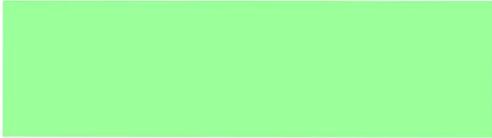


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090

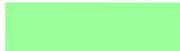


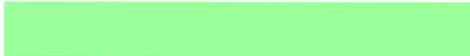
U.S. Citizenship  
and Immigration  
Services



DATE: FEB 12 2015

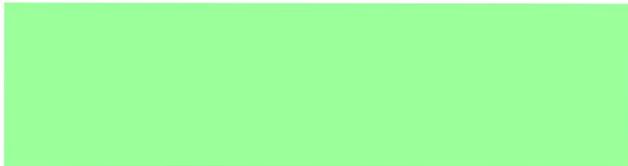
OFFICE: LOS ANGELES

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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,

A handwritten signature in black ink that reads "Ron Rosenberg".

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 an appeal was dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO is affirmed.

The record reflects that the applicant is a native and citizen of Mexico who submitted a Form I-212 to receive permission to enter the United States after her removal on February 3, 1998. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(iii) in order to reside in the United States with her U.S. citizen spouse and children.<sup>1</sup>

The Field Office Director concluded that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and failed to demonstrate that she met the requirement for consent to reapply, and denied the application accordingly. *Decision of the Field Office Director*, dated July 9, 2007. The AAO also determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and that, based upon the Ninth Circuit's deferral to the Board of Immigration Appeals' decision in *Matter of Torres-Garcia*. 23 I&N Dec. 866 (BIA 2006), the applicant was not eligible for permission to reapply for admission pursuant to *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *Decision of the AAO*, dated April 20, 2010.

On motion, filed on May 21, 2010 and received by this office on November 17, 2014, counsel for the applicant asserts that the applicant acted in reliance upon the Ninth Circuit's *Perez-Gonzalez* decision in submitting her Form I-212 application and, in the alternative, since over ten years have elapsed since her removal from the United States, her application should 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,

---

<sup>1</sup> Counsel requests that the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, also be considered in her Form I-290B motion to reopen and reconsider the Form I-212 appeal dismissal. However, the record does not contain a denial decision for the applicant's Form I-601 application and the AAO does not have original jurisdiction over applications.

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii)Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record reflects that on January 31, 1998, the applicant attempted to enter the United States using a border crossing card belonging to another individual. The applicant was ordered removed in section 235(b)(1) proceedings on February 2, 1998 and removed from the United States on the next day. The applicant subsequently entered the United States without inspection on March 1, 1998 and has remained in the United States since that date. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

Counsel for the applicant asserts that the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act because she acted in reliance upon the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), in submitting her Form I-212 application.

Counsel for the applicant also asserts that over ten years have elapsed since the applicant's last departure from the United States, years that need not be spent outside the United States. Counsel references section 212(a)(9)(C)(ii) of the Act, stating that the plain language of the statute does not create a requirement that the applicant must wait outside the United States before filing for permission to reapply for admission. However, the Board of Immigration Appeals held that an alien who is inadmissible under section 212(a)(9)(C)(i) 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) (emphasis added); 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)(i) of the Act, the BIA 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.

Aliens who reside within the jurisdiction of the Ninth Circuit Court of Appeals, however, may be eligible for consent to reapply for admission even if they are presently inadmissible under section 212(a)(9)(C)(i)(II) of the Act, if they meet specific requirements under the terms of *Duran-Gonzales v. DHS*, No. C06-1411(W.D. Wash., 2014) (settlement agreement).

The settlement agreement defines a class member as any person who:

1. Is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:
  - a. the beneficiary was physically present in the United States on December 21, 2000, or
  - b. If a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.
2. Is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act ("INA"), because he or she entered or attempted to reenter the United States without being admitted after April 1, 1997, and without permission after having previously been removed;
3. Properly filed a Form I-485 (Application to Adjust Status) and Form I-485 Supplement A (Adjustment of Status Under Section 245(i)) while residing within the jurisdiction of the Ninth Circuit on or after August 13, 2004, and on or before November 30, 2007;
4. Filed a Form I-212 (Application for Permission to Reapply for Admission Into the United States After Deportation or Removal) on or after August 13, 2004, and on or before November 30, 2007;
5. Form I-485, Form I-485 Supplement A, and Form I-212 were denied by U.S. Citizenship and Immigration Services ("USCIS") and/or the Executive Office for Immigration Review ("EOIR") on or after August 13, 2004, or have not yet been adjudicated;
6. Is not currently subject to pending removal proceedings under INA § 240, or before the United States Court of Appeals for the Ninth Circuit on a petition for review of a removal order resulting from proceedings under INA § 240; and

7. Did not enter or attempt to reenter the United States without being admitted after November 30, 2007.

Settlement Agreement and Amendment of the Class Definition at 2-3, *Duran Gonzales v. DHS*, No. C06-1411 (W.D. Wash, 2014).

The record indicates that the applicant filed a Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal on February 4, 2009 and filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on the same date. As such, the applicant has not provided sufficient evidence to demonstrate that she meets the requirement of filing a Form I-212 and Form I-485 on or after August 13, 2004, and on or before November 30, 2007.<sup>2</sup>

As the applicant does not meet all the requirements necessary to establish that she is a class member under the terms of the settlement agreement, the applicant is not eligible for benefits under the settlement agreement. Consequently, the applicant has not shown that she is eligible for permission to reapply for admission into the United States after deportation or removal pursuant to section 212 (a)(9)(C)(iii) of the Act.

The applicant's last departure from the United States took place on February 3, 1998. The applicant entered the United States without admission or parole on March 1, 1998 and has remained in the United States since that date. As such, the applicant has remained outside the United States for less than ten years since her last departure. Based upon this ground of inadmissibility, the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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. Accordingly, the prior AAO decision is affirmed.

**ORDER:** The motion is granted and the prior AAO decision dismissing the appeal is affirmed.

---

<sup>2</sup> Counsel asserts that the factors from the Ninth Circuit's decision in *Montgomery Ward & CO., Inc. v. FTC*, 692 F.2d 1322 (9th Cir. 1982), must be assessed to determine whether the court's decision in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), should be applied to her. However, as the applicant is not a class member under the settlement agreement, the *Montgomery Ward* factors are not applicable to determine the retroactivity of *Duran Gonzales*.