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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., NW, MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H5

[Redacted]

DATE: APR 26 2012 OFFICE: LOS ANGELES, CA FILE: [Redacted]
IN RE: [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 Form I-601, Application for Waiver of Inadmissibility (Form I-601) 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 El Salvador, 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 admission into the United States through fraud. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, 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 reside in the United States with her U.S. citizen husband.

The record reflects the applicant was ordered removed from the United States on December 19, 1997, and that she unlawfully re-entered the country on December 31, 1997. The applicant is thus also inadmissible under section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) for having been ordered removed, and seeking admission within ten years of removal. In addition, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for entering the United States without admission after having been removed.

In a decision dated February 25, 2009, the director determined the applicant had failed to establish her husband would experience extreme hardship if she were denied admission into the United States. The Form I-601 waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that her U.S. citizen husband will experience extreme emotional and financial hardship if she is denied admission into the United States. In support of these assertions, counsel submits a letter from the applicant's husband, medical report and psychological assessment documents, and birth certificate evidence for the applicant's husband's children. The entire record was reviewed and considered in rendering a decision on the appeal.

It is noted that the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Under section 212(i) of the Act:

- 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 December 19, 1997, the applicant attempted to gain admission into United States by using a border crossing card issued in the name of another individual. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act, for attempting to procure admission into the United States through fraud. Counsel does not contest the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act.

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

(i) [A]ny 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) [C]ause (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 applicant was ordered removed from the United States on December 19, 1997. The record reflects the applicant re-entered the United States without permission or admission on December 31, 1997, and the applicant has remained in the United States since that time. Accordingly she is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and she requires permission to reapply for admission into the United States, as set forth in section 212(a)(9)(C)(ii) of the Act.

The Board of Immigration Appeals (BIA) and the Ninth Circuit Court of Appeals, under whose jurisdiction this case arises, have held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may not be granted consent to reapply for admission 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 Gonzales 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) 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 Gonzales* 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 ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter the applicant is currently residing in the United States. Because the applicant has not remained outside of the United States for ten years since her last departure, she is currently statutorily ineligible to apply for permission to reapply for admission.¹ As such, no purpose would be served in adjudicating her waiver appeal under section 212(i) of the Act. The appeal shall therefore be dismissed.

ORDER: The appeal is dismissed.

¹ The director did not adjudicate the applicant's Form I-212, Application for Permission to Reapply for Admission after Deportation or Removal, filed May 21, 2002. It is noted, however, that pursuant to section 212(a)(9)(C)(iii), consent to reapply may not be granted until she remains outside of the United States for ten years.