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 29 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 a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted, but the underlying application remains denied.

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 lawful permanent resident spouse and her U.S. citizen children.

The Field Office Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed from the United States. *See Field Office Director's Decision,* dated July 31, 2009. The Field Office Director determined that the applicant was not eligible to apply for permission to reapply for admission because she had not remained outside the United States for the required ten years. *Id.* The Form I-212 was accordingly denied. *Id.*

On appeal, counsel contended that it was not permitted to retroactively apply *Duran Gonzales v. DHS* (*Duran Gonzales I*), 508 F.3d 1227 (9th Cir. 2007), when the applicant, in filing the Form I-212, relied upon the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel also asserted that it has been more than ten years since the applicant's last departure from the United States and she is eligible for permission to reapply for admission. We found that under the Ninth Circuit's decision in *Duran Gonzalez I*, the BIA's decision in *Matter of Torres Garcia,* 23 I&N Dec. 866 (BIA 2006) was entitled to judicial deference, and under *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010), *Duran Gonzalez I* was not impermissibly retroactive. *See AAO Decision,* February 24, 2011. We further found that under *Morales-Izquierdo,* a Form I-212 waiver cannot cure inadmissibility under section 212(a)(9)(C) of the Act until an applicant, while residing outside the United States, applies for and receives advance permission, but only after ten years have elapsed since the applicant's last departure from the United States. The appeal was accordingly dismissed.

On motion, counsel submits a brief in support. Therein, counsel claims that on November 1, 2007, when the applicant filed her I-485, I-485A, and I-212 applications, her application was controlled by the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft,* and therefore, she was eligible to adjust despite inadmissibility under section 212(a)(9)(C) of the Act. Counsel adds that while the Ninth Circuit's decision in *Duran Gonzalez I* precluded applicants who had not submitted their three applications by November 30, 2007, the date of the decision, from inadmissibility under section 212(a)(9)(C) of the Act, it did not address whether aliens, such as the applicant, who filed their three applications before the entry of the *Duran Gonzalez I* decision, were similarly barred. Counsel also states that *Morales-Izquierdo*, which indicates that *Matter of Torres Garcia* is not impermissibly

retroactive, is distinguishable from the applicant's case. Counsel states that in any event, the AAO should not rely on *Morales-Izquierdo* as the Ninth Circuit incorrectly found in that case that *Duran Gonzalez I* was based on statutory interpretation. In the alternative, counsel requests that the appeal should be held in abeyance until a decision is reached by the Ninth Circuit in current *Duran Gonzalez* proceedings.

Section 212(a)(9) of the Act states, in pertinent part:

> (C) Aliens unlawfully present after previous immigration violations. -
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> (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.
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> (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.

As noted on appeal, the record reflects that on July 27, 1999, the applicant presented a border crossing card in the name of ' to immigration officials in an attempt to procure admission into the United States. She was placed in removal proceedings, and was ordered removed under section 235(b)(1) of the Act the same day. The applicant later indicated that on August 1, 1999, she entered the United States without inspection. 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.[1]

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

[1] It is noted that the applicant's Form I-130 Petition indicates she last entered the United States without inspection in June 1996, not August 1999, and she states on her Form G-325A that she lived at a different address in California from June 1996 to August 1999. This information suggests that the applicant may have accrued more than one year of unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, until her departure in 1999. If the applicant did accrue this unlawful presence, and subsequently entered the United States without inspection, she may also be inadmissible under section 212(a)(9)(C)(i)(I) of the Act. However, in light of our findings in this decision, we presently decline to make a finding on inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

the alien's last departure from the United States. *See Matter of Torres-Garcia*; *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.

A settlement agreement in the Ninth Circuit Court of Appeals determined that aliens who reside within the jurisdiction of the Ninth Circuit 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. *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 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 reopened 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 demonstrate that such reliance was reasonable in light of the BIA's decision in *Matter of Torres-Garcia*, as discussed by the Ninth Circuit Court of Appeals in *Carrillo de Palacios v. Holder,* 708 F.3d 1072 (9th Cir. 2013).[2]

In this case, the record reflects that the applicant fulfills the definition of a class member as stated above. The record further reflects that the applicant filed her I-212, I-485, and I-485A applications on or about November 1, 2007. Therefore, the applicant is part of the second group.

