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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090
U.S. Citizenship and Immigration Services



H4

DATE: APR 23 2012 OFFICE: SAN DIEGO, CALIFORNIA

FILE:

IN RE: Applicant:

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was deported from the United States pursuant to the order of the Immigration Judge on or about May 20, 1996, and subsequently entered the U.S. without inspection between January and May 2000. Service records indicate that the applicant resided in the United States from May 2000 to November 14, 2007 when he appeared for a USCIS interview. Counsel asserts that the applicant voluntarily departed the United States in August 2005 and re-entered the U.S. without inspection the same day. The applicant states that he voluntarily departed the United States in August 2005 and then re-entered the U.S. without inspection in October 2005. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who reenters the United States without being admitted. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with his U.S. citizen spouse.

The District Director determined that the applicant was ineligible to obtain consent to reapply for admission to the United States and denied the Form I-212 accordingly. See *Decision of the District Director*, dated July 30, 2009.

Counsel submits a letter brief in support of the appeal, asserting that the Ninth Circuit Court of Appeals' (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) applies in the present case. See *Counsel's Brief*, dated September 4, 2009. Counsel asserts that the *Perez-Gonzalez* decision allows the applicant, who entered the U.S. without inspection shortly after being removed, to adjust status to that of a permanent resident under Section 245(i) of the Act. *Id.* Counsel concedes that the Ninth Circuit reversed that decision in *Duran Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), granting deference to the Board of Immigration Appeals (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Nevertheless, counsel asserts that the *Duran Gonzalez* decision cannot be retroactively applied to the applicant, whose waiver application was filed in reliance on the old law, i.e., the standard set forth in *Perez-Gonzalez*, within the jurisdiction of the Ninth Circuit. *Id.* Counsel asserts alternately that the applicant is eligible for adjustment of status because more than ten years have elapsed since his 1996 removal, and that consent to re-apply for admission may be granted *Nunc Pro Tunc*. *Id.* Counsel further asserts that the provisions of section 212(a)(9)(C)(ii) of the Act do not require the alien to remain "outside" the United States for a period of ten years before applying for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *Id.*

Counsel additionally asserts that section 212(a)(9)(C)(i)(II) of the Act unlawfully discriminates against Mexicans, arguing that certain provisions of the immigration laws, including the

regulations governing the requested immigration benefit, violate the equal protection clause and are unconstitutional. The AAO observes that, like the Board of Immigration Appeals, this office cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

The record contains but is not limited to: Form I-290B and counsel's letter brief; Forms I-212, I-485 and denials of each; birth and marriage records, family photos; Form I-130; and the applicant's inadmissibility and removal record. The entire record was reviewed in rendering a decision on appeal.

Section 212(a)(9) of the Act states, in pertinent part:

....
(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record reflects that on or about May 20, 1996, the applicant was deported from the United States pursuant to the order of the Immigration Judge. The applicant entered the United States without inspection between January and May 2000. The applicant resided in the United States from his 2000 entry until August 2005 when he voluntarily departed the U.S. The applicant entered the United States without inspection again between August and October 2005. The record contains no evidence that the applicant has departed the United States since October 2005.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States and U.S. Citizenship and Immigration Services (USCIS) has consented

to the applicant's reapplying for admission. In the present matter, the record reflects that the applicant was deported from the United States on or about May 20, 1996. The applicant admitted that he entered the United States without inspection shortly after his deportation and has resided in the United States ever since, with the exception of a voluntary departure in August 2005 after which he entered the United States without inspection shortly thereafter. Thus the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the BIA's holding that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving permission to reapply for admission prior to the expiration of the ten-year bar. The Ninth Circuit clarified that its holding in *Duran Gonzalez* applies retroactively, even to those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010). *See also Duran Gonzales v. DHS*, 659 F.3d 930 (9th Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzales* prospectively only); *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the courts). Therefore, despite counsel's assertions to the contrary, the applicant remains inadmissible to the United States.

Section 291 of the Act, 8 U.S.C. §1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for the exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.