



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

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

MATTER OF F-M-D-S-

DATE: AUG. 12, 2016

APPEAL OF FRESNO, CALIFORNIA 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, was found inadmissible for entering the United States without being admitted after having been ordered removed from the United States and seeks permission to reapply for admission into the United States. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii). For those inadmissible on this ground who seek admission after residing abroad for 10 years following their last departure, U.S. Citizenship and Immigration Services (USCIS) may remove the inadmissibility bar by granting permission to reapply in the exercise of discretion.

The Field Office Director, Fresno, California, denied the application. The Director noted that the Applicant was currently living in the United States after having illegally reentered after removal. The Director thus concluded that the Applicant did not meet the requirements for permission to reapply because she had not lived outside the United States for at least 10 years since the date of her last departure.

The matter is now before us on appeal. In the appeal, the Applicant contends that she filed the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, in reliance on the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, and thus, she is eligible to obtain permission to reapply and adjust status.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking permission to reapply for admission to the United States and has been found inadmissible for entering the United States without being admitted after having been ordered removed from the United States. Section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), provides, in pertinent part:

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.

Individuals found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii). Section 212(a)(9)(C)(ii) of the Act provides, in pertinent part:

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 of Homeland Security has consented to the alien's reapplying for admission.

Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval of the application is warranted as a matter of discretion. *See Matter of Lee*, 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978). Factors to be considered in determining whether to grant permission to reapply include the basis for the prior deportation; the recency of deportation; length of residence in the United States; the applicant's moral character; the applicant's respect for law and order; evidence of the applicant's reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to the applicant or others; and the need for the applicant's services in the United States. *See Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973); *see also Matter of Lee, supra*, at 278 (Finding that a record of immigration violations, standing alone, does not conclusively show lack of good moral character and "the recency of the deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience"). Generally, favorable factors that come into existence after an alien is placed in removal proceedings, so-called "after-acquired equities," are accorded less weight in a discretionary determination. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301-302 (BIA 1996); *see also Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992); *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980).

(b)(6)

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II. ANALYSIS

The issue presented on appeal is whether the Applicant should be granted permission to reapply for admission into the United States in the exercise of discretion. The Applicant states that her Form I-212 was filed in reliance on the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004), in which the Ninth Circuit held that individuals who were removed and who unlawfully reentered the United States were eligible to apply for permanent residence and file an application for permission to reapply for admission. The Applicant further claims that the decision in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), precluding relief under section 212(a)(9)(C) of the Act, should not be applied retroactively to her case. The record, reviewed in its entirety, shows that the Applicant is not eligible to seek permission to reapply.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(9)(C) of the Act for entering the United States without being admitted after having been ordered removed from the United States. Specifically, the record establishes that the Applicant attempted to enter the United States on [REDACTED] 2000, by presenting a fraudulently obtained Border Crossing Card.¹ The Applicant was order removed and departed pursuant to the removal order on [REDACTED] 2000. The Applicant subsequently re-entered the United States without authorization shortly thereafter, in January 2000, and has remained in the United States continuously ever since. On July 9, 2009, a Form I-871, Notice of Intent/Decision to Reinstate Prior Order, was issued to the Applicant.

Section 241(a)(5) of the Act provides in pertinent part:

If the [Secretary of Homeland Security] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

(a) [A]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such

¹ In her sworn statement, dated [REDACTED] 2000, the Applicant admits that she fraudulently obtained a Border Crossing Card in [REDACTED] Mexico, for a cost of \$500, and she confirms in her statement that she knew it was illegal to use this document.

circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

- (1) Whether the alien has been subject to a prior order of removal. . . .
- (2) The identity of the alien. . . .
- (3) Whether the alien unlawfully reentered the United States

(b) [I]f an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

As noted above, the record reflects that the Applicant was given a Form I-871 on July 9, 2009, as required by 8 C.F.R 241.8(b).² The Applicant has not been removed from the United States pursuant to that order and thus, the reinstatement order has not been executed. The Applicant is subject to mandatory reinstatement of a prior removal order pursuant to section 241(a)(5) of the Act and thus, she is not eligible to receive any relief or benefits under the Act.

B. Permission to Reapply

As stated above, the Applicant is ineligible for relief under the Act at this time pursuant to section 241(a)(5) of the Act. Even if section 241(a)(5) of the Act did not apply to the Applicant, the Applicant remains ineligible to seek permission to reapply.

An individual who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for permission to reapply unless the individual has been outside the United States for more than ten years since the date of the individual'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 Board of Immigration Appeals (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 granted the Applicant permission to reapply for admission into the United States.

² U.S. Immigration and Customs Enforcement (ICE) is the agency responsible for issuance of the Form I-871.

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 permission 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*").

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 permission 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 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 Supplement A to Form I-485, 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 on or after August 13, 2004, and on or before November 30, 2007;
5. Form I-485, Supplement A to Form I-485, and Form I-212 were denied by 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.

In this case, the Applicant has not provided sufficient evidence to demonstrate that she meets the fourth requirement of the Settlement Agreement as detailed above, as she has not established, nor does the record indicate, that she filed a Form I-212, on or after August 13, 2004, and on or before November 30, 2007. The only Form I-212 application in the record was submitted by the Applicant in February 2008, and denied on June 24, 2009.

As the Applicant does not meet all the requirements necessary to establish she is a class member under the terms of the Settlement Agreement, the Applicant is not eligible for benefits under said agreement. Consequently, even if the Applicant was not subjected to section 241(a)(5) of the Act, 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)(ii) of the Act.

III. INADMISSIBILITY PURSUANT TO SECTION 212(a)(6)(C)(i) OF THE ACT

The record establishes that the Applicant is also 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 January 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 file a Form I-601, Application for Waiver of Grounds of Inadmissibility.³ Without an approved Form I-601, no purpose would be served in granting the application for permission to reapply for admission at this time, even if we had determined that the Applicant was eligible for consideration under the Settlement Agreement, 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).

IV. CONCLUSION

The Applicant has the burden of proof in seeking permission to reapply for admission. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we dismiss the appeal.

³ The record establishes that the Applicant filed a Form I-601 in February 2008, and it was denied on June 24, 2009.

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ORDER: The appeal is dismissed.

Cite as *Matter of F-M-D-S-*, ID# 18072 (AAO Aug. 12, 2016)