

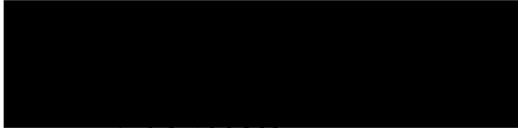
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **JAN 17 2012** Office: SAN JOSE

FILE:

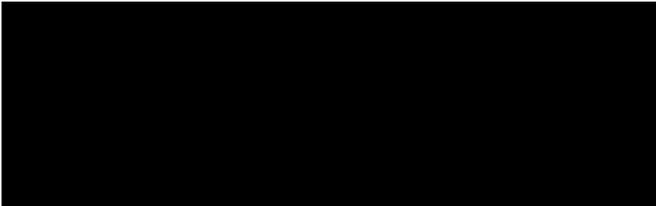
IN RE:

Applicant:

APPLICATION:

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

fr Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Jose, 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 removed from the United States on or about September 26, 1999. He was issued P-1 nonimmigrant visas on August 20, 2000 and February 15, 2001, and he last entered the United States on or about September 28, 2001 in P-1 status. The applicant did not obtain an approved Form I-212 application for permission to reapply for admission after his removal. Accordingly, the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 his U.S. citizen wife.

The field office director determined that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission into the United States by willful misrepresentation. The field office director observed that the applicant applied for a waiver of his inadmissibility under section 212(a)(6)(C)(i) of the Act pursuant to section 212(i) of the Act, but that the Form I-601 application was denied. Thus, the field office director determined that the applicant's Form I-212 application was moot, and denied it accordingly. *Decision of the Field Office Director*, dated June 27, 2009.

On appeal, counsel for the applicant asserts that the field office director approved the applicant's Form I-601 application for a waiver, and that there is no legal impediment to adjudicating and approving the applicant's Form I-212 application.

The record contains, in pertinent part: a brief from counsel; documentation regarding the applicant's prior removal and subsequent entry to the United States; documentation relating to challenges the applicant's wife would face should the applicant be prohibited from residing in the United States; and documentation of the applicant's arrests and criminal proceedings. 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.

- (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.

The record reflects that on September 26, 1999, the applicant attempted to enter the United States using a Mexican passport with his photograph substituted for that of the true owner. He was removed on the same day. He reentered the United States pursuant to a P-1 nonimmigrant visa on or about September 28, 2001. He has not departed the United States since that date. He seeks admission as a lawful permanent resident pursuant to a Form I-485 application to adjust his status based on his marriage to his U.S. citizen wife. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In a brief dated August 7, 2009, counsel asserts that the applicant filed his Form I-212 application in reliance on the Ninth Circuit Court of Appeals' decision in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and that the Ninth Circuit's reasoning in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), should not be retroactively applied to him.

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 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).

However, in the present matter, the applicant has not been found inadmissible under section 212(a)(9)(C) of the Act, as he re-entered the United States lawfully pursuant to a P-1 nonimmigrant visa. The field office director did not decline to adjudicate the applicant's Form I-212 application on the merits due to the 10-year statutory bar under section 212(a)(9)(C) of the Act. The AAO has examined counsel's lengthy discussion of the legal history and application of the Ninth Circuit's decisions in *Duran Gonzalez v. DHS* and *Perez Gonzalez v. Ashcroft*, yet counsel has not established that the decisions are relevant to the instant case, or that the field office director erroneously applied legal precedent. The AAO agrees with counsel that the applicant may establish eligibility to adjust his status to lawful permanent resident should he obtain waivers of all grounds of inadmissibility to which he is subject, and permission to reapply for admission.

In her brief, counsel indicates that the applicant is appealing the denial of both his Forms I-212 and I-601 applications. However, the applicant has only submitted a single Form I-290B appeal and filing fee. On Form I-290B at Part 2, counsel clearly indicates that the appeal relates to the applicant's Form I-212 application. While the applicant's Form I-601 application was denied on June 27, 2009, the record contains no appeal from this decision.

Counsel states that the field office director approved the applicant's Form I-601 application on August 30, 2008. However, on August 30, 2008, the Acting Field Office Director, San Jose, California, only granted a motion to reopen the applicant's Form I-601 application without issuing a decision on the merits. Upon issuing a decision on the merits on June 27, 2009, the field office director denied the applicant's Form I-601 application. Counsel contends that the field office director's decision of June 27, 2009 was in error. The AAO acknowledges comments that the acting field office director made in her August 30, 2008 decision regarding hardship to the applicant's family members are inconsistent with the field office director's ultimate decision to deny the waiver application on June 27, 2009. However, as the August 30, 2008 decision was only an approval of a motion to reopen the matter, it did not constitute a final decision on the merits. The field office director was not bound by the acting field office director's comments when issuing the final decision on June 27, 2009, and the record presents no procedural irregularity. The record clearly shows that the applicant's Form I-601 application for a waiver of inadmissibility was denied.

Thus, the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant does not contest his inadmissibility under section 212(a)(6)(C)(i) of the Act on appeal.

Further, the record shows that the applicant was charged with the infliction of corporal injury on a spouse in California for his conduct on or about April 25, 2004. While the applicant has not provided

complete documentation of this charge and related criminal proceedings, in his statement dated August 9, 2006 he indicated that he “went to jail for a few months,” which supports that he was convicted of the offense. Corporal injury to a spouse under California Penal Code § 273.5(a) has been found to be a crime involving moral turpitude. *Grageda v. I.N.S.*, 12 F.3d 919 (9th Cir. 1993). If the applicant was convicted of a charge under the section, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, and he requires a waiver under section 212(h) of the Act. Inflicting corporal injury on a spouse is a violent crime, as contemplated by the regulation at 8 C.F.R. § 212.7(d). Thus, if the applicant was convicted of this offense, he must establish “extraordinary circumstances,” typically that denial of any future Form I-601 application for a waiver would result in “exceptional and extremely unusual hardship,” in order for USCIS to favorably exercise discretion in granting a waiver of his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See* 8 C.F.R. § 212.7(d).

Counsel correctly contends that the Secretary of The U.S. Department of Homeland Security may approve a Form I-212, Permission to Reapply for Admission into the United States after Deportation or Removal, retroactively, *nunc pro tunc*, to the date of the applicant’s entry. However, *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964), held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an applicant who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant remains subject to the inadmissibility provision of section 212(a)(6)(C)(i) of the Act.¹ Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the Form I-212 application was properly denied by the field office director.

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. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary’s discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ As discussed above, the applicant may also be inadmissible under section 212(a)(2)(A)(i)(I) of the Act.