



**U.S. Citizenship
and Immigration
Services**



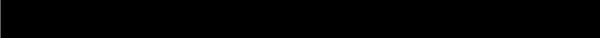
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DATE: **DEC 19 2012**

OFFICE: TUCSON, ARIZONA

FILE: 

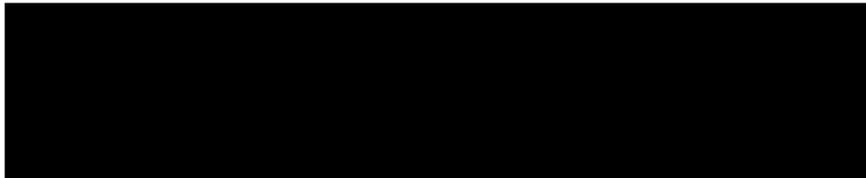
IN RE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal line extending to the right.

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission was denied by the Field Office Director, Tucson, Arizona and 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 expeditiously removed from the United States on or about November 21, 1999 for a period of five (5) years, and subsequently entered the United States without inspection less than two (2) months later on or about January 3, 2000. The applicant has resided in the United States ever since. 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 re-enters the United States without being admitted. She 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 her U.S. citizen spouse and children.

The Field Office Director determined that the applicant is statutorily 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 March 24, 2011.

On appeal counsel contends that the applicant should be granted permission to reapply for admission under the principle of *lex posteriori derogate legi priori*, and that in the alternative, the applicant is eligible for adjustment of status because more than 10 years have elapsed since her November 1999 removal, and that consent to reapply for admission may be granted *Nunc Pro Tunc*. See *Counsel's I-212 Appeal Brief*, dated April 15, 2011.

The record contains, but is not limited to: Forms I-290B appealing denials of the applicant's Forms I-212 and I-601 applications; counsel's briefs in support of each appeal; a petition for review and request for stay of removal to the Ninth Circuit Court of Appeals and the Court's dismissal thereof; various immigration applications and petitions; a hardship declaration; the applicant's declaration; letters from and documents related to the applicant's children; numerous letters of support and character reference; Mexico country-conditions documents; medical-related records; tax and income-related records; birth and marriage certificates; a 1997 memorandum concerning inadmissibility under section 212(i) of the Act; and excerpts from the United States Citizenship and Immigration Services Adjudicator's Field Manual. The record also contains numerous Spanish-language documents which are not accompanied by full, certified English translations as required under 8 C.F.R. § 103.2(b)(3).¹ These include what appear to be approximately 10 letters of support from various individuals. Because the required translations were not submitted for these documents, the AAO will not consider them in this proceeding. The entire record, with the exception of the Spanish-language documents described, was reviewed and considered in rendering this decision on the appeal.

¹ 8 C.F.R. § 103.2(b)(3). Translations. Any document containing foreign language submitted to United States Citizenship and Immigration Services (USCIS) shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

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 November 21, 1999, the applicant was expeditiously removed to Mexico for a period of five (5) years. She entered the United States without inspection less than two (2) months later, on or about January 3, 2000, and has resided in the United States ever since.

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 expeditiously removed from the United States on or about November 21, 1999. The applicant admitted that she entered the United States without inspection on or about January 3, 2000 and has remained in the United States ever since. Thus, the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Counsel contends that the applicant should be allowed admission under the principle of *lex posteriori derogate legi priori* "(which means that when there are two conflicting laws of equal weight, the later in time prevails)". According to counsel, section 212(a)(9)(C) should not be "interpreted" to prevent an alien from applying for permission to reapply within the statutory period as 8 C.F.R. § 212.2 regulations "clearly allow applicants to file Form I-212 within the United States." Counsel asserts that because the regulations speak of an alien remaining "outside

of the United States for five consecutive years since the date of deportation or removal,” there is an ambiguity in the law. The AAO finds counsel’s assertions unpersuasive. The five-year period addressed in 8 C.F.R. § 212.2 addresses the initial period under which an alien, following his or her first removal, is barred from entering the United States. The 10-year period identified in section 212(a)(9)(C)(ii) addresses specifically an alien who properly seeks admission more than 10 years after the date of his or her last departure from the United States, prior to the alien’s reembarkation at a place outside the United States.

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 10-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, as the law stands today, the applicant remains inadmissible to the United States.

Counsel contends that the applicant’s case is distinguishable from *Torres-Garcia*, *Perez-Gonzalez*, and *Duran Gonzalez* as 10 years had not elapsed in those cases since the last departure of the respective aliens. However, counsel has not identified any binding authority to establish that an individual may circumvent the 10-year period outside the United States provided under section 212(a)(9)(C)(ii) of the Act by remaining in the United States for 10 years after the unlawful entry that gave rise to inadmissibility.

Counsel further contends that the applicant should be allowed to adjust status in the United States despite her prior removal and subsequent unlawful re-entry after removal because section 245(i) of the Act was enacted more recently than section 212(a)(9)(C)(i) of the Act and 8 C.F.R. § 212.1, and should control as “the last-in-time” statute. However, the applicant has not shown that she is eligible for relief under section 245(i) of the Act, that section 245(i) of the Act conflicts with section 212(a)(9)(C)(i) of the Act, or that USCIS is otherwise precluded from applying section 212(a)(9)(C)(i) of the Act.

Counsel alternately contends that the applicant is eligible for adjustment of status because more than 10 years have elapsed since her November 1999 removal, and that consent to reapply for admission may be granted *Nunc Pro Tunc*. As previously discussed, 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. Under current controlling law, the applicant remains statutorily 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 she 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.