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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**



H4

[REDACTED]

DATE: **AUG 17 2012**

OFFICE: SAN DIEGO, CALIFORNIA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 waiver application was denied by the District Director, San Diego, California. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reconsider. The motion will be granted and the prior decision of the AAO will be affirmed. The application will be denied.

The applicant is a native and citizen of Mexico who was expeditiously removed from the United States on or about July 31, 1999, and subsequently entered the United States without inspection 10 to 14 days later. The applicant has resided in the United States ever since. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who re-enters the United States without being admitted. She seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with her U.S. citizen spouse and children.

The District Director determined that the applicant was ineligible to obtain consent to reapply for admission to the United States and denied the Form I-212 accordingly. *See Decision of the District Director*, dated February 24, 2011.

On appeal, the AAO concluded that the applicant does not qualify for the exception under section 212(a)(9)(C)(ii) of the Act and thus, as a matter of law, is not eligible for approval of a Form I-212. Consequently, the appeal was dismissed. *See Decision of the Administrative Appeals Office*, dated February 24, 2012.

On March 27, 2012 counsel for the applicant filed Form I-290B, Notice of Appeal or Motion to the Administrative Appeals Office. On the Form I-290B, in Part 2, counsel indicated that she was filing a motion to reconsider by marking box F. *See Form I-290B*, received March 27, 2012.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel newly asserts on motion that because the Ninth Circuit Court of Appeals has ordered itself to rehear, *en banc*, its decision in *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011), the AAO should reconsider the present applicant's "case in light of the court's pending decision in *Garfias-Rodriguez*." *See Counsel's Brief in Support of Motion to Reconsider*, dated March 22, 2012. The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(3), and the motion will be granted and the application reconsidered.

The record has been supplemented on motion with: counsel's brief; the petitioner's petition for rehearing in the *Garfias-Rodriguez* matter; and an online docket and documents summary for the *Garfias-Rodriguez* matter as of the March 22, 2012, the filing date of counsel's motion. The record also contains, but is not limited to: counsel's appeal brief; various immigration applications and petitions; a hardship letter; two letters from the applicant; marriage and birth

certificates and family photos; and the applicant's inadmissibility and removal records. The entire record was reviewed in rendering a decision on motion.

On motion, counsel asserts as she did previously on appeal, that the Ninth Circuit Court of Appeals' (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004) applies in the present case, that the *Perez-Gonzalez* decision allows the applicant, who entered the U.S. without inspection shortly after being expeditiously removed, to adjust status to that of a permanent resident under Section 245(i) of the Act. Counsel concedes that the Ninth Circuit reversed that decision in *Duran Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), granting deference to the Board of Immigration Appeals (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Nevertheless, counsel asserts that the *Duran Gonzalez* decision cannot be retroactively applied to the applicant, whose waiver application was filed in reliance on the old law, i.e., the standard set forth in *Perez-Gonzalez*, within the jurisdiction of the Ninth Circuit. Counsel asserts alternately that the applicant is eligible for adjustment of status because more than ten years have elapsed since her 1999 removal, and that consent to re-apply for admission may be granted *Nunc Pro Tunc*.

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 or about July 31, 1999, the applicant was expeditiously removed to Mexico for a period of five years. She entered the United States without inspection 10 to 14 days later and has resided in the United States ever since.

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). 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 U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the record reflects that the applicant was expeditiously removed from the United States on or about July 31, 1999. The applicant admitted that she entered the United States without inspection 10 to 14 days after her removal and has remained in the United States ever since. Thus the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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 (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 (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). Therefore, as the law stands today, the applicant remains inadmissible to the United States.

On motion, counsel declares that on March 1, 2012 the Ninth Circuit Court of Appeals ordered itself to rehear, *en banc*, its decision in *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011), which held that aliens inadmissible under INA §212(a)(9)(C)(i)(I) may not seek adjustment of status under INA §245(i). Counsel contends that the parties were invited to address whether *Morales-Izquierdo*, which held that the court's decision in *Duran Gonzalez* should be applied retroactively to aliens who relied on *Perez-Gonzalez*, should be overruled. Counsel writes: "The *Garfias-Rodriguez* petition for rehearing asserts that that decision fails to apply the proper retroactivity analysis." Counsel submits a copy of the petition for the present applicant's record. Based on the foregoing, counsel concludes: "As the issue of whether *Duran Gonzalez* may be retroactively applied to applicants who relied on *Perez-Gonzalez* when filing their applications is now pending before the *en banc* Ninth Circuit court, Ms. Gonzalez respectfully requests that the AAO reconsider her case in light of the court's pending decision in *Garfias-Rodriguez*." Counsel offers no legal basis or precedent under which the AAO might reverse a decision it made in accordance with current law, in favor of a "pending" court decision, the outcome of which is yet undetermined. The AAO finds that counsel's request is premature, and as such, must be denied.

Section 291 of the Act, 8 U.S.C. §1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant in the instant case does not qualify for the exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the decision on appeal is affirmed.

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**ORDER:** The motion to reconsider is granted. The prior decision of the AAO is affirmed. The application is denied.