



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **AUG 01 2014** OFFICE: SAN BERNARDINO [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Prior Immigration Violations under Section 212(a)(9)(C)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(iii)

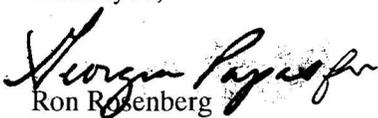
ON BEHALF OF APPLICANT:
[REDACTED]

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, San Bernardino, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was ordered removed from the United States on two occasions and subsequently entered the United States without being admitted. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II). She seeks permission to reapply for admission to the United States in order to reside in the United States with her lawful permanent resident spouse and U.S. citizen children.

The Field Office Director concluded the applicant did not meet the requirements for consent to reapply because she had not remained outside the United States for the requisite time since her last departure. The applicant's Form I-212 was denied accordingly. *Decision of the Field Office Director*, dated January 27, 2014.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) erred in denying the applicant's Form I-212, as the applicant was physically present in the United States upon the enactment of the LIFE Act under Public Law 106-553 on December 21, 2000, and that rendering the applicant ineligible to adjust status in the United States on account of an act of inadmissibility that occurred prior to the enactment of the LIFE Act would have an impermissible retroactive effect. Counsel also asserts the applicant is not precluded from seeking adjustment of status in the United States despite her apprehension at a port of entry, given that section 245(i) of the Act "specifically sets forth an exception for an alien who would otherwise be inadmissible to the United States." *Form I-290B, Notice of Appeal or Motion (Form I-290B)*, dated February 24, 2014.

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 August 25, 1999, the applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act upon attempting to evade inspection by immigration officials at the [REDACTED]. The record also reflects that after seeking entry into the United States at the [REDACTED] by presenting a photo-substituted passport with an I-551 stamp that did not belong to her, the applicant was ordered expeditiously removed a second time pursuant to section 235(b)(1) of the Act on September 4, 1999. The record further reflects that the applicant subsequently entered the United States without being admitted around June 4, 2000. The applicant is, therefore, inadmissible pursuant to 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.

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); see also *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 (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 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 10-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*).

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 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.

Id. at 518 (quoting *Montgomery Ward*, 691 F.2d at 1333).

The court found in *Garfias-Rodriguez* 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.” *Id.* 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. The court noted that Garfias first filed his adjustment application in 2002, but “*Perez-Gonzales* and *Acosta* were not decided until two and four years later, respectively. Thus, Garfias clearly did not file his adjustment application in reliance on *Acosta*, or even the analogous decision in *Perez-Gonzalez*.” *Id.* at 522. 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.* 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.*

Furthermore, on January 28, 2013, the Ninth Circuit Court of Appeals applied the *Montgomery Ward* test and held that the BIA decision in *Torres-Garcia* applied retroactively to an alien who applied for adjustment of status before the issuance of the decision in *Duran Gonzales I* adopting *Torres-Garcia* as the law of the circuit. *Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1071-72 (9th Cir. 2013). Specifically, Carrillo de Palacios contended that the BIA impermissibly applied its decision in *Torres-Garcia* to her case because she applied for adjustment of status several weeks before the court issued its decision in *Duran Gonzales I*, in which the court adopted *Torres-Garcia* as the law of the circuit. The panel applied the *Montgomery Ward* factors following the analysis undertaken in *Garfias-Rodriguez*. The court found that Carrillo de Palacios could not reasonably argue that *Torres-Garcia* represented an abrupt departure from any well-established practice, because “the tension between sections 212(a)(9)(C) and 245(i) of the Act was obvious. That ambiguity in the law -- which resulted

in a six-year dialogue between the BIA and us [the court]-- should have given [Carrillo de Palacios] no assurance of [her] eligibility for adjustment of status.” *Id.* at 1072. The court concluded in *Carrillo de Palacios* that on balance, the majority of *Montgomery Ward* factors favor the government and thus, the BIA did not err in applying *Torres-Garcia* retroactivity to Carrillo de Palacios. *Id.*

In the present case the applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act on August 25, 1999 and on September 4, 1999, and subsequently entered the United States without inspection around June 4, 2000, prior to the Ninth Circuit rulings in *Perez-Gonzalez* or *Acosta*. The applicant filed an application for adjustment of status on April 8, 2013, after the Ninth Circuit’s ruling in *Duran Gonzales*. As noted by the court, “From the outset, the tension between § 212(a)(9)(C) and § 245(i) was obvious. That ambiguity in the law—which resulted in a six-year dialogue between the BIA and us—should have given Garfias no assurances of his eligibility for adjustment of status. Garfias might have had reason to be encouraged after our generous reading of the statute in *Perez-Gonzalez* and *Acosta*, but, even then, any reliance he placed on our decisions held some risk because our decisions were subject to revision by the BIA under *Chevron* and *Brand X*. Given the specific facts and timing of this case, we conclude that the second and third factors weigh against Garfias.” See *Garfias-Rodriguez*, 702 F.3d at 522-523. Thus the applicant, having filed her application for adjustment of status after the Ninth Circuit’s ruling in *Duran Gonzales*, has not shown reliance on a former rule at the time of her application to adjust status. When applying the other factors of the *Montgomery Ward* test, the court in *Garfias-Rodriguez* found that the new rule 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 1999 and did not remain outside the United States for ten years since her last departure, but re-entered without admission approximately nine months after her second removal. She is currently statutorily ineligible to apply for permission to reapply for admission and has not established that the decision in *Duran Gonzales* precluding relief under section 212(a)(9)(C) of the Act should not be applied retroactively in her case.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.