



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

(b)(6)

[REDACTED]

Date: **JAN 21 2015** Office: LOS ANGELES, CA [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[REDACTED]

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 waiver application. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and two motions. The matter is now before the AAO on a third 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 found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit, and section 212(a)(9)(C)(i)(II) of the Act for reentering the United States without inspection after having been removed. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse and denied the waiver application accordingly. The AAO dismissed a subsequent appeal, concluding that the applicant is ineligible to apply for permission to reapply for admission because she entered the United States without inspection after previously being removed from the United States. Therefore, the AAO found that no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative and dismissed the appeal accordingly.

On the applicant's first motion, counsel contended that the AAO should hold the case in abeyance because the Court of Appeals for the Ninth Circuit granted rehearing en banc for *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011), and a petition for rehearing en banc for *Duran Gonzales v. DHS*, 659 F.3d 930 (9<sup>th</sup> Cir. 2011), was pending. The AAO granted the motion, but denied the underlying application based on the Ninth Circuit's en banc decision in *Garfias-Rodriguez* which held that, under *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act may not seek adjustment of status under section 245(i) of the Act, and that the holding in *Briones* may be applied retroactively to the petitioner. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512, 523 (9<sup>th</sup> Cir. 2012).

On the applicant's second motion, counsel asserted that the AAO improperly relied on the Ninth Circuit's decision in *Duran Gonzales v. DHS*. The AAO again granted the motion, but denied the underlying application because the applicant did not demonstrate that she relied on *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004) according to the test found in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9<sup>th</sup> Cir. 1982) as set forth and applied in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9<sup>th</sup> Cir. 2012) (en banc) and *Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1071-72 (9<sup>th</sup> Cir. 2013).

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 reflects that on August 26, 1997, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act. The applicant subsequently entered the United States without inspection later the same 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) 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 Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). Thus, to avoid inadmissibility under section 212(a)(9)(C) 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.

Inadmissibility under section 212(a)(9)(C)(i)(II) is not contested on motion. Instead, counsel claims on this third motion that the AAO inappropriately, by itself, applied the test found in *Montgomery Ward* to determine that the applicant was retroactively precluded from applying for an I-212 waiver due to such inadmissibility. Counsel asserts this was prejudicial, unconstitutional, and illegal, as the *Montgomery Ward* test is a test to determine whether it is constitutional to retroactively apply a change in the law, and the AAO lacks jurisdiction to decide constitutional issues.

In our previous decision we did not, by ourselves, apply the *Montgomery Ward* test, but rather, we followed Ninth Circuit Court of Appeals precedent which held that applying the *Montgomery Ward* test in such situations was appropriate. Specifically, we stated that the Ninth Circuit in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9<sup>th</sup> Cir. 2012) applied the *Montgomery Ward* factors and found

the BIA's decision in *Briones* may be applied retroactively to the applicant. See *AAO Decision, October 21, 2013*, at 4. We further noted that the Ninth Circuit later utilized the *Montgomery Ward* test in *Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1071-72 (9<sup>th</sup> Cir. 2013), to hold that the BIA's decision in *Torres-Garcia* applied retroactively to an alien who applied for adjustment of status several weeks before the issuance of the decision in *Duran Gonzales I* adopting *Torres-Garcia* as the law of the circuit). *Id.*

Counsel additionally contends that once a final determination is made by a federal court with jurisdiction over the constitutional issue, the AAO's role will be to apply the decision uniformly to all similarly situated individuals. Counsel references a future settlement agreement which will likely allow individuals, like the applicant, to obtain approved I-212 applications and adjust status.

The settlement agreement counsel refers to has since been reached. The 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 defines a class member is 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 with an I-212 application 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 (9<sup>th</sup> Cir. 2013).<sup>1</sup>

The record reflects that the applicant meets the definition of a class member under the terms of the settlement agreement. The record further reflects that the applicant filed her Forms I-212, I-485 and I-485A on or about December 8, 2006. Therefore, the applicant is part of the second group.

<sup>1</sup> See settlement agreement at page 8.

As the applicant belongs in the second group, under the terms of the settlement agreement the applicant must demonstrate it was reasonable for her to rely on the Ninth Circuit's 2004 decision in *Perez-Gonzalez* in light of the BIA's January 27, 2006, decision in *Matter of Torres Garcia*. This determination is based on whether, through application of the *Montgomery Ward* factors, *Matter of Torres-Garcia* should not apply to applicant, and the I-485, I-485A, and I-212 applications should be adjudicated on the merits.

