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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**



H5



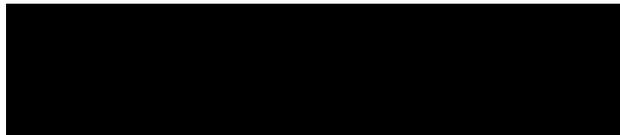
DATE: **APR 10 2012** OFFICE: SAN JOSE, CALIFORNIA

FILE:

IN RE: Applicant:

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:



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, San Jose, California, and 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having sought to procure admission through fraud or misrepresentation. The applicant also was found to be inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for having been unlawfully present in the United States for an aggregate period of more than one year, and for having reentered the United States without being properly admitted. The applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant, through counsel, does not contest the finding of inadmissibility under section 212(a)(6)(C)(i), and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her husband and child. However, counsel contests the finding of inadmissibility under section 212(a)(9)(C)(i).

The Field Office Director concluded that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act and was not eligible for the exception under section 212(a)(9)(C)(ii) of the Act. The Field Office Director further concluded that no purpose would be served in determining whether the applicant was eligible for a waiver under section 212(i) of the Act, and denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated September 16, 2009.

On appeal, counsel contends that by denying the applicant's waiver application, the United States Citizenship and Immigration Services (USCIS) failed to consider that the applicant filed an adjustment of status application pursuant to the provisions contained in section 245(i) of the Act; the Ninth Circuit's decision in *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) should not apply retroactively to the applicant; and the applicant is not required to remain outside the United States for 10 years before applying for readmission. Counsel further contends that the denial of the applicant's waiver application is arbitrary and capricious as well as an abuse of discretion given that the applicant's spouse will suffer extreme hardship; USCIS failed to properly analyze the particular circumstances of the instant case in light of precedent decisions and favorable discretionary factors; family unity should override any wrongdoing committed by the applicant; and the applicant has demonstrated true reformation of character and rehabilitation. *See Notice of Appeal or Motion (Form I-290B)*, dated October 14, 2009.

The record includes, but is not limited to: counsel's statement; letters of support; and identity, medical, employment, financial, and court documents. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) In general.-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.

...

(iii) Waiver Authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides, in pertinent part:

(1) The Attorney General [now Secretary of Homeland Security (Secretary)] may, in the discretion of the [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 [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.

The Field Office Director found the applicant inadmissible under 212(a)(6)(C) of the Act for having misrepresented her identity to immigration officials on November 8, 2005. The record establishes that the applicant was one of four visible passengers in a vehicle driven by [REDACTED], when the vehicle was apprehended by immigration officials for having sped past the primary inspection booth at the San Ysidro Port of Entry. During secondary inspection, the applicant presented a false name and admitted that she did not have proper documentation to enter the United States. She also provided a summary of the events leading to her apprehension. The applicant was paroled into the United States to serve as a material witness in the arraignment of [REDACTED] who was charged with violating 8 USC Sec. 1324. On November 29, 2005, the applicant's parole was rescinded, she was permitted to withdraw her application for admission in lieu of removal proceedings, and she returned to Mexico. A few days later, the applicant entered the United States without inspection by immigration officials, and has remained to date.

Based on the record, the AAO finds that when the applicant provided a false name and date of birth during secondary inspection, she was not seeking to procure admission to the United States or any other benefit under the Act. Rather, she was providing information concerning the circumstances of her relationship to [REDACTED] and her intentions of coming to the United States, and was attempting to avoid having her true identity affiliated with the proceedings against [REDACTED]. Accordingly, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

However, the record reflects that the applicant is inadmissible under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of her last departure from the United States.¹

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

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In General.- Any alien (other than an alien lawfully admitted for permanent residence) who-

...

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

...

(v) Waiver.-The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary] regarding a waiver under this clause.

(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 aggregated period of more than 1 year; or

...

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.

The record establishes that the applicant entered the United States without being admitted in or around January 1999, and remained until in or around March 2005, when she voluntarily left for Mexico. The applicant accrued unlawful presence from January 1999 until March 2005, a period in excess of one year. As the applicant is seeking admission within 10 years of departure, she is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

And, as stated previously, the applicant entered the United States again without being admitted in or around November 2005, and has remained to date. Accordingly, the AAO finds that the applicant is further inadmissible under section 212(a)(9)(C)(i)(I) 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 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). In *Duran Gonzalez*, *supra*, 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 the present matter, the applicant was unlawfully present in the United States for more than one year and subsequently reentered the United States without being admitted by U.S. immigration officials in or around November 2005. As the applicant has not been outside the United States for a total of 10 years, she is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver application.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish that she is eligible for the benefit being sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.