

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

[REDACTED]

H4

Date: Office: SAN FRANCISCO, CA
NOV 06 2012

FILE: [REDACTED]

[REDACTED]
CONSOLIDATED

IN RE: APPLICANT: [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,

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 rejected by the Administrative Appeals Office (AAO) as it was untimely filed. The matter is now before the AAO on motion. The motion will be granted, but the underlying application remains denied.

The record reflects that the applicant is a native and citizen of Mexico who was ordered removed under section 235(b)(1) of the Act on February 23, 1999 and subsequently entered the United States without inspection. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 U.S. Citizen spouse and children.

The Field Office Director determined that the applicant remains inadmissible under section 212(a)(9)(C) of the Act and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated June 19, 2009. The AAO rejected the appeal as untimely, finding that the applicant filed the appeal 38 days after the decision was issued. *Decision of AAO*, April 4, 2011.

On motion, counsel contends that the applicant mailed the appeal by U.S.P.S. certified mail on July 16, 2009, and that it should have reached the Field Office in a timely manner. Counsel additionally asserts USCIS policy calls for adjudication on the merits, rather than a dismissal based on technical matters.

The record includes, but is not limited to, statements from the applicant and her spouse, evidence of birth, marriage, residence, and citizenship, documentation of removal proceedings, financial and educational documents, as well as other applications and petitions. The entire record was reviewed and considered in rendering a decision on the motion.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that an affected party must file a complete appeal within 30 days after service of an unfavorable decision. If the decision is mailed, the 30-day period for submitting an appeal begins 3 days after it is mailed. 8 C.F.R. § 103.5a(b). The date of filing is the date of actual receipt of the appeal, not the date of mailing. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record reflects that the Field Office Director mailed the decision on June 19, 2009 to the applicant at the applicant's address of record. It is noted that the Field Office Director stated that the applicant had 33 days to file an appeal. Although counsel dated the appeal on July 16, 2009, the appeal was not received until July 27, 2009, 38 days after the decision was issued. Though the applicant submitted documentation to demonstrate she mailed the appeal on July 16, 2009, the applicant has not shown that the appeal was filed within the allotted time. *See* 8 C.F.R. § 103.2(a)(7)(i). Therefore, the appeal was untimely filed and the AAO's rejection was appropriate.

Regardless, the AAO notes that the applicant remains inadmissible under section 212(a)(9)(C) of the Act. 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 the applicant entered the United States without inspection before [REDACTED], the date her son was born in the United States. She returned to Mexico in January 1999, and on or about February 23, 1999, the applicant was apprehended by immigration officials after she presented a border crossing card which did not belong to her in an attempt to procure admission into the United States. The applicant was ordered removed, and she was returned to Mexico on that day. The record further reflects that the applicant entered the United States without inspection two days later, and has remained in the United States ever since. The applicant accrued more than one year of unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, to January 1999, and was ordered removed on February 23, 1999. She subsequently entered the United States without inspection. As such, the AAO finds the applicant is inadmissible under section 212(a)(9)(C) of the Act.

On appeal, counsel contends that the applicant's physical presence in the United States is unbroken because her visit to Mexico lasted less than 90 days, citing *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903 (5th Cir. 1005) in support. Irrespective of whether the Fifth Circuit Court of Appeals decision applies to the applicant, who resides in California, the court in *Reyes-Vasquez* did not evaluate inadmissibility under section 212(a)(9)(C) of the Act, but rather determined whether an alien was eligible for cancellation of removal under section 240A of the Act, which requires 10 years of physical presence in the United States. See section 240A(b) of the Act. The court's holding in

Reyes-Vasquez is therefore inapplicable to the present matter. As set forth above, inadmissibility under section 212(a)(9)(C) of the Act does not require 10 years of physical presence in the United States. Counsel thus incorrectly conflates the requirements for cancellation of removal under section 240A of the Act and inadmissibility under section 212(a)(9)(C) of the Act.

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).

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 failed to establish that she is statutorily eligible to apply for permission to reapply for admission into the United States. Accordingly, although the motion is granted, the underlying application remains denied.

ORDER: The motion is granted, but the underlying application remains denied.