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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



tlg



DATE: **AUG 27 2012**

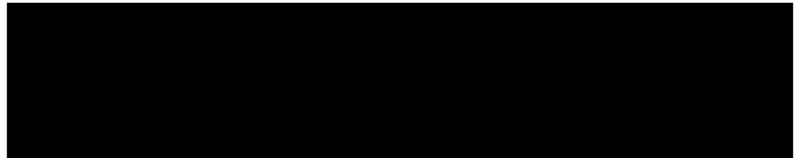
Office: LAS VEGAS

FILE:

IN RE: Applicant:

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 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 in accordance with the instructions on 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.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Las Vegas, Nevada, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant is a native and citizen of Mexico who entered the United States without being admitted in 1992. In January 2001, the applicant was voluntarily returned to Mexico. On April 3, 2001, the applicant re-entered the United States without being admitted and has remained in the United States to date. The applicant was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children.

The field office director, in a separate decision denying the applicant's Form I-485, noted that as the applicant had accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until he was removed in January 2001, and he was therefore inadmissible under section 212(a)(9)(C) as a result of his subsequent re-entry to the United States in April 2001, and was not eligible to receive consent to reapply for admission for at least 10 years after his last departure. The Form I-485 was denied accordingly. *See Decision of the Field Office Director to Deny the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485)*, dated July 27, 2009. As a consequence of the Form I-485 denial, the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied as well. *See Decision of the Field Office Director to Deny the Applicant's Form I-601*, dated July 27, 2009.

To begin, on appeal counsel references that the applicant "filed an application for permission to reapply for admission into the United States after deportation or removal on Form I-601...." *See Form I-290B*. The AAO notes that the record fails to establish that counsel or the applicant did in fact submit a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) on behalf of the applicant. The only appeal in the record for the applicant is in relation to the Form I-601 application submitted by the applicant in April 2009.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), states in pertinent part:

(B) Aliens Unlawfully Present.-

(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.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 Attorney General (Secretary) that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien...

The AAO concurs with the field office director that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I). As established in the record, the applicant initially entered the United States without being admitted in 1992 and was voluntarily returned to Mexico in January 2001. In April 2001, the applicant again re-entered the United States without being admitted. The additional finding of inadmissibility in the instant case is based on the applicant's entry without being admitted in April 2001 after having been unlawfully present in the United States for an aggregate period of more than one year. As noted above, this ground of inadmissibility was referenced in the field office director's decisions to deny the applicant's Form I-485.<sup>1</sup>

(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,

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<sup>1</sup> The Field Office Director references that the applicant was removed from the United States in January 2001. *See Decision of the Field Office Director to Deny the Applicant's Form I-485*, dated July 27, 2009. The record does not establish that the applicant was in fact removed in January 2001. If the applicant had in fact been removed, he would also be inadmissible under section 212(a)(9)(C)(i)(II) of the Act, for having entered the United States without being admitted after having been removed from the United States. Nevertheless, the applicant remains inadmissible under section 212(a)(9)(C)(i)(I) of the Act, based on his re-entry to the United States without being admitted after having accrued unlawful presence for a period of more than one year.

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.

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.<sup>2</sup> *Morales-Izquierdo v. DHS*, 600 F.3d. 1076 (9th Cir. 2010). See also *Duran Gonzales v. DHS*, 659 F.3d 930 (9<sup>th</sup> 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).

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 ten years ago, the applicant has remained outside the United States and USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and did not remain outside the United States for 10 years after his last departure. 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(a)(9)(B)(v) of the Act.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen spouse or whether he merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of

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<sup>2</sup> As noted above, the record fails to establish that counsel or the applicant did in fact file a Form I-212. Nevertheless, as explained above, even if a Form I-212 application was pending on behalf of the applicant before *Perez-Gonzalez* was overturned, 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.

the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The waiver application is denied.