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



U.S. Citizenship  
and Immigration  
Services

H6

DATE: FEB 23 2012

OFFICE: NEWARK, NJ

FILE: [REDACTED]

IN RE: [REDACTED]

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 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

**DICUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Turkey who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and is the son of U.S. citizens. He seeks a waiver of his inadmissibility in order to remain in the United States.

The Field Office Director, however, found that no purpose would be served by considering the applicant's Form I-601, Application for Waiver of Ground of Excludability, as the applicant was also inadmissible pursuant to sections 212(a)(9)(C)(i)(I) and (II) of the Act and ineligible to file for the exception available under section 212(a)(9)(C)(ii). She denied the Form I-601 accordingly. *Decision of the Field Office Director*, dated August 31, 2009.

On appeal, the counsel states that the applicant is eligible to file for the exception available under section 212(a)(9)(C)(ii) of the Act as he is in the United States and covered by section 245(i) of the Act. Counsel contends that the federal courts have overruled *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), on which the Field Office Director relied, as well as *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) and that these BIA decisions are not controlling in this matter. *Form I-290B, Notice of Appeal or Motion*, dated October 1, 2009.<sup>1</sup> The AAO notes that the Form I-290B indicates that the applicant's counsel will file a brief within 30 days, but has found no brief or additional evidence included in the record. Accordingly, the record is considered to be complete.

The evidence of record includes, but is not limited to: statements from the applicant, his spouse, his parents and his siblings; numerous statements of support from friends and family members; statements from the applicant's pastor and other church officials; medical statements and records for the applicant's spouse and oldest daughter; tax returns; documentation relating to the applicant's business; and country conditions information on Turkey. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

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

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<sup>1</sup> The AAO notes that counsel indicates on the Form I-290B that he is appealing the denials of the Form I-601 and Form I-212, both of which are dated August 31, 2009. However, the applicant has submitted only one filing fee. Accordingly, the AAO, will consider only the applicant's appeal of the Form I-601.

(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.

Section 212(a)(9)(C) of the Act provides:

(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 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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The record reflects that the applicant initially entered the United States as an F-1 student on November 13, 1985, remaining in status until August 1987. On May 12, 1989, the applicant was placed in proceedings and on July 11, 1989, an immigration judge granted him voluntary departure until October 11, 1989. The applicant did not depart the United States but filed a motion to reopen, which was granted by the immigration judge on December 13, 1990. On May 28, 1991, the immigration judge ordered the applicant removed from the United States and the applicant appealed to the Board of Immigration Appeals (BIA), which dismissed the appeal as untimely on August 27, 1992. On or about October 1, 1992, the applicant filed a motion to reopen and on August 18, 1995, he submitted a second motion. The BIA denied the applicant's motion on November 30, 1998, and on March 13, 2001, he was removed to Turkey. The applicant, however, reentered the United States without inspection on December 5, 2004, using a hole in the U.S./Mexico International Boundary Fence near Douglas, Arizona. He was apprehended that same day by a United States Customs and Border Protection officer.

Based on this history, the applicant accrued unlawful presence in excess of one year, from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he was removed from the United States on March 13, 2001, which triggered the unlawful presence provisions under the Act. As the applicant failed either to remain outside the United States for the ten years he was barred from admission or to obtain a waiver under section 212(a)(9)(B)(v) of the Act, he remains

inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

The AAO acknowledges that the applicant in the present case is eligible for waiver consideration under section 212(a)(9)(B)(v) of the Act based on his U.S. citizen spouse and parents, all of whom are qualifying relatives for the purposes of the waiver application. However, the AAO also finds that no purpose would be served by considering the Form I-601 as the applicant is also inadmissible under section 212(a)(9)(C)(i) of the Act. By reentering the United States without admission following the accrual of more than one year of unlawful presence and after having been ordered removed, the applicant triggered both inadmissibility prongs of section 212(a)(9)(C)(i) of the Act, and is not eligible to apply for relief.

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 his or her last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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.

On appeal, counsel contends that the above referenced *Matter of Torres-Garcia* and *Matter of Briones* have been overturned in federal court and that the applicant is eligible for the exception provided by section 212(a)(9)(C)(ii) of the Act. Counsel's assertions regarding *Torres-Garcia* and *Briones* are not, however, persuasive.

In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> 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 discretionary waivers of inadmissibility 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2011) (stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the court).

In the present matter, the record reflects that the applicant's last departure from the United States occurred on March 13, 2001 and that he returned to the United States on December 5, 2004. As he has not remained outside the United States for ten years since his last departure, he is currently statutorily ineligible to apply for permission to reapply for admission. As a result, no purpose would be served in adjudicating his waiver under section 212(a)(9)(B)(v) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he or she is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.