

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



**PUBLIC COPY**

H6



Date: **NOV 14 2011**

Office: SAN FRANCISCO, CA

FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)

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, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for being unlawfully present in the United States for one year or more and reentering the United States without being admitted. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with his wife in the United States.

The field office director found that the applicant's Form I-485 adjustment of status application was denied and that the applicant failed to submit documentation to demonstrate that he meets the exception to inadmissibility under section 212(a)(9)(C)(i)(II) of the Act. The field office director denied the waiver application accordingly. *Decision of the Field Office Director*, dated June 29, 2009.

On appeal, counsel contends that when the applicant applied for adjustment of status, the controlling law at the time was *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). According to counsel, the applicant's Form I-601 waiver application and Form I-485 adjustment application may not be denied because ten years have not elapsed since the applicant's last departure from the United States. Counsel contends that a temporary restraining order was obtained in the *Duran-Gonzalez* case prohibiting the government from denying Form I-212 applications and that the prohibition should apply to this case.

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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

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 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).

A Form I-601 waiver application is viable when there is a pending adjustment of status application (Form I-485) or immigrant visa application. In this case, the record reflects that the applicant's Form I-485 was denied on June 29, 2009, because the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act for entering the United States without inspection in 1991, departing the country in January 2000, and returning to the United States without inspection in January 2000. The field office director found that pursuant to *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), and *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the applicant was ineligible to apply for consent to reapply for admission to the United States as he had not remained abroad for ten years. The field office director denied the Form I-485 accordingly.

Because the applicant does not have an underlying adjustment application to support the filing of his Form I-601 waiver application, and, because the applicant must remain outside the United States for ten years before applying for any relief, no purpose would be served in adjudicating the applicant's Form I-601 and examining the hardship to the applicant's wife. Accordingly, the appeal is dismissed.

**ORDER:** The appeal is dismissed.