

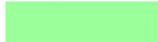


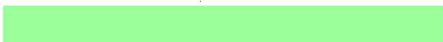
**U.S. Citizenship
and Immigration
Services**

(b)(6)



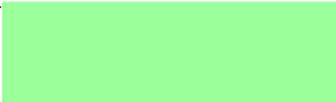
Date: **FEB 11 2013** Office: FRESNO, CA

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 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 in accordance with the instructions on 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,

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The applicant appealed the decision and the Administrative Appeals Office (AAO) denied the appeal. The appeal is now before the AAO on Motion to Reopen and Reconsider. The Motion will be granted and the matter will be reconsidered.

The record reflects that the applicant is a native and citizen of Mexico who removed pursuant to section 235(b)(1), and then re-entered the United States without inspection within 10 years of her last departure. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with her Lawful Permanent Resident (LPR) spouse.

The field office director determined that the applicant was ineligible to apply for permission to reapply for readmission because the applicant was also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, and had not resided outside the United States for the requisite 10-year period. The Field Office Director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 28, 2011. The AAO denied the applicant's appeal on the same basis, and the applicant has submitted a Motion to Reopen and Reconsider.

On motion, counsel for the applicant asserts that the AAO should consider the holding in *Nunez-Reyes v. Holder*, 636 F.3d 684, (9th Cir. 2011), and that the applicant had relied on the holdings in *Acosta v. Gonzalez*, 439 F. 3d 550, (9th Cir. 2006), and *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), when she applied for adjustment of status under section 245(i) of the Act. *Form I-290B*, received October 13, 2011.

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. . . .

On January 6, 1999, the applicant attempted to enter the United States by presenting a border crosser card that did not belong to her and she was removed pursuant to section 235(b)(1) of the Act. She then re-entered the United States without inspection some time prior to February 1, 1999. The applicant remained in the United States, married a U.S. citizen and applied for adjustment. As the applicant was removed from the United States and re-entered without inspection she is inadmissible under section 212(a)(9)(C)(i)(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 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); *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 10 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. 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 10-year bar (*Duran Gonzalez II*). The Ninth Circuit clarified that its holding in *Duran Gonzalez II* 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)(*Duran Gonzalez III*).

In *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), the Ninth Circuit further held that the BIA ruling in *Matter of Briones* that aliens inadmissible due to illegal reentry after accruing more than one year of unlawful presence could not apply for adjustment of status applied retroactively. On June 27, 2011, the petitioner in *Garfias-Rodriguez* filed a petition for panel rehearing and petition for rehearing en banc from the April 11, 2011 decision.

The applicant submitted the Form I-290B, Notice of Appeal or Motion, on October 12, 2011. On motion to reconsider, counsel contends that the applicant's case arose in the Ninth Circuit and the law as of the date of the applicant's Form I-485 application to adjust status should be applied to the

present matter. Specifically, counsel asserts that *Matter of Briones* should not be applied to the applicant's case. However, on March 1, 2012, the Ninth Circuit Court of Appeals ordered that *Garfias-Rodriguez v. Holder* be reheard en banc. *Garfias-Rodriguez v. Holder*, 672 F.3d 1125 (9th Cir. 2012). On October 19, 2012, the court issued its en banc decision in the matter. In this decision, the court held that it must defer to the BIA's decision in *Matter of Briones*, and held that the BIA's decision may be applied retroactively to the Petitioner: *Garfias-Rodriguez v. Holder*, 2012 WL 5077137 (2012 C.A.9).

The litigation on this issue has been resolved by the Ninth Circuit, which has deferred to the BIA's holding that aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act may not seek adjustment of status under section 245(i) of the Act. The Court has further held that this ruling may be applied retroactively. As such, the AAO does not find any legal basis for overturning its prior decision.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted, as she is statutorily ineligible to file an application for permission to reapply for admission into the United States pursuant to section 212(a)(9)(C)(i) of the Act. Accordingly, the decision of the AAO will be affirmed and the application will remain denied.

ORDER: The motion is granted, the prior decision of the AAO is affirmed, and the application remains denied.