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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

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DATE: **JAN 30 2012** OFFICE: SAN FRANCISCO, CALIFORNIA

FILE: [REDACTED]

IN RE: Applicant: [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:

[REDACTED]

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 Field Office Director, San Francisco, California, denied the waiver application, and it 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)(B)(i)(II) of the Immigration and Nationality Act (the Act), § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant also was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for an aggregate period of more than one year and reentering the United States without being admitted. The applicant is the spouse of a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant through counsel does not contest these findings of inadmissibility. Rather, he 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 in the United States with his wife and their children.

The Field Office Director concluded that the applicant failed to establish that he has complied with the exception provided in section 212(a)(9)(C)(ii) of the Act¹ to overcome his grounds of inadmissibility, and accordingly deemed the adjudication of the Application for Waiver of Grounds of Inadmissibility (Form I-601) moot. *See Field Office Director's Decision*, dated August 31, 2009.

On appeal, counsel asserts that the United States Citizenship and Immigration Services (USCIS) erroneously denied the applicant's adjustment of status and waiver applications because under section 245(i) of the Act and the 9th Circuit Court's holdings in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) and *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), the applicant was clearly eligible for relief at the time that he filed his adjustment of status application despite being inadmissible under section 212(a)(9)(C)(i) of the Act. *See Notice of Appeal or Motion (Form I-290B)*, dated September 22, 2009; *see also I-290B Brief in Support of Appeal*, dated October 22, 2009. Counsel further asserts that it was unlawful for USCIS to hold the adjustment of status application in abeyance while waiting for the law to favorably change in its favor. *Id.*

The record includes, but is not limited to: a brief from counsel; letters of support; identity documents; employment records; financial documents; school records; criminal records; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

¹ The AAO notes that the Field Office Director incorrectly indicates that the exception is provided in section 212(a)(9)(C)(i) of the Act.

(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.

...

(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,

...

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.

The record reflects that the applicant initially entered the United States in or around September 1992 without inspection by U.S. immigration officials. The applicant then voluntarily left the United States on or about May 1, 2000. The record further reflects that the applicant reentered the United States without inspection by U.S. immigration officials on or about May 22, 2000, and has remained in the United States to date. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions in the Act, until on or about May 1, 2000, a period in excess of one year. Accordingly, the applicant is inadmissible pursuant to sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

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, an

applicant 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 10 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 *Duran Gonzales v. DHS*, 659 F.3d 930 (9th 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).

In the present matter, the record does not reflect that the applicant has satisfied the requirements for the exception to inadmissibility under section 212(a)(9)(C)(ii) of the Act. Accordingly, he is currently statutorily ineligible to apply for permission to reapply for admission, and therefore, the AAO finds that no purpose would be served in considering the merits of his Form I-601 waiver application under section 212(a)(9)(B)(v) of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.