



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

(b)(6)

DATE: **MAY 30 2013** OFFICE: FRESNO, CALIFORNIA

FILE: [REDACTED]

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) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(9)(A)

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 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 with the field office or service center that originally decided your case by filing a 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, California, denied the application for permission to reapply for admission into the United States. The applicant, through counsel, appealed the Field Office Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. Around July 27, 2012, the applicant filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, the AAO's previous decision will be withdrawn, and the matter is remanded to the Field Office Director for further proceedings.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been ordered excluded from the United States and seeking admission within the proscribed period. The Field Office Director determined the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was not necessary and denied the applicant's Form I-212 accordingly. The AAO determined no purpose would be served in addressing the merits of the applicant's Form I-212 application as he also was determined to be inadmissible under section 212(a)(6)(C)(i) of the Act and did not file an Application for Waiver of Grounds of Inadmissibility (Form I-601) to address this inadmissibility.¹

On motion, counsel contends: U.S. Citizenship and Immigration Services (USCIS) retroactively and incorrectly applied existing laws to the applicant's circumstances; section 212(a)(9)(A)(ii)(I) cannot be retroactive to increase the applicant's punishment after the date he committed his crime; the applicant's Form I-212 application "should be considered under the laws and regulation[s] in force at the time he was excluded"; "[d]ue process must be afforded to him in order for [USCIS's] pronouncements to pass muster"; and "at the time the [applicant] was excluded in 1995, an applicant who had been ordered deported was completely within his privilege to apply for re-admission right here in the [United States] through the District Director" (*citing Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788-89 (9th Cir. 2004)) (footnote omitted). *Brief in Support of Motion*, dated July 25, 2012. The AAO finds counsel's arguments unpersuasive as the applicant's inadmissibility under section 212(a)(9)(A)(ii)(I) of the Act does not involve a criminal matter. Moreover, in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, *supra*, 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 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).

¹ The AAO also determined that, contrary to counsel's suggestion, a Form I-212 application cannot be treated as a Form I-601 application.

Counsel also contends that the applicant presented new facts, which were “completely ignored by [USCIS]”; “the Secretary [of Homeland Security] is entitled to exercise discretion on a variety of applications and issues, some of which have not yet been reduced to a specific form”; the appeal of the applicant’s I-212 application should have been decided prior to the denial of his adjustment of status application; “Form I-212 is indeed necessary in this case since the offense was committed in 1995; and under 1995 laws and regulations, the applicant is entitled to apply for re-admission without departing from the United States.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). As the applicant has submitted new documentary evidence to support his claim and asserted reasons for reconsideration, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: correspondence, briefs, and motion from counsel; letters of support; identity, medical, employment, financial, and academic documents; photographs; criminal history documents; and documents on conditions in Mexico. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in relevant part:

(A) Certain aliens previously removed.-

...

(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

...

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 the applicant was placed in exclusion proceedings on July 24, 1995, upon attempting to enter the United States by presenting an I-551 stamp in another person's name. The record also reflects the applicant subsequently entered the United States without inspection by immigration officials around July 27, 1995, and he has remained in the United States to date. The applicant filed his Form I-212 application on August 23, 2009, and the Field Office Director denied it on May 11, 2010, indicating the Form I-212 is not necessary. On appeal, the AAO determined Form I-212 is necessary.

On motion, the AAO withdraws its previous finding that Form I-212 is necessary, as the record is unclear concerning the applicant's exclusion and whether the Field Office Director found the applicant was ordered excluded after his attempted entry on July 24, 1995. The AAO notes the Field Office Director's decision states, "The [Form I-212] application is based on the ground that **you believed** to have been ordered deported or removed [sic] from the United States and now seek to reapply for admission or adjustment of status" (emphasis added). The AAO also notes the Field Office Director's decision cites 8 C.F.R. § 212.2(a), addressing the evidence needed to prove that individuals seeking permission for readmission into the United States after removal have remained outside the United States for the required period. The Field Office Director, however, does not outline the applicant's immigration history or analyze how this regulation applies to his circumstances. Rather, the Field Office Director makes general statements that Form I-212 "is not necessary" and "is denied."

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial. See 8 C.F.R. § 103.3(a)(i). Therefore, the AAO remands the matter to the Field Office Director to determine whether the applicant was ordered excluded in July 1995 and, thereby, inadmissible under section 212(a)(9)(A) of the Act. Should the Field Office Director determine the applicant is subject to 212(a)(9)(A) of the Act, the Field Office Director will issue a new decision denying the applicant's Form I-212 as no purpose would be served in granting the applicant's Form I-212 when the applicant also is inadmissible under section 212(a)(6)(C)(i) of the Act and no waiver has been approved.² In the alternative, should it be determined that the applicant is not subject to section 212(a)(9)(A) of the Act, then the Field Office Director will issue a new decision dismissing the Form I-212 as moot.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.

² *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.