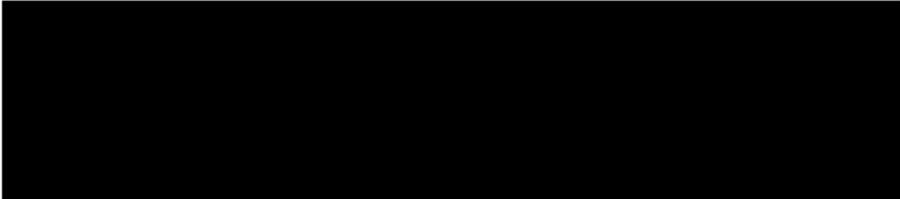




U.S. Citizenship
and Immigration
Services



H5

DATE: DEC 19 2012

OFFICE: TUCSON, ARIZONA

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tucson, Arizona 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 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 willful misrepresentation. The applicant was expeditiously removed from the United States on or about November 21, 1999 for a period of five (5) years, and subsequently entered the United States without inspection less than two (2) months later, on or about January 3, 2000. The applicant has resided in the United States ever since. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who reentered the United States without being admitted. She seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii), and 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. spouse and children.

The Field Office Director concluded that the applicant does not meet the requirements for consent to reapply for admission because she did not remain outside the United States for ten (10) years following her removal and that, therefore, approval of her waiver application would serve no purpose and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the District Director*, dated March 24, 2011.

On appeal counsel contends that the waiver application was incorrectly denied because the applicant's merits for a waiver under section 212(i) of the Act were not considered. *See Counsel's I-601 Appeal Brief*, dated April 15, 2011.

The record contains, but is not limited to: Forms I-290B appealing denials of the applicant's Forms I-212 and I-601 applications; counsel's briefs in support of each appeal; a petition for review and request for stay of removal to the Ninth Circuit Court of Appeals and the Court's dismissal thereof; various immigration applications and petitions; a hardship declaration; the applicant's declaration; letters from and documents related to the applicant's children; numerous letters of support and character reference; Mexico country-conditions documents; medical-related records; tax and income-related records; birth and marriage certificates; a 1997 memorandum concerning inadmissibility under section 212(i) of the Act; and excerpts from the United States Citizenship and Immigration Services Adjudicator's Field Manual. The record also contains numerous Spanish-language documents which are not accompanied by full, certified English translations as required under 8 C.F.R. § 103.2(b)(3).¹ These include what

¹ 8 C.F.R. § 103.2(b)(3). Translations. Any document containing foreign language submitted to United States Citizenship and Immigration Services (USCIS) shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

appear to be approximately 10 letters of support from various individuals. Because the required translations were not submitted for these documents, the AAO will not consider them in this proceeding. The entire record, with the exception of the Spanish-language documents described, was reviewed and considered in rendering this decision on the 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 shows that on or about November 21, 1999 the applicant sought to procure admission to the United States by presenting a Mexican passport and non-immigrant visa bearing the identity of another individual. Based upon the foregoing, the applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and was expeditiously removed from the United States the same day. The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(6)(C) 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 on or about November 21, 1999, the applicant was expeditiously removed to Mexico for a period of five years. She entered the United States without inspection less than two months later, on or about January 3, 2000, and has resided in the United States ever since.

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). 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* 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 or about November 21, 1999 for a period of five (5) years. The applicant admitted that she entered the United States without inspection on or about January 3, 2000 and has remained in the United States ever since. Thus the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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 permission to reapply for admission prior to the expiration of the 10-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). Therefore, as the law stands today, the applicant remains inadmissible to the United States.

Counsel contends that "in violation of its own procedures, the Service failed to make an initial determination on the waiver." Counsel asserts that as a June 20, 1997 "Memorandum generated by the Service" indicates that the I-601 waiver application "is to be considered for relief from inadmissibility under section 212(a)(6)(C)(i) of the Act," and because the USCIS Adjudicator's Field Manual lays out steps for considering whether a waiver is available, the applicant's Form I-601 application must be considered on the merits despite a finding that the applicant is statutorily inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act. While counsel references guidelines in the Adjudicator's Field Manual on adjudicating a waiver application under section 212(i) of the Act, such guidelines are silent on whether an adjudicator must reach the merits of a claim under section 212(i) of the Act when the applicant is also statutorily inadmissible under section 212(a)(9)(C) of the Act for which there is no waiver. Counsel's assertion that the guidelines mandate full adjudication of a claim under section 212(i) of the Act is not support by the record or any binding legal authority.

Approval of a Form I-601 application for a waiver is discretionary. Section 212(i)(1) of the Act. As the applicant has not been outside of the United States for a total of 10 years following her reentry without admission after removal, she is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in reaching the merits

of her Form I-601 application for a waiver under section 212(i) of the Act, as she would remain inadmissible and the approval would have no effect.

Section 291 of the Act, 8 U.S.C. §1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant in the instant case has not met that burden, in that she has not shown that a purpose would be served in adjudicating her waiver application under section 212(i) of the Act due to her inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.