



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

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

MATTER OF S-A-F-

DATE: SEPT. 12, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Guatemala, seeks a waiver of inadmissibility for fraud or misrepresentation. *See* Immigration and Nationality Act (the Act) § 212(i), 8 U.S.C. § 1182(i). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to that of a lawful permanent resident must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Los Angeles, California, denied the application. The Applicant appealed and we dismissed the appeal, finding that the Applicant also was inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I). The Applicant subsequently filed five motions that we denied. The Applicant's last motion was denied as untimely.

The matter is now before us on a motion to reopen and reconsider. The Applicant states that it was beyond his control that the previous motion was filed 1 day late, as it was "prepared for private overnight carrier" by his attorney and the motion took 2 days, instead of 1, to arrive. The Applicant also states that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act, and in the alternative, he is eligible to request permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act under the *Duran Gonzalez* settlement agreement.¹

We will withdraw the decision of the Director and remand for further proceedings to determine the Applicant's eligibility for relief under the *Duran Gonzalez* settlement agreement and for the entry of a new decision on the Form I-601, which, if adverse, shall be certified to us for review.

I. LAW

The Applicant is seeking to adjust status to that of a lawful permanent resident and has been found inadmissible under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for procuring

¹ *Duran Gonzalez v. Department of Homeland Security*, Civil Action No. C06-1411-MJP (W.D. Wash., 2014) ("*Duran Gonzalez*").

admission to the United States through fraud or material misrepresentation. Section 212(a)(6)(C)(i) of the Act renders inadmissible any foreign national who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act. Section 212(i) of the Act provides for a waiver of this inadmissibility if refusal of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the foreign national.

The Applicant also has been found inadmissible for entering the United States without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than one year and after the entry of an order of removal. Section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), provides that any foreign national who has been unlawfully present in the United States for an aggregate period of more than 1 year, or has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible.

Foreign nationals 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), which provides that inadmissibility shall not apply to a foreign national seeking admission more than 10 years after the date of last departure from the United States if, prior to the 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 foreign national's reapplying for admission.

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, 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.

Pursuant to the settlement agreement in the *Duran Gonzalez* class action lawsuit², however, certain individuals who reside within the jurisdiction of the Ninth Circuit may be afforded an opportunity to

² On August 13, 2004, the U.S. Circuit Court of Appeals for the Ninth Circuit held that a foreign national could submit Form I-485, Application to Register Permanent Residence or Adjust Status under section 245(i) of the Act, by filing a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, 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 Board of Immigration Appeals ("Board") 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 Board's interpretation in *Torres-Garcia* and overturned *Perez-Gonzalez*. *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007).

establish that they should be eligible to seek permission to reapply for admission under section 212(a)(9)(C)(ii) from within the United States, even when they have not resided outside of the United States for a 10-year period.

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 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 U.S. 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.

Additional terms of the settlement agreement are discussed below.

II. ANALYSIS

On motion, the Applicant reiterates two assertions that he has made on previous motions. The Applicant first states that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act because

he did not accrue unlawful presence while his Form I-589, Application for Asylum and Withholding of Removal, was pending. The Applicant also reasserts that he is eligible for consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act as a class member under the *Duran Gonzalez* settlement agreement.

A. Inadmissibility

The Applicant asserts that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act based on the statute's plain language. The Applicant states that in order to be found inadmissible under section 212(a)(9)(C)(i) of the Act, there must be a finding of a prior immigration violation and that in his case, the prior immigration violation is his unlawful presence under section 212(a)(9)(B) of the Act. He then asserts that the exceptions outlined in 212(a)(9)(B)(iii) of the Act also apply to section 212(a)(9)(C) of the Act. In particular, the Applicant states that he had a Form I-589 pending and thus was not unlawfully present in the United States for an aggregate period of 1 year or more before reentering the United States without being admitted. The Applicant cites the plain language of the statute as his authority for this assertion. As we stated in our previous decisions, however, the exceptions listed under section 212(a)(9)(B)(iii) of the Act do not apply to section 212(a)(9)(C) of the Act. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy, USCIS, HQDOMO 70/21.1, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, Revision to and Re-designation of Adjudicator's Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03) 28* (May 6, 2009), http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/revision_redesign_AFM.pdf. The Applicant's assertions on motion do not overcome our decision that he is inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

B. Permission to Reapply for Admission after Deportation or Removal

As stated in our prior decisions, the Applicant is inadmissible under both sections 212(a)(9)(C)(i)(I) and (II) of the Act because he reentered the United States without being admitted after accruing more than 1 year of unlawful presence and after an order of removal. The Applicant reasserts on motion that he meets the terms of the *Duran Gonzalez* settlement agreement. On motion he submits a copy of a notice the USCIS Los Angeles District Office provided to him in February 2007, stating that his application for permanent resident status was pending review as a result of the *Perez-Gonzalez* case. Contrary to our conclusion in previous decisions, the record does in fact indicate that the Applicant filed a Form I-212 on September 18, 2006, which would meet that term of the settlement agreement. A review of the settlement agreement shows that the Applicant meets the seven terms of the agreement as they apply to his inadmissibility under section 212(a)(9)(C)(i)(II).

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 section 240 of the

Act were not initiated with the filing of a Form I-862, Notice to Appear, subsequent to the filing of the Forms I-485 and 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 Forms I-212 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 does not 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

The Applicant filed Forms I-485 and I485A on June 8, 2006, and Forms I-212 and I-601 on September 18, 2006. Therefore, he is a member of the second group of Subclass A, and he must establish reasonable reliance on *Perez-Gonzalez* or show that the burden resulting from denial would be greater than the ordinary consequences of removal. The burden of proof is on the Applicant on these issues. See section 291 of the Act, 8 U.S.C. § 1361.

In addition, because the Applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, and the terms of the *Duran Gonzalez* settlement agreement do not directly apply to that ground of inadmissibility, the Applicant must meet the additional requirement of showing reliance on *Acosta v. Gonzalez*, 439 F.3d 550 (9th Cir. 2006).⁴ Showing reliance on *Perez-Gonzalez* does not result in a presumption of reliance on *Acosta v. Gonzalez*, but can be a “strong persuasive factor.” *Id.* The Applicant must also show that his waiver of inadmissibility under section 212(i) of the Act is approvable. *Id.*

The record does not show that the Director issued a decision on the Applicant’s Form I-212; therefore we do not have jurisdiction to adjudicate the Applicant’s class membership in the first

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 Requests 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-602-0121, at 8.

instance. And while we do have jurisdiction to adjudicate the Applicant's Form I-601, we remand the matter to the Director to adjudicate the issue of class membership, including the approvability of the Applicant's Form I-601, as the evidence concerning that application dates to 2009. For these reasons, we will remand the matter to the Field Office Director, Los Angeles, to address the applicability of the settlement agreement on the adjudication of the Applicant's Form I-212.

If on remand the Director determines that the Applicant is ineligible for relief pursuant to the settlement agreement, the Director will also issue a new decision on the Applicant's Form I-601.⁵ 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.

IV. CONCLUSION

The Applicant has the burden of proving admissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden, as he has not established that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act, or that he is eligible to request permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. However, the Applicant has shown that he meets certain terms of the *Duran Gonzalez* settlement agreement; therefore we remand the matter to the Director to determine the Applicant's class membership in the first instance.

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

Cite as *Matter of S-A-F-*, ID# 12507 (AAO Sept. 12, 2016)

⁵ Without an approved Form I-212, no purpose would be served in granting Form I-601, 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).