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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**



PUBLIC COPY

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[Redacted]

Date: DEC 13 2011

Office: FRESNO, CA

FILE: [Redacted]

IN RE:

Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(i)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 waiver application was denied by the Field Office Director, Fresno, 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 found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband and child in the United States.

The field office director found that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act and that since fewer than ten years have elapsed since she last left the United States, she is ineligible to apply for consent to reapply for admission. The field office director denied the waiver application accordingly. *Decision of the Field Office Director*, dated July 17, 2009.

On appeal, counsel contends that an appeal is pending before the Ninth Circuit Court of Appeals in *Duran-Gonzalez* and that the applicant's appeal should not be decided until a decision has been issued in that case. In addition, counsel contends that in light of *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), an issue may be raised with respect to whether the applicant's removal order is constitutional because the applicant was not told of her right to counsel.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

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 permission to reapply for admission 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 record shows, and the applicant concedes, that she attempted to enter the United States on February 20, 1999, using her friend's border crossing card. *Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A)*, dated February 20, 1999. The applicant was placed in expedited removal proceedings, ordered removed, and was removed from the United States the same day. *Notice and Order of Expedited Removal (Form I-860)*, dated February 20, 1999; *Verification of Removal (Form I-296)*, dated February 20, 1999. The record shows that the applicant entered the United States without inspection sometime in 1999 and has since remained in the United States. *Application for Waiver of Grounds of Inadmissibility (Form I-601)*, dated June 5, 2007; *Biographic Information form (Form G-325A)*, dated May 16, 2007.

Because the applicant has not remained outside of the United States for more than ten years, she is ineligible to apply for consent for admission. To the extent counsel contends the applicant's appeal should not be decided until a decision has been issued in *Duran-Gonzalez*, the AAO notes that the Ninth Circuit Court of Appeals vacated the case on November 30, 2007. More importantly, as stated above, in *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010), the Ninth Circuit Court of Appeals 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.

In addition, counsel's reliance on *Rodriguez-Echeverria* for the proposition that the applicant's removal order is unconstitutional because she was not told of her right to counsel is unpersuasive. The regulation at 8 C.F.R. § 287.3(c) specifically provides an exception from informing aliens of the right to counsel in the case of an alien subject to expedited removal proceedings. 8 C.F.R. § 287.3 ("Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government.") (emphasis added). In *Rodriguez-Echeverria*, a lawful permanent resident of the United States was arrested and interrogated without being informed of her right to counsel. *Rodriguez-Echeverria*, 534 F.3d at 1048, 1051. Because the individual in *Rodriguez-Echeverria* was not in expedited removal proceedings, but rather, was a lawful permanent resident, the holding of that case is simply inapplicable here. Cf. *Samayoa-Martinez v. Holder*, 558 F.3d 897, 901-02 (9th Cir. 2009) (holding that the obligation to notify an alien of their procedural rights provided in 8 C.F.R. § 287.3(c) applies only after an alien has been placed in removal proceedings which begins with the filing of a Notice to Appear in immigration court); *Matter of E-R-M-F- and A-S-M-*, 25 I&N Dec. 580, 583 (BIA 2011) (same).

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative and whether she is eligible for consideration of a waiver under section 212(i) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.