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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: **SEP 10 2013** Office: LOS ANGELES

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal pursuant to 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:
[REDACTED]

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
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 the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C). The applicant 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).

On July 15, 2009, the Field Office Director denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) stating that the applicant is inadmissible under Section 212(a)(9)(C)(i)(II) of the Act and not eligible for consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act as ten years had not passed since the applicant's last departure from the United States. The applicant timely appealed that decision; however, the appeal did not reach the AAO until June 4, 2013.

On appeal, counsel for the applicant states that the Field Office Director erred in denying applicant's Form I-212, as the applicant was not ordered removed in 1990 because removal proceedings did not exist in 1990. Counsel also requested that the application be held until a decision was reached on a new appeal filed by the applicant in "Duran-Gonzalez," presumably referring to *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007) (*Duran Gonzalez II*); *Duran-Gonzales v. DHS*, 659 F.3d 930, 939-41 (9th Cir. 2011) (*Duran Gonzales II*).

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 appeal.

The AAO will first address the question of whether the applicant is admissible to the United States.

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 of Homeland Security has consented to the alien's reapplying for admission.

...

The applicant has a long immigration history in the United States, however, only the portion of that history relevant to the underlying application for permission to reapply for admission after deportation or removal (Form I-212) will be discussed as a part of this decision. The record reflects that the applicant was granted voluntary departure in lieu of deportation “on or before March 16, 1990.” The decision was dated March 16, 1990 and apparently also ordered that the applicant depart on or before March 16, 1990. The record indicates that the applicant departed the United States “afoot” on March 19, 1990, and as a result his order of voluntary departure converted into a deportation order. The record indicates that the applicant then reentered the United States unlawfully in 1991, remaining until December 2001 when he returned to Mexico to visit his mother. The applicant states that he subsequently reentered the United States unlawfully again in January 2002. Subsequent to this appeal, the record indicates that the Board of Immigration Appeals entered an order on January 31, 2013, reopening and administratively closing the applicant’s deportation proceedings under section 242 of the Act. As a result, the applicant no longer has a deportation order. However, the applicant remains inadmissible under section 212(a)(9)(C)(i)(I), as he was unlawfully present in the United States for an aggregate period of more than one year and subsequently reentered the United States without admission in January 2002. The applicant was unlawfully present in the United States from April 1, 1997 until his departure in December 2001.

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 Board of Immigration Appeals 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, however, 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).

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 favor 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 521-523. 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 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.* at 523.

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*, 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 that “[t]he 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.

In the present matter, the applicant 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. Although the applicant submitted his application for adjustment of status (Form I-485) on May 25, 2007, he did not admit to his prior deportation order on that form or ask for permission to reapply for admission after deportation or removal (Form I-212) at that time. The applicant filed his Form I-212 application on February 7, 2008, after the court's decision in *Duran Gonzalez I*, thus the Form I-212 application was not filed in reliance on the court's 2004 decision in *Perez-Gonzalez*, which had held that an alien could apply for a Form I-212 waiver from within the United States. 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. The AAO finds that the balance of factors favors the retroactive application of *Briones* in this case. The applicant has not remained outside of the United States for ten years since his last departure and he is therefore currently statutorily ineligible to apply for permission to reapply for admission.

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. 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. Accordingly, the application for permission to reapply for admission will remain denied.

ORDER: The appeal is dismissed.