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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals*  
20 Massachusetts Ave. N.W. MS 2090  
Washington, D.C. 20529-2090



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

H/S

[REDACTED]

DATE: OFFICE: SAN FRANCISCO, CALIFORNIA

FILE: [REDACTED]

NOV 14 2011

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality 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 Field Office Director, San Francisco, California, denied the waiver application (Form I-601) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant was further found to be inadmissible under section 212(9)(C) of the Act for having been ordered removed under section 235(b)(1) or section 240 and entering the United States without being admitted. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States.

The Field Office Director concluded that the applicant failed to establish that he has complied with the exception provided in section 212(a)(9)(C)(ii) of the Act to overcome his grounds of inadmissibility, and accordingly deemed the adjudication of Form I-601 moot at that point and time. See *Decision of the Field Office Director*, dated June 24, 2009.

On appeal, counsel asserts that the Form I-601 should not have been denied as moot because the Form I-212 should not have been denied. See *Form I-290B*, Notice of Appeal or Motion, received July 23, 2009.

The record contains documents, including but not limited to: Forms I-290B; counsel's brief in support of appeal; Forms I-212, I-485, I-601 and denials of each; counsel's brief in support of Form I-601; two hardship declarations from the applicant's wife; marriage and birth certificates; letters from a family physician, a marriage and family therapist, and internet print-outs concerning emotional stress and overeating; character reference letters; family photographs; tax/income and expense records; and the applicant's inadmissibility and removal records. The entire record was reviewed in rendering a decision on appeal.

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.

The record reflects that the applicant presented a fraudulent I-585 border crossing card when attempting to procure admission to the United States at the Calexico, California port of entry on May 23, 1999. The applicant admitted under oath, in the form of a sworn statement, that he had purchased the false document in Mexicali, Baja California, Mexico and that he was unauthorized to enter the United States. Based on the applicant's misrepresentation, he is inadmissible pursuant to section 212(a)(6)(C)(i) 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 on May 23, 1999, as described *supra*, and was expeditiously removed to Mexico on the same date. The applicant subsequently entered the United States without inspection on or about the next day and has resided in the U.S. since that date.

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 10 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). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States and U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the record reflects that the applicant was expeditiously removed from the United States on May 23, 1999. The applicant admitted that he entered the United States without inspection the following day, and has remained in the United States ever since. Thus the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Counsel asserts on appeal that the Ninth Circuit Court of Appeals' (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) applies in the present case. See *Counsel's Brief*, dated July 22, 2009. Counsel asserts that the *Perez-Gonzalez* decision allows the applicant, who entered the U.S. without inspection shortly after being expeditiously removed, to adjust status to that of a permanent resident under Section 245(i) of the Act. *Id.* Counsel concedes that the Ninth Circuit reversed that decision in *Duran Gonzales v. Department of*

*Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), granting deference to the Board of Immigration Appeals (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Nevertheless, he asserts that the *Duran Gonzalez* decision cannot be retroactively applied to the applicant, whose waiver application was filed in reliance on the old law, i.e., the standard set forth in *Perez-Gonzalez*, within the jurisdiction of the Ninth Circuit. *Id.* Counsel asserts alternately that the applicant is eligible for adjustment of status because more than ten years have elapsed since his 1999 removal, and that consent to re-apply for admission may be granted *Nunc Pro Tunc*. *Id.* Counsel further asserts that the provisions of section 212(a)(9)(C)(ii) of the Act do not require the alien to remain “outside” the United States for a period of ten years before applying for a waiver for purposes of section 212(a)(9)(C)(ii). *Id.*

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 in *Matter of Torres-Garcia* 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. Counsel asserts that the Ninth Circuit’s prior decision in *Duran Gonzalez* should not apply retroactively to the following class members such as the applicant in this matter: individuals who are inadmissible under INA §212(a)(9)(C)(i)(II) and whose waiver applications were filed in reliance on the old law, i.e., the standard set forth in *Perez-Gonzalez*, within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA §245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision. See *Counsel’s Brief*, dated July 22, 2009. However, the Ninth Circuit clarified that its holding in *Duran Gonzalez* does apply 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). Therefore, despite counsel’s assertions to the contrary, the applicant remains inadmissible to the United States.

In the present matter, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act because he was removed under section 235(b)(1) of the Act on May 23, 1999 and he subsequently entered the United States without inspection the following day. The applicant has not departed the United States since his entry without inspection in May 1999. As the applicant has not been out of the United States for a total of ten years, he is currently statutorily ineligible to apply for permission to reapply for admission.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i)(1) and 212(a)(9)(C)(i)(II) of the Act, the burden of proving eligibility remains entirely with the applicant. See Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden, in that he has not shown that a purpose would be served in adjudicating his waiver under section 212(i) of the Act due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.