



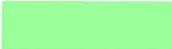
U.S. Citizenship
and Immigration
Services

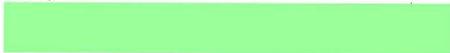
(b)(6)



DATE: **MAR 07 2013**

OFFICE: SAN FRANCISCO, CA

FILE: 

IN RE: 

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

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.

Thank you,

A handwritten signature in black ink, appearing to read "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, California denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. On appeal, the Administrative Appeals Office (AAO) withdrew the Field Office Director's decision and remanded the matter for entry of a new decision. The Field Office Director issued a new decision, certifying it to the AAO. Upon review, the AAO returned the matter for entry of a certification notice. The Field Office Director issued the notice and again certified her decision to the AAO. The AAO dismissed the appeal, withdrawing our two previous decisions. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

The applicant is a native and citizen of Mexico who was found inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having been ordered removed from the United States and thereafter entering the United States without being admitted. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States.

The Field Office Director determined that the applicant was subject to section 212(a)(9)(C)(i)(II) of the Act and was not eligible to submit the Form I-212. She denied the application accordingly. *See Decisions of the Field Office Director*, dated July 10, 2009, November 24, 2010 and March 15, 2011. In decisions dated April 20, 2010 and December 27, 2010, the AAO found the applicant inadmissible pursuant to section 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), but concluded that no purpose would be served in considering the Form I-212 as his admission to the United States was also barred by section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for having made a false claim to U.S. citizenship. Following certification of the Field Office Director's March 15, 2011 decision, the AAO found in a decision dated February 21, 2012, that the immigration judge's determination of the applicant's inadmissibility under section 212(a)(9)(C) of the Act is controlling and dismissed the appeal.

On motion, counsel asserts that the AAO's failure to apply a June 17, 1997 policy memorandum issued by the legacy Immigration and Naturalization Service (now United States Citizenship and Immigration Services (USCIS)) to the applicant's case is an abuse of discretion. *Applicant's Brief in Support of the Motion*, dated March 22, 2012.

The requirements for a motion to reconsider are found in the regulation at 8 C.F.R. § 103.5(a)(3):

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel contends that in finding the applicant inadmissible under section 212(a)(9)(C) of the Act, the AAO failed to follow long-established USCIS policy. She asserts that this failure is an abuse of discretion as the published decisions issued by the U.S. Court of Appeals for the Ninth Circuit

(Ninth Circuit) and the Board of Immigration Appeals (BIA) do not address inadmissibility under section 212(a)(9)(C)(i)(II) of the Act where an alien, like the applicant in this matter, returned to the United States without inspection prior to April 1, 1997. Counsel states that in the absence of precedent decision, it is appropriate to apply USCIS' July 17, 1997 policy memorandum to the applicant's case. *Brief* at 13. Counsel also maintains that the AAO failed to take into consideration that it has applied and continues to apply the June 17, 1997 memorandum in cases that are similar to that of the applicant. She contends that it is a "foundation of law that similarly situated individuals be treated similarly" and that the AAO cannot, therefore, treat the applicant's case differently. *Brief* at 14-17.

Counsel also asserts that even if the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, his case should be held in abeyance pending the Ninth Circuit's en banc decision in *Garfias-Rodriguez v. Holder*.¹ *Brief* at 17-18. She further asserts that the Ninth Circuit's decision in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) cannot be applied retroactively to the applicant as he acted in reliance on *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), which continues to apply to his case.² *Brief* at 19-24.

To be granted, a motion to reconsider must establish that a USCIS decision was based on an incorrect application of law or policy. Here, counsel bases the applicant's motion on what she describes as the AAO's failure to adhere to long-standing USCIS policy guidance regarding the application of section 212(a)(9)(C) of the Act to aliens who returned to the United States without admission after accruing more than a year of unlawful presence or having been ordered removed. Counsel correctly states that, as a matter of policy, USCIS has not applied section 212(a)(9)(C) of the Act to aliens who like the applicant, returned unlawfully to the United States prior to April 1, 1997, the effective date of this provision. *See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 312(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

However, in making this argument, counsel has failed to address the basis on which the AAO withdrew our decisions of April 20 and December 27, 2010, and dismissed the applicant's appeal. As we indicated in our February 21, 2012 decision, the dismissal of the applicant's appeal was made pursuant to section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1), based on our determination that the section 212(a)(9)(C) inadmissibility finding of the immigration judge in the applicant's case was controlling in this matter. As the motion filed by the applicant does not address this issue, he has

¹ On October 19, 2012, the Ninth Circuit issued its en banc decision in *Garfias-Rodriguez*, deferring to the BIA's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) in which the BIA held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) 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. The Court also held that *Briones* may be applied retroactively. *Garfias-Rodriguez v. Holder*, 2012 WL 7077137 (2012C.A.9).

² The Ninth Circuit in *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010) clarified that its holding in *Duran Gonzales* applies retroactively, even to those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *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.)

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failed to establish that our February 21, 2012 decision was based on an incorrect application of law or that it was incorrect based on the evidence of record at that time. Accordingly, we find that the applicant has not met the requirements for a motion to reconsider. The motion will be denied.

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. Here the applicant has not met that burden.

ORDER: The motion is dismissed.