



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JAN 31 2013**

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:

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,

Ron Rosenberg,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** In separate decisions dated February 24, 2011, the waiver application (Form I-601) and the application for permission to reapply for admission (Form I-212) were denied by the District Director, San Diego, California. Counsel filed a single appeal of the Form I-212 denial which came before the Administrative Appeals Office (AAO) and the appeal was dismissed. The matter came again before the AAO on motion to reconsider. The motion was granted and the application remained denied. The matter comes now before the AAO on a second motion to reconsider. The motion will be granted. The application will remain 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 concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *See Decision of the District Director*, dated February 24, 2011. 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 March 22, 2011 counsel for the applicant filed a single Form I-290B, Notice of Appeal or Motion, on which she indicated at Part 2 under "Application/Petition Form #" that she was appealing the denial of Form "I-212." *See Form I-290B, Notice of Appeal or Motion*, received March 22, 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 E. *See Form I-290B*, received March 27, 2012. On motion, the AAO concluded that counsel's request that the application be granted because there is a petition for rehearing pending before the Ninth Circuit Appeals which might be decided favorably and might then have a bearing on the applicant's case was both premature and without legal basis or precedent. Consequently, the application remained denied. *See Decision of the Administrative Appeals Office*, dated August 17, 2012.

On September 18, 2012 counsel for the applicant filed a new 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 E. *See Form I-290B*, received September 18, 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 concedes on motion that *Duran Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007) remains binding law at this time but contends that the Ninth Circuit Court of Appeals heard oral arguments on June 20, 2012 concerning a petition for rehearing in *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011), which asserts that the *Duran Gonzalez* decision failed to apply the proper retroactivity analysis. Therefore, counsel contends, that because a decision in *Garfias* is forthcoming in the near future and may affect [REDACTED] eligibility for adjustment of status, the present motion to reconsider is properly filed “as a precautionary measure in order to preserve her waiver in the event that the *Garfias* decision affects her eligibility for relief.” Counsel articulates a legal basis for the present motion, and cites to a specific case which was pending before the Ninth Circuit at the time of filing as support that the decisions of the District Director and the AAO may be based on erroneous law due to the possible favorable outcome of the pending case. 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 will again be reconsidered.

The record has been supplemented on motion only with counsel’s two-page motion itself and a more current online docket and documents summary for the *Garfias* matter, printed September 10, 2012. The record also contains, but is not limited to: counsel’s previous motion and appeal brief; the online *Garfias* docket printed March 22, 2012; a copy of the *Garfias* petition for rehearing; 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 prior motion and appeal, that the Ninth Circuit’s 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 10-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. See *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).

On October 13, 2012 the Ninth Circuit Court of Appeals issued its decision on the petition for review in *Garfias-Rodriguez v. Holder*, 672 F.3d 1125 (9<sup>th</sup> Cir. 2012). The Court explained:

In *Acosta v. Gonzales*, 439 F.3d 550, 553-56 (9th Cir. 2006), we held that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1182(a)(9)(C)(i)(I), are eligible for adjustment of status under INA § 245(i), 8 U.S.C. § 1255(i), in spite of the latter section’s requirement of admissibility. A year later, the BIA decided that such aliens are not eligible to apply for adjustment of status under § 245(i) in *In re Briones*, 24 I. & N. Dec. 355, 371 (BIA 2007). In this case, we must decide whether to defer to the agency’s interpretation of the INA and overrule *Acosta* and, if so, whether the agency’s interpretation may be applied to *Garfias* retroactively. We conclude that we must defer to the BIA’s decision, and we hold that the BIA’s decision may be applied retroactively to *Garfias*. We thus deny his petition for review.

*Id.* at 12587-12588. The Ninth Circuit clarified: “We defer to the BIA’s holding that aliens who are inadmissible under INA § 212(a)(9)(C)(i)(I) may not seek adjustment of status under § 245(i).” *Id.* at 12625. As both *Duran Gonzalez* and *Morales-Izquierdo* remain binding law, *Duran Gonzalez* continues to apply retroactively even to aliens who had Form I-212 applications pending before *Perez-Gonzalez* was overturned. Therefore, as the law stands today, the present applicant remains inadmissible to the United States.

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. In this case, the applicant has not met her burden and the application will remain denied.

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