

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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**



HL4

Date: **FEB 29 2012** Office: LAS VEGAS

FILE:

IN RE: Applicant:

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

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,

M. Rhew
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Las Vegas, Nevada, 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 attempted to enter the United States on February 25, 1998 with a passport that was not her own, and she was removed on the same date. She then entered the United States without inspection on an unknown date, and she is presently in the United States. The applicant is inadmissible pursuant to sections 212(a)(9)(A)(ii) and 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1182(a)(9)(C)(i)(II). She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with her lawful permanent resident husband and child, and U.S. citizen child.

The field office director determined that the applicant is statutorily ineligible for a waiver, as she is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and she has not remained outside the United States for a 10 year period. *Decision of the Field Office Director*, dated July 27, 2009.

On appeal, counsel for the applicant asserts that the applicant's Form I-212 application should not be denied, as she relied on the decision of the Ninth Circuit Court of Appeals in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel contends that the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act, as more than 10 years have passed since her expedited removal. Counsel notes that the applicant warrants special consideration due to the fact that she has a pending Form I-360 special immigrant petition.¹

The record contains, but is not limited to: briefs from counsel; statements from the applicant and others in support of the application; a domestic violence evaluation of the applicant; a letter from a licensed marriage and family therapist regarding the applicant's mental health; medical documentation for the applicant; and documentation relating to the applicant's financial status. The entire record was reviewed and considered in rendering this decision.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

¹ The applicant's Form I-360 special immigrant petition was approved on April 28, 2010.

- (ii) Other aliens.-Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or
 - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

...

(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.

An applicant who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless more than 10 years have elapsed since the date of the applicant's last departure from the United States. *See Matter of Briones*, 24 I&N Dec. 355, 358-59 (BIA 2007); *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 of the United States during that time, *and* that USCIS has consented to the applicant's reapplying for admission. *Matter of Briones*, 24 I&N Dec. at 358, 371; *Matter of Torres-Garcia*, 23 I&N Dec. at 873, *aff'd.*, *Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007).

In the present matter, the applicant is inadmissible under section 212(a)(9)(C) of the Act due to the fact that she was removed on February 25, 1998 and she subsequently entered the United States without inspection. The applicant has not departed the United States since her entry without inspection in approximately February 1998.² As the applicant has not been out of the United States for a total of ten years, she is currently statutorily ineligible to apply for permission to reapply for admission, and the present appeal must be dismissed on that basis.

Counsel asserts that the applicant's Form I-212 application should be adjudicated despite the requirements of section 212(a)(9)(C) of the Act, as she relied on the decision of the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision in *Perez Gonzalez v. Ashcroft* and deferred to the Board of Immigration Appeals' (BIA) 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 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 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). Accordingly, the field office director properly applied section 212(a)(9)(C) of the Act in the present matter.

Counsel suggests that section 212(a)(9)(C) of the Act no longer applies to the applicant, as 10 years have passed since the date of her removal. However, as discussed above, the applicant must remain outside the United States for a 10 year period to satisfy the requirements of section 212(a)(9)(C) of the Act, and she has not done so.

The AAO acknowledges that the applicant has an approved Form I-360 special immigrant petition, due primarily to abuse she endured from her former spouse. However, the AAO lacks discretion to decline to apply section 212(a)(9)(C) of the Act in the present matter.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has not shown that the present application may be approved due to her inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² Counsel asserts that the applicant reentered the United States without inspection after her removal on or about February 21, 1998. As the applicant was removed on February 25, 1998, it is clear that her reentry date was not prior to that time. In a statement dated April 5, 2010, the applicant indicated that she entered the United States without inspection in or about May 1989.