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



U.S. Citizenship  
and Immigration  
Services

DATE: OCT 30 2013

Office: SAN BERNARDINO

FILE: [REDACTED]

IN RE:

Applicant: [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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Administrative Appeals Office (AAO) previously dismissed the applicant's waiver application (Form I-601) in a decision dated April 9, 2013. The matter is now before the AAO on motion. The motion 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 Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States through fraud or misrepresentation, and under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for reentering the United States illegally after having been ordered removed. The Field Office Director, San Bernardino, California, found that the applicant had failed to establish extreme hardship to a qualifying relative and denied his Form I-601 accordingly. *See Decision of Field Office Director*, dated September 12, 2012. In a separate decision the Field Office Director found the applicant had not met the requirements for consent to reapply under section 212(a)(9)(C)(ii) of the Act. Therefore, the Field Office Director also denied the applicant's Form I-212. *See Decision of Field Office Director Regarding Form I-212*, dated September 12, 2012. In our decision on appeal, we found the applicant to be statutorily ineligible to seek permission to reapply for admission due to his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act. Therefore, we found that no purpose would be served in adjudicating the applicant's waiver application.

On motion, counsel for the applicant alleges that the AAO erred in finding that section 212(a)(9)(C)(i)(II) of the Act rendered the applicant ineligible for permission to reapply for admission because he had not remained outside the United States for ten years since his last departure. Counsel states that the applicant may seek permission to reapply for admission despite his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act "because the federal regulations contemplate the admission of an alien deported or removed."

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

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 the applicant was removed from the United States on June 14, 1999 pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). Later that same month, he reentered the United States without inspection. He has remained in the United States since that date. The applicant is therefore inadmissible under section 212(a)(9)(C)(i)(II) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act. He does not dispute the finding of inadmissibility, but asserts that his inadmissibility does not bar him from seeking permission to reapply for admission and a waiver.

The AAO finds that the applicant has failed to demonstrate that our previous decision was in error. 8 C.F.R. § 103.5(a)(3). Counsel asserts that pursuant to federal regulations, an alien who seeks adjustment of status after being removed may seek permission to reapply for admission to the United States even though he has not remained outside the United States for the requisite period since his last departure. Specifically, counsel notes that 8 C.F.R. § 212.2(e) requires an applicant for adjustment of status who has previously been removed to file a Form I-212 application for permission to reapply for admission. Counsel further contends that 8 C.F.R. § 212.2(a) "authorizes the Attorney General to admit an alien following deportation or removal." *Counsel's Brief*. Counsel cites 8 C.F.R. § 212.2(a) to emphasize that an alien who has been deported or removed is required to remain outside the United States for five years, or 20 years in the case of an alien convicted of an aggravated felony, but that an "alien who is seeking to enter the United States prior to the completion of the requisite . . . absence must apply for permission to reapply for admission . . ." *Id.* Counsel concludes that the applicant's

eligibility to adjust status under § 245(i) as well as with the regulatory provisions which contemplate the filing for such permission prior to the expiration of the term of inadmissibility allows him to seek permission to reapply for admission to the United States prior to the expiration of the term called for in the Act.

However, in our decision of the same date regarding the applicant's motion to reconsider our dismissal of his Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), we find that the applicant had not demonstrated eligibility to seek permission to reapply for admission. We note in that decision that in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) (*Duran Gonzales I*), the Ninth Circuit Court of Appeals deferred to the BIA's holding that section 212(a)(9)(C)(i)(II) 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. We also find in that decision that the applicant has not established that the decision in *Torres-Garcia* precluding relief under section 212(a)(9)(C) of the Act and the decision in *Duran Gonzales I* adopting *Torres-Garcia* should not be applied retroactively in his case.

Accordingly, as an alien inadmissible under section 212(a)(9)(C)(i)(II) of the Act, the applicant is ineligible to seek permission to reapply for admission at this time because he has not remained outside the United States for ten years since his last departure in June 1999. Therefore, because he is statutorily ineligible for relief, no purpose would be served in adjudicating his waiver application, which is properly denied as a matter of discretion.

The applicant has failed to demonstrate that the AAO's previous decision was in error. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The applicant's motion will be dismissed.

**ORDER:** The motion is dismissed.