



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-M-Z-

DATE: SEPT. 17, 2015

APPEAL OF SAN JOSE FIELD OFFICE DECISION

APPLICATION: FORM I-212, APPLICATION FOR PERMISSION TO REAPPLY FOR
ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR
REMOVAL

The Applicant, a native and citizen of Mexico, seeks permission to reapply for admission into the United States. *See* Immigration and Nationality Act (INA, or the Act) § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). The Field Office Director, San Jose, California, denied the application. The matter is now before us on appeal. The appeal is remanded to the Field Office Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to the AAO for review.

The Applicant was found inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and sought permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act. In a decision dated August 30, 2012, the Field Office Director found that the Applicant was subject to a reinstated removal order and therefore concluded, pursuant to section 241(a)(5) of the Act, that he was statutorily ineligible for any relief under the Act and denied the Form I-212 application accordingly.

On appeal, the Applicant asserted that based on his reliance on the Ninth Circuit Court of Appeals decision in *Perez-Gonzales v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), he was eligible to seek permission to reapply for admission despite his unlawful entry after removal. On December 9, 2014, the Applicant submitted a request that USCIS reopen the Form I-212, Application for Permission to Reapply for Admission after Deportation Removal, under the Settlement Agreement in *Duran Gonzalez v. DHS*, Civ. No. 06-1411-MJP (W.D.Wa. Settlement approved 7/21/2014; Judgment entered 7/30/2014). As the request was received by USCIS before January 21, 2016, within 18 months of the effective date of the Settlement Agreement, it is timely.

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 indicates that on April 17, 2000, the Applicant attempted to enter the United States with a Form I-512, Authorization for Parole of an Alien into the United States, belonging to another individual. The Applicant was ordered removed pursuant to section 235(b)(1) of the Act and removed from the United States on April 18, 2000. The Applicant states that he subsequently entered the United States without admission or parole in May 2000. The Applicant is therefore inadmissible under section 212(a)(9)(C)(i)(II) of the Act for having reentered the United States without being admitted after having been ordered removed under section 235(b)(1) 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.

On August 13, 2004, the Ninth Circuit Court of Appeals held 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 *Matter of Torres-Garcia* the BIA rejected the Ninth Circuit's rationale in *Perez-Gonzalez* and held that individuals inadmissible under section 212(a)(9)(C)(i)(II) of the Act could not be granted consent to reapply until they remained outside the United States for 10 years after the date of the latest departure. 23 I&N Dec. at 875-76. On November 30, 2007, the Ninth Circuit Court of Appeals deferred to the BIA's interpretation in *Torres-Garcia* and overturned *Perez-Gonzalez*. *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) ("*Duran Gonzales I*").

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Pursuant to the July 21, 2014, Settlement Agreement in the *Duran Gonzalez* class action lawsuit, certain individuals who reside within the jurisdiction of the Ninth Circuit may be afforded an opportunity to establish that *Matter of Torres-Garcia* should not apply retroactively to them and have their applications for adjustment of status and consent to reapply for admission adjudicated on the merits.

The Settlement Agreement applies to class members defined 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.

The class members are further divided into three subclasses. Subclass A members are applicants who (i) have remained physically present in the United States since the filing of the Form I-485, Form I-485 Supplement A, and Form I-212, and (ii) against whom removal proceedings under INA

(b)(6)

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§ 240 were not initiated with the filing of a Notice to Appear subsequent to the filing of the Form I-485, Form I-485 Supplement A, and Form I-212. The Applicant states that he has remained in the United States since filing his Form I-485 and Form I-212 in May 2007 and appears to meet the requirements for membership in Subclass A.¹

The subclass 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.

According to the Settlement Agreement, individuals in the first group are presumed to have reasonably relied on *Perez-Gonzalez*, and their I-212 applications may be adjudicated on the merits regardless of whether they spent 10 years outside the United States after their last departure. The Settlement Agreement further states that applicants in the second group must show, through application of a five-factor retroactivity test set forth in the Ninth Circuit decision *Garfias-Rodriguez v. Holder* (“*Montgomery Ward* factors”), that *Matter of Torres-Garcia* should not apply to them. See *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (applying retroactivity test set forth in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982)).

This office conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record establishes that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry to the United States in April 2000 by fraud or willful misrepresentation, as discussed above. The Applicant therefore requires a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), and must submit the Form I-601, Application for Waiver of Grounds of Inadmissibility.

Without an approved Form I-601, no purpose would be served in granting the application for permission to reapply for admission at this time, as it would not result in the Applicant’s admissibility. See *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg’l Comm’r 1964); *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg’l Comm’r 1963). We therefore remand the matter to the Field Office Director to issue a Request for Evidence providing the Applicant an opportunity to submit the Form I-601. If a Form I-601 waiver application is approved, the Field Office Director shall issue a new decision addressing the Applicant’s Form I-212 application. As part of its review on remand, the Field Office Director will address the effect of the Settlement Agreement on the adjudication of the Applicant’s Form I-212. If that decision is adverse to the Applicant, it will be certified for review to this office pursuant to 8 C.F.R. § 103.4.

¹ Although the Applicant was issued a Notice to Appear on [REDACTED] 2007, proceedings against the Applicant were terminated by the immigration judge on [REDACTED] 2009. As such, he is not in removal proceedings, and his application is not under the jurisdiction of the Executive Office of Immigration Review.

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ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us review.

Cite as *Matter of A-M-Z-*, ID# 10632 (AAO Sept. 17,2015)