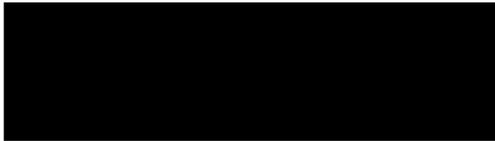


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



PUBLIC COPY



H4

Date: Office: SAN FRANCISCO, CA

FILE: 

IN RE: **JAN 26 2012** APPLICANT: 

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

ON BEHALF OF APPLICANT:

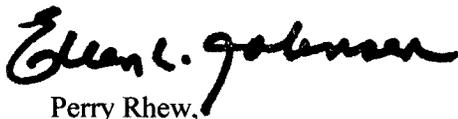


INSTRUCTIONS:

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,



Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and the applicant moved to reopen / reconsider the appeal. The motion will be granted; however, the AAO's November 6, 2009 decision will be affirmed and the application remains denied.

The record reflects that the applicant is a native and citizen of Mexico who on July 12, 1999 presented a border crossing card which did not belong to him to gain admission into the United States. *Form I-860, Notice and Order of Expedited Removal*, July 13, 1999. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. The applicant was placed into expedited removal proceedings, and was removed on July 13, 1999 pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). *Id.*

The applicant admitted in a sworn statement that he subsequently entered the United States without inspection on July 25, 1999. *See Form I-215, Record of Sworn Statement in Affidavit Form*, August 17, 1999. On August 17, 1999, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1231(a)(5). *See Form I-871, Notice of Intent / Decision to Reinstate Prior Order*, August 17, 1999. On the same day, the applicant was removed from the United States and returned to Mexico. *Form I-205*, August 17, 1999. During a subsequent immigration interview, the applicant admitted he re-entered the United States without inspection in October 2000.

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 spouse and child.

The Field Office Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The Field Office Director concluded that the applicant was consequently not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated June 16, 2009. The AAO affirmed the Field Office Director's decision, adding that because the applicant's removal, unlawful re-entry and filing of the Form I-212 all occurred after the enactment of 212(a)(9)(C)(i) of the Act, counsel's contention that the application of the statute to the applicant was impermissibly retroactive was without merit. *Decision of the AAO*, November 6, 2009.

On appeal counsel submits a brief in support of appeal as well as copies of administrative decisions. In the brief, dated December 8, 2009, counsel contends the AAO should hold the case in abeyance, given that a class action lawsuit was pending before the Ninth Circuit Court of Appeals which would

decide whether its holding in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007) would be applied retroactively to applicants who relied on the holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *Brief in support of appeal*, December 8, 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-

(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 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 permission to reapply for admission prior to the expiration of the ten-year bar. Counsel requested the applicant's motion should be held in abeyance until the applicable law on retroactive application of *Duran Gonzalez* was clarified. *Brief in support of appeal*, December 8, 2009. The Ninth Circuit has 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).

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* CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since his last departure. He is therefore currently statutorily ineligible to apply for permission to reapply for admission.

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 alien 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 is subject to the provisions of section 212(a)(9)(C) of the Act. No waiver is available to an alien who is subject to this provision, 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 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 he is eligible for the benefit sought. The applicant has not met his burden in this case. Accordingly, although the motion to reopen / reconsider is granted, the AAO's prior decision is affirmed, and the application remains denied.

ORDER: The motion to reopen / reconsider is granted, the AAO's prior decision is affirmed, and the application remains denied.