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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

H4

DATE: APR 23 2012 OFFICE: SAN JOSE, CA

[Redacted]

IN RE: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States  
after Prior Immigration Violations 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:

[Redacted]

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II) because he reentered the United States without being admitted after he was ordered removed under section 235(b)(1) of the Act. 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 and children.

The FOD determined that the applicant did not meet the statutory requirements for an exception under section 212(a)(9)(C)(ii) of the Act and, accordingly, denied the Form I-212. *Decision of the Field Office Director*, dated September 24, 2009.

On appeal, the applicant's counsel contends that the FOD erred in denying the Form I-212 because the applicant did not staying outside the United States for 10 years after his last departure. Counsel states that the applicant filed his adjustment application and Form I-212 based on the ruling in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), which later was overturned by *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007). Because at the time the appeal was filed, the issue whether the ruling in *Duran Gonzalez* would be retroactive to applicants who acted in reliance on *Perez Gonzalez* was pending with the Ninth Circuit, counsel requests that this appeal be held in abeyance until the court makes a ruling. *Counsel's brief*, dated October 22, 2009.

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-

....

(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 Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

On January 26, 1999, the applicant was expeditiously removed from the United States under section 235(b)(1) of the Act for attempting to enter the United States with a Border Crossing Card that did not belong to him and was, thereafter, barred from entering the United States for five years. *Form I-860, Notice and Order of Expedited Removal*, dated January 26, 1999; *Form I-213, Record of Deportable/Inadmissible Alien*, dated January 26, 1999; *Form I-296, Notice to Alien Ordered Removed/Departure Verification*, dated January 26, 1999. On July 30, 2007, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, concurrently with an immigrant petition that was filed on his behalf by his wife. The applicant indicated on the Form I-485 that his last arrival to the United States was on or about January 1999 and that he had entered the United States without inspection.

Based on this evidence, the AAO finds the applicant to be inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed from the United States and subsequently reentering the United States without being admitted.

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). 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 discretionary waivers of inadmissibility 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).

In that the record in the present matter does not establish that the applicant has resided outside the United States for 10 years since his last departure, he is not eligible to apply for the exception provided in section 212(a)(9)(C)(ii) of the Act. Accordingly the appeal will be dismissed.

**ORDER:** The appeal is dismissed.