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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**



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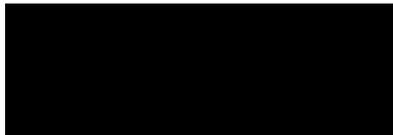
DATE: Office: SAN FRANCISCO, CA

FILE: 

IN RE: **NOV 23 2011**
Applicant: ADRIANA BARAJAS

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality 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 be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 applicant is a native and a citizen of Mexico who resided in the United States unlawfully for a period over one year, departed the United States and then re-entered without inspection. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I). She is the spouse of a U.S. citizen. The applicant is seeking a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) in order to reside in the United States.

The Field Office Director concluded that the applicant was ineligible to file a waiver application as a matter of law and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 8, 2009.

On appeal, counsel for the applicant asserts that the Ninth Circuit decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), should be applied to this case and that, pursuant to the *Acosta* decision, the applicant is eligible to seek an exception from her inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Counsel further states that the applicant's spouse would suffer extreme hardship if the applicant is not granted a waiver of inadmissibility. *Brief in Support of Appeal*, received June 24, 2009.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record reflects that the applicant entered the United States without inspection on or about November 22, 1996 and remained until she departed in or around January 2005. Therefore, the applicant was unlawfully present in the United States for over a year from April 1, 1997, the effective date of the unlawful presence provision of the Act until January 2005, and is now seeking admission within ten years of her last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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 applicant departed the United States in January 2005, after having accrued more than one year of unlawful presence, and subsequently re-entered without inspection on January 21, 2005. Therefore, the applicant is inadmissible under section 212(a)(9)(C)(i)(I) 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 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)(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. The Ninth Circuit has 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).

Counsel states that in *Duran Gonzalez* the Ninth Circuit did not address the status of its decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). In *Acosta*, the Ninth Circuit extended its reasoning in *Perez Gonzalez* to aliens who were inadmissible under section 212(a)(9)(C)(i)(I) of the Act, as is the applicant in this case. Counsel further states that, although the BIA addressed inadmissibility under 212(a)(9)(C)(i)(I) in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), that decision should not

be given deference, and the Ninth Circuit decision in *Acosta* should apply in this case. Counsel's argument is not persuasive. The Ninth Circuit, in *Garfias-Rodriguez v. Holder*, 2011 WL 1346960 (9th Cir. 2011), held that the BIA decision in *Briones* is entitled to deference and that "adjustment of status under [section 245(i) of the Act] is unavailable to aliens inadmissible under [section 212(a)(9)(C)(i)(I) of the Act]." *Id.* at *7. Therefore, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act and the BIA precedent decisions in *Matter of Torres-Garcia* and *Matter of Briones* are applicable in the instant case.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must file for permission to reapply for admission (Form I-212). However, consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted to one who has left the United States, is currently abroad and is seeking admission to the United States at least ten years after the date of his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The record does not reflect that the applicant in the present matter has met these requirements. Accordingly, the applicant is statutorily ineligible to seek an exception from her inadmissibility under section 212(a)(9)(C)(i)(I) of the Act and the AAO finds no purpose would be served in considering the merits of her Form I-601 waiver application under sections 212(a)(9)(B)(v) and 212(i) of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.