Pursuant to the terms of the settlement agreement, a determination must be made whether, through application of the *Montgomery Ward* factors, *Matter of Torres Garcia* should not apply to the class member's application, and whether the class member is eligible to have the three forms adjudicated

[2] *See* settlement agreement at page 8.

on their merits. The class member must demonstrate that reliance on *Perez-Gonzalez* was reasonable in light of the decision in *Matter of Torres Garcia,* as discussed by the Ninth Circuit in *Carrillo de Palacios v. Holder,* 708 F.3d 1066, 1072 (9th Cir. 2013). In that case, the petitioner, Ms. Carrillo de Palacios, had been ordered removed, and subsequently entered the United States without being admitted. Like the present applicant, Ms. Carrillo de Palacios applied for adjustment of status after the BIA issued its decision in *Matter of Torres Garcia,* but before the Ninth Circuit issued its decision in *Duran Gonzalez I.*

In *Carillo de Palacios,* the Ninth Circuit reiterated and discussed the *Montgomery Ward* factors. With respect to the factors themselves, the Ninth Circuit stated:

> The Montgomery Ward test seeks to 'balanc[e] a regulated party's interest in being able to rely on the terms of a rule as it is written, against an agency's interest in retroactive application of an adjudicatory decision'... the Montgomery Ward test considers:
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> (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. *Montgomery Ward*, 691 F.2d at 1333.

Carrillo de Palacios v. Holder, 708 F.3d at 1072. The Ninth Circuit applied the *Montgomery Ward* factors to Ms. Carrillo de Palacio's case. In doing so, the Ninth Circuit found that the first factor was not well-suited to the context of immigration law and did not favor either party. *Id.* The court further found that the second and third factors strongly favor the government, as the petitioner could not reasonably argue that *Torres Garcia* represented an abrupt departure from any well-established practice, because '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 the petitioner no assurances of [her] eligibility for adjustment of status.' *Id., citing Garfias-Rodriguez v. Holder,* 702 F.3d at 522. The Ninth Circuit noted that the petitioner could not have reasonably relied on their former decision in *Perez–Gonzalez* because she applied for adjustment of status after *Torres Garcia* was issued and was thus 'on notice of' *Perez–Gonzalez's* 'vulnerability.' *Id.* As in *Garfias-Rodriguez,* the Ninth Circuit noted that the fourth factor weighed heavily in favor of the petitioner, because the retroactive application of *Torres Garcia* forecloses any possibility that she could adjust status under *Perez-Gonzalez. Carrillo de Palacios v. Holder,* 708 F.3d at 1072. Lastly, the court found that the fifth factor favors the government, but only marginally so, because the *Torres Garcia* rule does not follow from the plain language of the statute, since sections 212(a)(9)(C) and 245(i) of the Act are inconsistent, and when read together, ambiguous. *Id.* On balance, the Ninth Circuit concluded that the majority of the *Montgomery Ward* factors favored the government, and consequently, the BIA did not err in applying *Torres Garcia* retroactively to Carrillo de Palacios. *Id.*

In this case, the applicant has not provided assertions specific to her case or documentation to demonstrate that her reliance on the Ninth Circuit's holding in *Perez-Gonzalez* was reasonable in light of *Matter of Torres Garcia,* as discussed by the Ninth Circuit in *Carillo de Palacios v. Holder.* Counsel's contentions in the brief are also not sufficient to establish such reliance. Contrary to counsel's assertions, as stated above the BIA's decision in *Matter of Torres Garcia* did not constitute a complete departure from a well-established practice as set forth in *Perez Gonzalez* because the tension and ambiguity between sections 245(1) and 212(a)(9)(C) of the Act provided a similarly situated alien no assurances of eligibility to adjust status. *See Carrillo de Palacios v. Holder*, 708 F.3d at 1072; *see also Garfias-Rodriguez v. Holder,* 702 F.3d at 522. In addition, submission of application fees and an alien's admission of unlawful presence to immigration authorities have been held to be insufficient reliance interests. *Garfias-Rodriguez v. Holder,* 702 F.3d at 522.

Therefore, 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, although the motion is granted, the underlying application remains denied.[3]

ORDER: The motion is granted, but the underlying application remains denied.

[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 with the office that initially denied her Form I-212.