The five factors of the *Montgomery Ward* test applied in *Garfias-Rodriguez* include the following:

- (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.

*Garfias-Rodriguez*, 702 F.3d at 518 (quoting *Montgomery Ward*, 691 F.2d at 1333).

As stated in our previous decision, the court found that the first factor was developed in a different context, was not well-suited for application to immigration law and did not weigh in favor of either side. *Id.* at 520-21. The court found that the second and third factors were closely intertwined and favor the government, as the new rule in *Briones* did not constitute an "abrupt departure from well-established practice" on which a party's reliance would more likely be reasonable, and that ambiguity in the law and the tension between sections 212(a)(9)(C) and 245(i) of the Act "should have given Garfias no assurances of his eligibility for adjustment of status." *Id.* at 521-523. In addition, the court found that the two reliance interests identified by Garfias, the payment of a \$1000 penalty fee and his admission of his unlawful presence in the United States by applying for adjustment of status, did not favor Garfias because he filed his application well in advance of any decision finding that section 212(a)(9)(C) inadmissibility did not bar him from adjusting his status under section 245(i) of the Act.<sup>2</sup> The court also gave little weight to the fact that Garfias admitted to his illegal presence in the United States by applying for adjustment of status. *Id.* at 522. The court found that the fourth factor, the burden of possible or certain deportation, strongly favored Garfias, while the fifth factor -- the statutory interest in applying a new rule -- favors the government

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<sup>2</sup> Garfias had applied for adjustment of status in 2002, two years before *Perez-Gonzalez* was decided and four years before the decision in *Acosta*, which held that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) of the Act are eligible for adjustment of status under section 245(i). The court stated,

The only window in which Garfias' reliance interest based on our previous rule might have been reasonable is the 21-month period in 2006 and 2007 between the issuance of *Acosta* and *Briones*. After *Briones* was issued, he was on notice of *Acosta's* vulnerability.

“because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well-established.” *Id.* at 523 (citing *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9<sup>th</sup> Cir. 2004)). The court concluded that Garfias was not entitled to relief because the balance of factors favored the retroactive application of *Briones*. *Id.*

Counsel asserts that the AAO’s application of the *Montgomery Ward* factors in its previous decision was incorrect, because when the applicant filed her I-212 application she was authorized to do so by *Perez-Gonzalez* regardless of whether or not the BIA reached an opposite conclusion in *Matter of Torres Garcia*. Counsel further contends that to imply that the applicant was on notice that the law might change adversely to her and she could not rely on the Ninth Circuit’s decision in *Perez Gonzalez* is incorrect, as she was authorized to file her I-212 application at the time she filed.

The Ninth Circuit Court of Appeals held that its decision in *Perez Gonzalez* was based on a “finding of statutory ambiguity that left room for agency discretion.” *Duran Gonzalez I* at 1237. The Ninth Circuit further found that because the BIA made a reasonable interpretation of section 212(a)(9)(C)(i)(II) of the Act in *Matter of Torres Garcia*, its interpretation was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), pursuant to *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In addition, as noted above, the Ninth Circuit later indicated that its six-year dialogue with the BIA on the tension between section 212(a)(9)(C) of the Act and section 245(i) of the Act should have given the petitioner no assurances of his eligibility for adjustment of status. *Garfias-Rodriguez*, 702 F.3d at 522-23.

Aside from counsel’s assertions above, the applicant has not presented any facts or additional evidence, specific to her case, to demonstrate that she relied on a former rule. Without such facts or documentation, we find that because the applicant filed her I-485, I-485A, and I-212 applications on December 8, 2006, after the BIA’s decision in *Matter of Torres Garcia*, she has not established that she relied on a former rule at the time of those applications. Moreover, we again find that after applying this and the other *Montgomery Ward* factors, *Matter of Torres Garcia* applies to the applicant.

The record reflects that the applicant was removed from and last departed the United States in August 1997, and returned to the United States later that month. The record further reflects that she did not remain outside the United States for ten years since her last departure. Pursuant to the BIA’s decision in *Matter of Torres Garcia*, she is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant is not eligible to apply for consent to reapply at this time. Accordingly, no purpose would be served in evaluating whether the applicant has established extreme hardship to a qualifying relative and the appeal of the underlying waiver application is dismissed as a matter of discretion.

(b)(6)

*NON-PRECEDENT DECISION*

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In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The motion is granted and the underlying waiver application remains denied.<sup>3</sup>

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<sup>3</sup> 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.