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



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

[Redacted]

44

DATE: **JUN 21 2012**

OFFICE: FRESNO

[Redacted]

IN RE: [Redacted]

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:

[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 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 in accordance with the instructions on 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,

Maria F. Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, 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 this matter is now before the AAO on a motion to reopen or reconsider. The motion will be denied.

The applicant is a native and citizen of Mexico who attempted to enter the United States with the border crossing card of another individual on February 20, 1999. The applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry to the United States by fraud or willful misrepresentation. The applicant was ordered removed pursuant to section 235(b)(1) of the Act and removed from the United States on February 20, 1999. The applicant subsequently entered the United States without admission or parole in 1999 and remains in the United States. The applicant is a beneficiary of an approved Petition for Alien Relative. The applicant seeks permission to reapply for admission to the United States in order to reside in the United States with her U.S. citizen spouse and child.

The Field Office Director determined that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II) and has not met the requirements to reapply for admission, and denied her Form I-212 application accordingly. *See Decision of Field Office Director*, dated July 17, 2009. The AAO agreed that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and may not apply for consent to reapply because she has not remained outside the United States for ten years.

In the applicant's motion to reconsider, counsel asserts that in light of *Nunez-Reyes v. Holder*, No. 05-74350, 2011 WL 2714159 (9th Cir. July 14, 2011), the applicant's decision should be reconsidered because she filed for adjustment of status before the change in law.

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.

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 permission to reapply for admission prior to the expiration of the ten-year bar.

Despite counsel's claim that the decision to deny the applicant's Form I-212 should be reconsidered because she filed for adjustment of status before the change in law, the Ninth Circuit Court of Appeal 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). Although counsel relies on the decision of the Ninth Circuit Court of Appeals in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), which overturned a prior Ninth Circuit decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and applied only prospectively, in a subsequent decision the Court specifically declined to apply *Duran Gonzales* prospectively only. *See 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); *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).

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* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and has not remained outside the United States for ten years following her last departure from the United States. She is currently statutorily ineligible to apply for permission to reapply for admission and the motion to reopen or reconsider will therefore be denied.

ORDER: The motion is denied.