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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**

HLS

[REDACTED]

Date: OCT 19 2011

Office: LOS ANGELES

FILE: [REDACTED]

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 waiver application was denied by the Field Office Director, Los Angeles, California, and 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 attempted to procure entry to the United States in August 1997 by presenting a fraudulent Border Crossing Card. *See Form I-213, Record of Deportable/Inadmissible Alien*, dated August 21, 1997. Consequently, she was removed from the United States on August 22, 1997. *See Notice to Alien Ordered Removed/Departure Verification*, dated August 22, 1997. Pursuant to the applicant's sworn testimony, she subsequently entered the United States without inspection in September 1997. *See Record of Sworn Statement in Affidavit Form*, dated February 24, 2006.

Based on the applicant's attempt to procure entry to the United States in August 1997 by presenting a fraudulent Border Crossing Card, the field office director found the applicant 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 having attempted to procure entry to the United States by fraud or willful misrepresentation. The field office director further noted that as the applicant was removed from the United States and subsequently entered the United States without inspection, she was inadmissible under section 212(a)(9)(C)(i)(II) of the Act and thus, was ineligible for a waiver of inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Decision of the Field Office Director*, dated June 15, 2009.

In support of the appeal, counsel for the applicant submits a brief, dated July 14, 2009. The entire record was reviewed and considered in rendering this decision.

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

- (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:

- (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 immigrant 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 has consented to the alien's reapplying for admission.

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 USCIS has consented to the applicant's reapplying for admission. In *Duran Gonzales v. DHS (Gonzales II)*, 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.

On appeal, counsel states that in *Perez-Gonzalez v. Ashcroft (Perez-Gonzalez)*, 379 F. 3d 783 (9th Cir. 2004), the Ninth Circuit said that individuals who had been removed or deported may apply for adjustment of status along with an accompanying I-212 waiver application. *Gonzales II*, counsel notes, overturned *Perez-Gonzalez*. Counsel asserts that in its decision, the Ninth Circuit did not address the issue of whether aliens in the applicant's position, who filed their I-212 applications prior to the entry of a decision in *Duran Gonzales*, should still have their applications considered under the law as set forth in *Perez-Gonzalez*. Counsel contends that a retroactive application of *Gonzales II* will impair the applicant's rights and thus, fairness and due process prevent the retroactive application of the Board's interpretation of section 212(a)(9)(C)(ii). *See Brief in Support of Appeal*, dated July 14, 2009. Subsequent to the filing of the applicant's appeal, however, the

Ninth Circuit clarified that its holding in [REDACTED] 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 the present matter, the applicant is currently residing in the United States and did not remain outside the United States for ten years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under section 212(i) of the Act.

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 or whether she merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.