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

(b)(6)

U.S. Citizenship and Immigration Services

Date: JAN 0 6 2015

Office: LOS ANGELES, CA

IN RE: APPLICANT:

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under 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:

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 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 and subsequently reentered 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 remain in the United States with her U.S. citizen spouse.

The Field Office Director determined that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act and denied the Form I-212 accordingly. *See Decision of Field Office Director,* dated June 2, 2009.

On appeal, filed on July 2, 2009 and received by this office on February 20, 1024, counsel submits a brief in support. Therein, counsel contends the applicant filed her I-212 application in reliance on the Ninth Circuit Court of Appeals' decision in *Perez Gonzalez v. Ashcroft,* 379 F.3d 983 (9th Cir. 2004), and that *Duran Gonzalez v. Dept. of Homeland Security,* 508 F.3d 1229 (9th Cir. 2007) (hereinafter *Duran Gonzalez I)* should not be applied retroactively to the applicant. In addition, counsel requests that the applicant's case be held in abeyance until an outcome has been reached in *Duran Gonzalez v. Dept. of Homeland Security* (9th Cir. 2009, No. 09-35174).

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 -
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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 the applicant first entered the United States without inspection on June 13, 1992. The record further reflects that on April 3, 1998, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act, after having attempted to procure admission into the United States on April 2, 1998, using a border crossing card which was not issued to her. The applicant's Form I-485, Application to Register Permanent Residence or Adjust Status states that the applicant entered the United States without inspection later that month. 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)(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); *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.

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 (the Act) 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 Register Permanent Residence or 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 section 240 of the Act, 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 section 240 of the Act; 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 class members are further divided into two groups based on when they filed their Forms I-212, I-485, and I-485A. Applicants who filed all three applications between August 13, 2004, and January 26, 2006, are members of the first group, and applicants who filed all three applications between January 27, 2006, and November 30, 2007, are members of the second group. These dates are based on Ninth Circuit Court of Appeals and Board of Immigration Appeals (BIA) decisions.

On August 13, 2004, the Ninth Circuit Court of Appeals decided that a foreign national could apply for adjustment of status under section 245(i) of the Act by filing a Form I-212 to overcome inadmissibility under section 212(a)(9)(C)(i)(II) of the Act without remaining outside the United States for 10 years. *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004). In contrast, on January 27, 2006, the BIA held in *Matter of Torres Garcia* that a foreign national inadmissible under section 212(a)(9)(C)(i)(II) of the Act could not be granted consent to reapply until he or she remained outside the United States for 10 years after the date of the latest departure. On November 30, 2007 in *Duran Gonzalez I,* the Ninth Circuit Court of Appeals deferred to the BIA's interpretation, overturning its holding in *Perez-Gonzalez.*

The settlement agreement found that applicants in the first group reasonably relied on *Perez-Gonzalez*, and stated that their I-212 applications can be adjudicated regardless of whether they spent 10 years outside the United States after their last departure. The settlement agreement further determined that applicants in the second group must show that they reasonably relied on *Perez-Gonzalez* despite the fact that the BIA had already found, in *Matter of Torres Garcia,* that an applicant must spend 10 years outside the United States before their I-212 applications can be adjudicated.

In this case, the record reflects that the applicant filed her Forms I-212, I-485, and I-485A on or about April 29, 2007. Therefore, the applicant is part of the second group. Although counsel contends that *Duran Gonzalez I* should not apply retroactively to the applicant because it would cause undue hardship to her husband, there is no assertion or documentation of record to demonstrate that the applicant reasonably relied on *Perez-Gonzalez* after *Matter of Torres Garcia* was decided.[1] The applicant has not met her burden of proof and has not established eligibility for adjudication of her Form I-212 under the terms of the settlement agreement.

In addition, the applicant has not addressed the Field Office Director's finding in the Form I-212 denial that she is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act. To be inadmissible under this section of the Act, the applicant must have accrued more than one year of unlawful presence after April 1, 1997, and have subsequently entered the United States without inspection. If the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, eligibility for review under the settlement agreement would not matter as because it only pertains to applicants who are inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The applicant also remains inadmissible under section 212(a)(6)(C)(i)(I) of the Act for having attempted to procure admission into the United States through fraud or misrepresentation on April 2, 1998.[2]

The applicant has not demonstrated that she is eligible for benefits under the settlement agreement as she has not shown that she reasonably relied on the Ninth Circuit's holding in *Perez-Gonzalez.* Consequently, the applicant has not established that she is eligible to apply 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has not demonstrated she is eligible to apply for consent to reapply at this time. Accordingly, the appeal is dismissed.[3]

ORDER: The appeal is dismissed.

[1] It is noted that the applicant's appeal was filed in 2009, before the settlement agreement was reached in 2014, and therefore, before the criteria on reasonable reliance was set forth.

[2] The Field Office Director denied the applicant's I-601 application for a waiver of this inadmissibility on July 23, 2009, and that decision was not appealed.

[3] This decision does not affect the applicant's ability to file a motion to reopen her Form I-212 under the terms of the settlement agreement.