

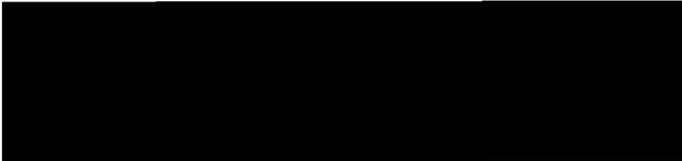
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



#5

DATE: FEB 14 2012 OFFICE: LOS ANGELES, CALIFORNIA



IN RE:

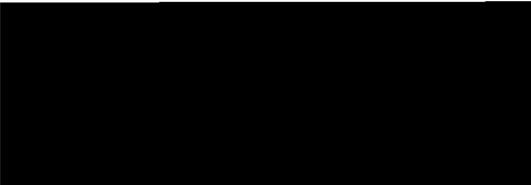
Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)

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 Field Office Director, Los Angeles, California, denied the waiver request, 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 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)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having been ordered removed under sections 235(b)(1) and 240 of the Act upon arrival, 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). However the applicant contests the finding of inadmissibility under section 212(a)(9)(C)(i)(II) and seeks permission to reapply for admission into the United States after removal in order to reside in the United States with his wife and children.

The Field Office Director concluded that the applicant failed to meet the requirements for consent to reapply for admission, and denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) accordingly. *See Decision of the Field Office Director*, dated July 28, 2009.

On appeal, counsel contends that the United States Citizenship and Immigration Services (USCIS) abused its discretion by failing to consider the ample evidence of hardship individually and in the aggregate to the applicant's U.S. citizen spouse, and committed errors of law and fact by retroactively applying the Ninth Circuit's decision in *Duran Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) to the applicant's Form I-212. *See Notice of Appeal or Motion (Form I-290B)*, dated August 25, 2009; *see also I-290B Brief in Support of Appeal*, dated September 23, 2009. Counsel further contends that USCIS abused its discretion because it did not engage in the particularized analysis of the applicant's hardship evidence or assess the cumulative effect of hardship when it "conceded that it would be 'fruitless' to grant [the applicant's] I-601 application given his other ground of inadmissibility, only casting more doubt as to whether it actually ever reviewed the evidence and documentation [the applicant] presented on his behalf." *I-290B Brief in Support of Appeal, supra*. The AAO notes that although counsel indicates that the applicant wishes to appeal the denial of both his Form I-601 and Form I-212, only one Form I-290B and fee have been submitted. A Form I-290B and filing fee must be filed for each individual application appealed. Therefore, the AAO will consider the Form I-601 on appeal.¹

¹ In situations where an applicant files both a Form I-212 and a Form I-601, the Adjudicator's Field Manual (AFM) states that the Form I-601 is to be adjudicated first. Chapter 43.2(d) of the AFM states, "If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212

The record includes, but is not limited to: counsel's brief; letters of support; identity documents; medical records; employment records; financial documents and billing statements; and school records. 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 presented a Border Crossing Card (I-586) for which the applicant was not the rightful owner when seeking admission to the United States on March 21, 2000. The record supports this finding, and the AAO concurs that this misrepresentation was material. The applicant through counsel has not disputed his inadmissibility on appeal. The AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(9)(C) 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 provision of law,

since its approval would serve no purpose." Accordingly, pursuant to Chapter 43.2(d) of the AFM, the AAO will consider the applicant's Form I-601.

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 reflects that the applicant entered the United States without being admitted in or around April 2000, after his expeditious removal pursuant to section 235(b)(1) of the Act on March 22, 2000, and after his order of removal *in absentia* pursuant to section 240 of the Act on April 6, 2000. The record further reflects that the applicant has remained in the United States to date and, through counsel, filed Form I-212 on December 6, 2006. The AAO finds that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) 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 expeditiously removed from the United States on March 22, 2000, ordered removed *in absentia* on April 6, 2000, and subsequently reentered the United States without being admitted by U.S. immigration officials at a later date in April 2000. As the applicant has not been outside the United States for a total of 10 years, he 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.

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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden, in that he has not shown that a purpose would be served in adjudicating his waiver under section 212(i) of the Act due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.