



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: LOS ANGELES

JUL 29 2014

File: [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)

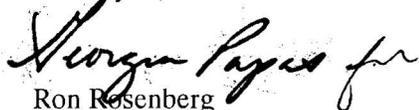
ON BEHALF OF APPLICANT:
[REDACTED]

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, Los Angeles, 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 The Field Office Director's decision denying the appeal as a motion to reopen will be withdrawn, and the appeal will be dismissed.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 and subsequently entered 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). He seeks permission to reapply for admission to the United States in order to reside in the United States with his spouse, child, and U.S. citizen son.

The Field Office Director determined the applicant was removed from the United States on October 31, 1998, and the applicant subsequently entered the United States without inspection by U.S. immigration officials. The Field Office Director denied the Form I-212 accordingly. *See Decision of Field Office Director*, dated September 15, 2010.

On appeal, filed on October 15, 2010 and received by the AAO on February 20, 2014, counsel asserts: U.S. Citizenship and Immigration Services (USCIS) improperly denied the applicant's Form I-212, as the underlying removal order was imposed in violation of the applicant's right to due process; more than 10 years have passed since the applicant's removal, and therefore he is eligible for an adjudication of his Form I-212; the decisions in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) are inconsistent with the clear language of the Act; the issue of the applicant's inadmissibility was not fully reviewed; and current law on his status remains in conflict. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), dated October 14, 2010; *see also Supporting Memorandum*.

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 October 27, 1998, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225. The applicant attempted to enter the United States without inspection three days later, on October 30, 1998, and was again removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225, on October 31, 1998. The applicant entered the United States without inspection subsequent to his removal on October 31, 1998, and he has remained to date. 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, supra*; *see also Matter of Briones, supra*; 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 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, 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)

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

(*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.

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 section 212(a)(9)(C)(i)(I) of the Act are eligible for adjustment of status under section 245(i).

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.” *Carrillo de Palacios* 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. *Carrillo de Palacios* at 1072.

In the present case the applicant was ordered removed from the United States on October 27, 1998 and October 31, 1998, and he subsequently entered the United States without inspection at a later date in 1998. The applicant filed an application for adjustment of status on June 13, 2006, after the BIA’s ruling in *Matter of Torres-Garcia*. He was clearly “on notice of *Perez-Gonzalez’s* vulnerability....” See *Carrillo de Palacios* at 1072. Thus the applicant has not shown reliance on a former rule at the time of his application to adjust status. Further, 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 on October 31, 1998, and he did not remain outside the United States for 10 years since his last departure but returned at a later date in 1998. He is currently statutorily ineligible to apply for permission to reapply for admission and 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he 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.