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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

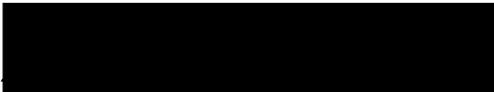
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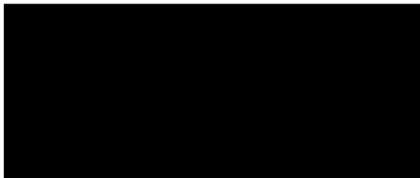
DATE: **APR 23 2012** OFFICE: SAN JOSE, CA

FILE: 

IN RE: 

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 (FOD), San Jose, California and the matter 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 having sought to procure admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. 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 with his U.S. citizen spouse.

The FOD concluded that the applicant was statutorily ineligible for a waiver and denied the application accordingly. *See Decision of Field Office Director* dated September 24, 2009.

On appeal, counsel states that the FOD erred in denying the applicant's waiver on the basis that his Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, was denied making him statutorily ineligible for relief. Counsel states that the applicant files this appeal to preserve his statutory right with respect to, at the time a pending issue with the Ninth Circuit, whether the ruling in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007) is retroactive to applicants who acted in reliance on the Ninth Circuit's prior ruling in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

The evidence of record includes, but is not limited to: statements from the applicant and his spouse; a psychological evaluation of the family and copies of medical documents; copies of school records of the applicant's daughter; identification documents; and financial documents. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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 [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 record reflects that, on January 26, 1999, the applicant attempted to enter the United States by presenting a Form I-586, Border Crossing Card, in the name of [REDACTED] to immigration inspectors at the Nogales Port of Entry. Upon further inquiry, the applicant admitted his true identity. Therefore, the AAO finds the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having attempted to obtain admission to the United States through fraud or the willful misrepresentation of a material fact. The applicant does not contest his inadmissibility.

The FOD also found the applicant inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act because the applicant reentered the United States without being admitted after he was ordered removed under section 235(b)(1) of the Act.

Section 212(a)(9)(C)(i)(II) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

....

(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 Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

As a result of his attempt to enter the United States with an immigration document that did not belong to him, the applicant was expeditiously removed from the United States under section 235(b)(1) of the Act and was, thereafter, barred from entering the United States for five years. *Form I-860, Notice and Order of Expedited Removal*, dated January 26, 1999; *Form I-213, Record of Deportable/Inadmissible Alien*, dated January 26, 1999; *Form I-296, Notice to Alien Ordered Removed/Departure Verification*, dated January 26, 1999. On July 30, 2007, the

applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status, based on the approved immigrant petition that was filed on his behalf by his wife. The applicant indicated on the Form I-485 that his last arrival to the United States was on or about January 1999 and that he had entered the United States without inspection. Based on this evidence, the AAO finds the applicant to be inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed from the United States and subsequently reentering the United States without being admitted.

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 Duran Gonzales v. DHS*, 659 F.3d 930 (9th Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzales* prospectively only); *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).

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 10 years ago, the applicant has remained outside the United States and CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and has not remained outside the United States for 10 years since his last departure. The applicant is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(i) of the Act.

ORDER: The appeal is dismissed.