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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 3 0 2013 Office: SAN BERNARDINO 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)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.

Thank you,

Michael Shumway

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) in a decision dated April 9, 2013. The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States through fraud or misrepresentation, and under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for reentering the United States illegally after having been ordered removed. The Field Office Director, San Bernardino, California, found the applicant had not met the requirements for consent to reapply under section 212(a)(9)(C)(ii) of the Act. Therefore, the Field Office Director denied the applicant's Form I-212. *See Decision of Field Office Director*, dated September 12, 2012. In our decision on appeal, we found the applicant to be statutorily ineligible to seek permission to reapply for admission due to his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act.

On motion, counsel for the applicant alleges that the AAO erred in finding that section 212(a)(9)(C)(i)(II) of the Act rendered the applicant ineligible to apply for permission to reapply for admission until he had been outside the United States for ten years since his last departure. Counsel states that the applicant may seek permission to reapply for admission despite his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act "because the federal regulations contemplate the admission of an alien deported or removed."

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

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-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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 the applicant was removed from the United States on June 14, 1999 pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). Later that same month, he reentered the United States without inspection. He has remained in the United States since that date. The applicant is therefore inadmissible under 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. He does not dispute the finding of inadmissibility, but asserts that his inadmissibility does not bar him from seeking permission to reapply for admission.

The AAO finds that the applicant has failed to demonstrate that our previous decision was in error. 8 C.F.R. § 103.5(a)(3). Counsel asserts that pursuant to federal regulations, an alien who seeks adjustment of status after being removed may seek permission to reapply for admission to the United States even though he has not remained outside the United States for the requisite period since his last departure. Specifically, counsel notes that 8 C.F.R. § 212.2(e) requires an applicant for adjustment of status who has previously been removed to file a Form I-212 application for permission to reapply for admission. Counsel further contends that 8 C.F.R. § 212.2(a) "authorizes the Attorney General to admit an alien following deportation or removal." Counsel cites 8 C.F.R. § 212.2(a) to emphasize that an alien who has been deported or removed is required to remain outside the United States for five years, or 20 years in the case of an alien convicted of an aggravated felony, but that an "alien who is seeking to enter the United States prior to the completion of the requisite . . . absence must apply for permission to reapply for admission . . . ." *Id.* Counsel concludes that the applicant's

> eligibility to adjust status under § 245(i) as well as with the regulatory provisions which contemplate the filing for such permission prior to the expiration of the term of inadmissibility allows him to seek permission to reapply for admission to the United States prior to the expiration of the term called for in the Act.

However, 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); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *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 *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 *Briones* may be applied retroactively to the Petitioner.[1] *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).

The five factors of the *Montgomery Ward* test 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).

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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).

The court found that the first factor was developed in a different context, 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 favored the government, as the new rule in *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 521-23. 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 -- favored the government "because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in 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 *Briones*. *Id.*

In the present case the applicant was removed pursuant to section 235(b)(1) of the Act on June 14, 1999. He subsequently entered the United States without inspection later in June 1999, prior to the Ninth Circuit rulings in *Perez-Gonzalez* and *Acosta*. Although the applicant filed an application for adjustment of status on June 1, 2006, after the decisions in *Perez-Gonzalez* and *Acosta*, he has not demonstrated that he relied on the rules stated in those decisions in applying for adjustment of status. The applicant's 2006 adjustment of status application and the accompanying brief do not claim that he was eligible to adjust his status despite having reentered unlawfully, nor has he identified on motion any "specific reliance interests" which might show that he "filed his application in reliance on" *Perez-Gonzalez* or *Acosta*. *Garfias-Rodriguez* at 522. Furthermore, as in *Garfias*, the Ninth Circuit decisions "were subject to revision by the BIA under Chevron and *Brand X*" and the ambiguity in the law and the tension between sections 212(a)(9)(C) and 245(i) of the Act "should have given [the applicant] no assurances of his eligibility for adjustment of status." *Id.* at 522-23. The applicant filed a second adjustment of status application on December 6, 2011, after the Ninth Circuit in *Duran Gonzales I* deferred to

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[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*, 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.

the BIA's holding that aliens inadmissible under section 212(a)(9)(C)(i)(II) of the Act cannot receive permission to reapply for admission prior to the expiration of the ten-year bar, and after the court held in *Duran Gonzales II* that its decision in *Duran Gonzales I* had full retroactive effect. 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 *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 June 1999 and did not remain outside the United States for ten years since his last departure, but returned later that same month. He is currently statutorily ineligible to apply for permission to reapply for admission and has not established that the decision in *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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant is not eligible to apply for consent to reapply at this time. The applicant has failed to demonstrate that the AAO's previous decision was in error. Accordingly, his motion will be dismissed and the application for permission to reapply for admission will remain denied.

ORDER: The motion is dismissed.