U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-C-D-M-

DATE: FEB. 3, 2017

MOTION ON ADMINISTRATIVE APPEALS 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, Santa Ana, California, denied the application. The Director noted that the Applicant reentered the United States without inspection after having been ordered removed. 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. This office dismissed a subsequent appeal on the same basis.

The matter is now before us on motion to reopen.[1] In the motion, 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 review, we will deny the motion to reopen.

I. LAW

Section 212(a)(9)(C)(i)(II) renders inadmissible any foreign national who was ordered removed under section 235(b)(1) and who enters or attempts to reenter the United States without being admitted. Section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii), provides for an exception to section

[1]The Applicant appears to be represented. However, the record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative. All representations will be considered, but this notice will be furnished only to the Applicant.

212(a)(9)(C)(i)(II) inadmissibility in the exercise of discretion for those who seek admission after residing abroad for 10 years following their last departure.

II. ANALYSIS

The issue presented on motion 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

The Applicant has been found inadmissible under section 212(a)(9)(C)(i)(II) 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] 1998, by presenting fraudulent documentation.[2] The Applicant was ordered removed and departed pursuant to the removal order on [redacted] 1998. The Applicant subsequently re-entered the United States without authorization and has remained in the United States continuously ever since.

B. The Settlement Agreement

A foreign national 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 10 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 foreign national's last departure was at least 10 years ago, the foreign national has remained outside the United States, and USCIS has granted the foreign national permission to reapply for admission into the United States.

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[2] In the Applicant's sworn statement, dated [redacted] 1998, she admitted that she fraudulently obtained a border crossing card from "a man in the streets of [redacted] and the Applicant further confirmed in her statement that she knew she did not have any legal entry document to enter or reside in the United States. The record establishes that the Applicant was granted a waiver of inadmissibility for fraud or misrepresentation by virtue of an approved Form I-601, Application for Waiver of Grounds of Inadmissibility, on June 23, 2006.

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 rational 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 Gonzales* class action lawsuit *(Duran-Gonzalez v. Department of Homeland Security.*, Civil Action No. C06-1411-MJP (W.D. Wash., 2014)), 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 between April 1, 1997 and November 30, 2007, 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.

Class members are 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 § 240 were not initiated with the filing of a Notice to Appear subsequent to the filing of the Form I-485 and Form I-212. The Applicant appears to meet the requirements for Subclass A membership.

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 establish that their reliance on *Perez-Gonzalez* was reasonable and 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)). If a class member fails to show reasonable reliance on *Perez-Gonzalez,* USCIS must still consider whether the burden resulting from following *Matter of Torres-Garcia* is sufficiently onerous to make it improper to rely on *Matter of Torres-Garcia.*[3]

As the Applicant's Form I-212 was filed between January 27, 2006, and November 30, 2007, the Applicant appears to be a member of the second group. In a Notice of Intent to Deny (NOID) that we issued to the Applicant on December 19, 2016, we noted that the Applicant's assertion on motion that she relied on *Perez-Gonzalez* by "paying the waiver" did not support reasonable reliance and could not be considered.[4] We further stated that the Applicant had not demonstrated that she was

[3] USCIS Policy Memorandum PM-602-0121, *Additional Guidance for Implementation of the Settlement Agreement in Duran Gonzalez v. Department of Homeland Security- Adjudication of Request for U.S. Citizenship and Immigration Services (USCIS) Motions to Reopen Certain Consent to Reapply and Adjustment of Status Applications Filed in the Ninth Circuit Between August 13, 2004, and November 30, 2007* (Aug. 25, 2015), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0825_Duran-Gonzalez_Settlement_PM_APPROVED.pdf.

[4] USCIS Policy Memorandum PM-602-0108, *Implementation of the Settlement Agreement in Duran Gonzalez v. Department of Homeland Security- Adjudication of Request for U.S. Citizenship and Immigration Services (USCIS) Motions to Reopen Certain Consent to Reapply and Adjustment of Status Applications Filed in the Ninth Circuit Between August 13, 2004, and November 30, 2007* (January 31, 2015),

eligible for benefits under the Settlement Agreement as she had not established on motion that she had reasonably relied on the Ninth Circuit's holding in *Perez-Gonzalez*. Nor had the Applicant submitted evidence on motion to establish that the burden of denial would be greater than the ordinary circumstances of removal. We gave the Applicant 33 days to respond to the NOID. The Applicant did not submit a response to the NOID and the record is thus considered complete.

As we detailed in the NOID, the Applicant has not established on motion that she meets all the requirements necessary to establish that she meets the terms of the Settlement Agreement. The Applicant is thus not eligible for benefits under the agreement.

C. Permission to Reapply

As we detailed above, 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 10 years since the date of the individual's last departure from the United States. *See Matter of Torres-Garcia, supra.* In the present matter, the Applicant is currently residing in the United States and did not remain outside the United States for 10 years since her last departure. The Applicant is statutorily ineligible to apply for permission to reapply for admission at this time.

III. 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 deny the motion to reopen accordingly.

ORDER: The motion to reopen is denied.

Cite as *Matter of R-C-D-M-*, ID# 11893 (AAO Feb. 3, 2017)

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https://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0131_Duran-Gonzalez_Settlement_PM_Effective.pdf.