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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

Date: JUL 2 2 2013 Office: LOS ANGELES FILE:

IN RE: APPLICANT:

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Los Angeles, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on motion. The motion will be granted and the underlying application remains denied.

The record reflects that the applicant is a native and citizen of Mexico who was ordered removed from the United States and subsequently entered without being admitted. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II). He seeks permission to reapply for admission to the United States in order to reside in the United States with his U.S. citizen spouse.

The field office director determined the applicant did not meet the requirements for consent to reapply for admission and denied the Form I-212 accordingly. *See Decision of Field Office Director,* dated June 28, 2009.

The AAO found that the applicant was residing in the United States and had not remained outside the United States for ten years after his last departure, making him statutorily ineligible to apply for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *See Decision of the AAO*, March 26, 2012.

On motion counsel asserts that the Ninth Circuit Court of Appeals decision to rehear *Garfias-Rodriguez v. Holder* en banc could directly impact the applicant, as the applicant's residence is under the jurisdiction of the Ninth Circuit. Counsel contends that his case should be held in abeyance pending a decision in the matter, in which the court will review the decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) and whether section 212(a)(9)(C)(i) of the Act bars adjustment of status under section 245(i) of the Act.

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 record reflects that on September 19, 1997, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act. The applicant subsequently entered the United States without inspection on September 20, 1997. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) 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); *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, the BIA has held that 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.

The applicant resides in the jurisdiction of the Ninth Circuit Court of Appeals. In *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) *(Duran Gonzales I),* the Ninth Circuit Court of Appeals 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. On October 25, 2011, the court held that its decision in *Duran Gonzales I* had full retroactive effect. *Duran-Gonzales v. DHS*, 659 F.3d 930, 939-41 (9th Cir. 2011). *(Duran Gonzales II)*. In a separate decision, the court deferred to the decision of the BIA in *Matter of Briones* that section 212(a)(9)(C)(i)(I) of the Act bars aliens from adjustment of status under section 245(i), overturning its prior decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). *Garfias-Rodriguez v. Holder,* 649 F.3d 942, 949 (9th Cir. 2011). The court further held that *Matter of Briones* could be applied retroactively. *Id.* at 949-50.

On March 1, 2012, the Ninth Circuit Court of Appeals ordered that *Garfias-Rodriguez* be reheard en banc, and in its en banc decision, the court adopted a multi-factor retroactivity test based on the decision in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). After applying the *Montgomery Ward* factors, the court again found that the BIA decision in *Matter of Briones* may be applied retroactively to the Petitioner. *Garfias-Rodriguez v. Holder,* 702 F.3d 504 (9th Cir. 2012) (en banc). *See also Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1071-72 (9th Cir. 2013) (applying the *Montgomery Ward* test and holding that the BIA decision in *Torres–Garcia*

applied retroactively to an alien who applied for adjustment of status several weeks before the issuance of the decision in *Duran Gonzales I* adopting *Torres–Garcia* as the law of the circuit).[1]

The five factors of the *Montgomery Ward* applied in *Garfias-Rodriguez* include the following:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Garfias-Rodriguez at 518 (quoting *Montgomery Ward,* 691 F.2d at 1333).

The court found that the first factor was developed in a different context and was not well-suited for application to immigration law and did not weigh in favor of either side. *Id.* at 520-21. The court found that the second and third factors were closely intertwined and favor the government, as the new rule in *Matter of Briones* did not constitute an "abrupt departure from well-established practice" on which a party's reliance would more likely be reasonable, and that ambiguity in the law and the tension between sections 212(a)(9)(C) and 245(i) of the Act "should have given Garfias no assurances of his eligibility for adjustment of status." *Garfias-Rodriguez* at 521-523. In addition, the court found that the two reliance interests identified by Garfias, the payment of a $1000 penalty fee and his admission of his unlawful presence in the United States by applying for adjustment of status, did not favor Garfias because he filed his application well in advance of any decision finding that section 212(a)(9)(C) inadmissibility did not bar him from adjusting his status under section 245(i) of the Act.[2] The court also gave little weight to the fact that Garfias admitted to his illegal presence in the United States by applying for adjustment of status. *Id.* at 522. The court found that the fourth factor, the burden of possible or certain deportation, strongly favored Garfias, while the fifth factor -- the statutory interest in applying a new rule -- favors the government "because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in

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[1] In light of the intervening en banc decision in *Garfias-Rodriguez,* the court withdrew the opinion in *Duran Gonzales II*, vacated the district court's judgment in the matter and remanded the case to apply the *Montgomery Ward* test to determine whether *Duran Gonzales I* should be applied retroactively to the plaintiffs in the matter. *Gonzales v. DHS*, 712 F.3d 1271, 1276-78 (9th Cir. 2013).

[2] Garfias had applied for adjustment of status in 2002, two years before *Perez-Gonzalez* was decided and four years before the decision in *Acosta v. Gonzales*, which held that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) of the Act are eligible for adjustment of status under section 245(i). The court stated,

> The only window in which Garfias' reliance interest based on our previous rule might have been reasonable is the 21-month period in 2006 and 2007 between the issuance of *Acosta* and *Briones.* After *Briones* was issued, he was on notice of *Acosta's* vulnerability. *Garfias-Rodriguez* at 522.

immigration law is well-established." *Id.* at 523 (*citing Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). The court concluded that Garfias was not entitled to relief because the balance of factors favored the retroactive application of *Matter of Briones*. *Id.* at 523.

In the present case the applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act on September 19, 1997, and subsequently entered the United States without inspection on September 20, 1997, prior to the Ninth Circuit rulings in *Perez-Gonzalez* or *Acosta*. The applicant filed an application for adjustment of status on October 28, 2003, also prior to the *Perez-Gonzalez* and *Acosta* rulings. Thus the applicant has not shown reliance on a former rule at the time of his application to adjust status. Further, when applying the other factors of the *Montgomery Ward* test the court in *Garfias-Rodriguez* found that the new rule in *Matter of Briones* did not represent an abrupt departure from well-established practice, but merely attempted to fill a void in an unsettled area of law, and the statutory interest in applying a new rule favored the retroactive application of the decision.

In the present matter, the applicant last departed the United States in September 1997 and did not remain outside the United States for ten years since his last departure, but returned after one day. He is currently statutorily ineligible to apply for permission to reapply for admission and has not established that the decision in *Matter of Torres-Garcia* precluding relief under section 212(a)(9)(C)(ii) of the Act and the decision in *Duran Gonzales I* adopting *Torres-Garcia* should not be applied retroactively in his case.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the application for permission to reapply for admission will remain denied.

ORDER: The motion is granted and the underlying application remains denied