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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JAN 2 8 2014 Office: SAN BERNARDINO, CA

IN RE:

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Officer Director, San Bernardino, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was ordered removed on June 12, 1998, subsequently entered without inspection, and had her removal order reinstated on July 15, 2011. 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). 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 lawful permanent resident spouse and U.S. citizen children.

The Field Office Director determined the applicant was subject to section 212(a)(9)(C) of the Act and was barred from relief pursuant to section 241(a)(5) of the Act. *See Field Office Director's Decision,* dated April 22, 2013. The Form I-212 was accordingly denied. *Id.*

On appeal, the applicant contends that she is not barred under section 241(a)(5) of the Act, as she is not currently in the United States. The applicant concedes that she entered the United States unlawfully after she was deported, but contends that her spouse would experience extreme hardship without her present in the United States.

The record contains evidence of birth, marriage, residence, and citizenship, payroll and other financial documents, letters from employers and schools, documentation of immigration proceedings, and other applications and petitions. The entire record was reviewed and considered in rendering a decision on the appeal.

In the present matter, the record reflects that on June 11, 1998 the applicant presented a Mexican passport bearing a United States visa which did not belong to her in an attempt to procure admission into the United States. She was consequently found to be inadmissible pursuant to section 212(a)(6)(C) of the Act for fraud or willful misrepresentation of a material fact. The applicant was placed into expedited removal proceedings, and she was ordered removed on June 12, 1998. The applicant's departure to Mexico was verified on that date. The applicant admits that, on or about June 18, 1998, she entered the United States without inspection. Furthermore, the record contains birth certificates indicating she is the mother of four children born in the United States, in 1999, 2001, 2005, and 2007. On July 15, 2011, the applicant's 1998 order of removal was reinstated pursuant to section 241(a)(5) of the Act. Her departure to Mexico was verified that same day.

As a preliminary matter, the AAO notes that the applicant's contentions with respect to reinstatement of her removal order under section 241(a)(5) of the Act are supported by the record. The applicant's June 12, 1998 removal order was reinstated on July 15, 2011, and she was removed from the United States. According to the present record, the applicant is now outside the United States. As such, based on the record the applicant is not, at present, subject to

reinstatement under section 241(a)(5) of the Act, nor does section 241(a)(5) currently bar the applicant from relief under the Act.

However, the applicant is subject to inadmissibility under section 212(a)(9)(C)(i)(II) 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 applicant was ordered removed on June 12, 1998, and subsequently entered without inspection. Therefore, she is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) 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). In this case, the applicant's last departure occurred on July 15, 2011, and consequently, she is not currently eligible for consent to reapply after deportation or removal.

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 section 212(a)(9)(C) of the Act, 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.

It is further noted that because the applicant is currently residing outside the United States she must apply for her immigrant visa through consular processing. At the time of her interview at a U.S. Embassy or consulate she will be advised of all grounds of inadmissibility and any waivers she requires.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.