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

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

[REDACTED]

#6

DATE: **MAR 30 2012**

OFFICE: LAS VEGAS

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:

[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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Las Vegas, and 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. The applicant entered the United States without inspection or parole in January 1996. The applicant remained in the United States until his departure in December 2002. The applicant attempted to enter the United States on March 13, 2003 by concealing himself in the trunk of a vehicle. The applicant was ordered removed from the United States and was removed to Mexico on the same date. The applicant subsequently entered the United States without admission or parole. The applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in December 2002. The applicant is admissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The applicant seeks a waiver of inadmissibility to reside in the United States with his U.S. citizen spouse and child.

The Field Office Director concluded that since the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, was denied on July 27, 2009, the applicant's Form I-601 application should be rejected as it was not based upon an underlying Form I-485 application. See *Decision of Field Office Director*, dated July 30, 2009.

In support of the appeal, counsel for the applicant submits a brief asserting that the applicant relied upon Ninth Circuit case law, specifically, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), in submitting his Form I-601 application. Counsel further asserts that the applicant's spouse would suffer extreme hardship if the inadmissibility waiver is not granted. The entire record was reviewed and considered in rendering this decision.

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

(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.

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 was removed from the United States pursuant to section 235(b)(1) of the Act on March 13, 2003 and subsequently returned to the United States illegally. The applicant is therefore inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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 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).

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 ten years following his removal. 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 a qualifying relative or whether he merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant, Section 291 of the Act, 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.