U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6960325

Date: APR. 22, 2020

Appeal of San Jose, California Field Office Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant is 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.

The Director of the San Jose, California Field Office denied the application because the Applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for entering the United States without being admitted after having been removed and had not resided abroad for 10 years following her last departure from the United States.

The Applicant subsequently filed a motion to reopen. In the motion, the Applicant contended that she filed the Form I-212, Application for Permission to Reapply for Admission into the United States, in reliance on the Ninth Circuit Court of Appeals' decision in *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), and thus she was eligible to obtain permission to reapply and adjust status. The Director reopened the Applicant's application but concluded that the Applicant did not merit approval because 1) she had not established that she had reasonably relied on *Perez-Gonzalez* after the Board of Immigration Appeals had issued its decision in *Matter of Torres Garcia,* 23 I&N Dec. 866 (BIA 2006), and 2) she had not established that an undue burden would result if *Matter of Torres-Garcia* was applied in her case.

On appeal, the Applicant contends that she is eligible for permission to reapply for admission at this time. She also maintains that she merits a favorable exercise of discretion.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. This office reviews the questions in this matter *de novo*. *See Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, the decision of the Director will be withdrawn and the matter is remanded for the entry of a new decision consistent with the following analysis.

I. LAW

Section 212(a)(9)(C)(i)(II) renders inadmissible any foreign national who was ordered removed 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 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.

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).

II. ANALYSIS

The issue presented on appeal is whether the Applicant is eligible to seek permission to reapply for admission in accordance with the Settlement Agreement based on *Duran-Gonzalez et al. v. Department of Homeland Security, et al.*[1] We find that the Applicant has established that she is eligible to seek permission to reapply for admission in accordance with the *Duran-Gonzalez* Settlement Agreement; however, because she is inadmissible on another ground, we will remand the Form I-212 to the Director to allow the Applicant to file a new Form I-601, Application for Waiver of Grounds of Inadmissibility.

A. Inadmissibility

The Applicant is inadmissible under the following sections of the Act: 212(a)(9)(C)(i)(II), for entering the United States without being admitted after having been ordered removed from the United States; and 212(a)(6)(C)(i), for seeking to procure admission to the United States by fraud or misrepresentation. The Applicant does not contest inadmissibility, determinations supported by the record and discussed in detail by the Director.

B. Permission to Reapply

1. The *Duran-Gonzalez* Settlement Agreement

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,* 23 I&N Dec. 866 (BIA 2006), 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 permission to reapply until they remained outside the United States for 10 years after the date of the latest departure. 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) ("*Duran Gonzales I*").

Pursuant to the *Duran-Gonzalez* Settlement Agreement, certain individuals who reside within the jurisdiction of the Ninth Circuit may be afforded an opportunity to establish that *Matter of Torres-*

[1] Civil Action No. C06-1411-MJP in the United States District Court for the Western District of Washington.

Garcia should not apply to them and to apply for adjustment of status and permission to reapply for admission despite not having remained outside the United States for ten years.
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 Director determined that the Applicant meets 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))[2]. If a class member fails to show reasonable reliance on *Perez-Gonzalez,* USCIS must still consider whether the burden of denial would be greater than the ordinary consequences of removal.[3]

As the Applicant filed the relevant applications between January 27, 2006, and November 30, 2007, she is a member of the second group. The Applicant asserts that she reasonably relied on *Perez-Gonzalez* based on her attorney's advice that *Perez-Gonzalez* would remain good law. In addition, she states that she relied on that advice and proceeded with her applications, paid the filing fees associated with the applications, and brought herself to the attention of immigration authorities. A foreign national's belief that *Perez-Gonzalez* could not be invalidated, or the Applicant's admission to being unlawfully present and paying fees, does not support reasonable reliance.[4]

Nevertheless, we do find that following *Matter of Torres-Garcia* would impose an unwarranted burden on the Applicant. With respect to this criterion, the Applicant's lawful permanent resident spouse, currently 60 years old, submits a declaration stating that he will experience extreme emotional, physical, and financial hardship were he to be separated from the Applicant. He contends that he married the Applicant in 1998 and long-term separation would cause him emotional hardship. The Applicant's spouse also explains that he has learning difficulties and cannot read or write English and he needs the Applicant to help him on a daily basis. The Applicant's spouse also contends that although he is employed, he needs his spouse's income to meet the household's financial obligations.

The Applicant's spouse maintains that relocating to Mexico is not an option. He asserts that he was born in Nicaragua and has no ties to Mexico. Further, he contends that he would be at risk of losing his lawful permanent resident status were he to relocate to Mexico with the Applicant. The Applicant's spouse also states that he fears for his safety and well-being in Mexico, due to crime and violence.

The record establishes that the Applicant's spouse became a lawful permanent residence in June 2000 and has significant community and employment ties in the United States. The record further

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[2] The *Montgomery Ward* factors, as applied to the retroactive application of the 2007 Ninth Circuit decision in *Duran Gonzalez I*, include whether the rule established by *Matter of Torres-Garcia* is an "abrupt departure" as distinct from simply settling an unsettled legal issue, whether the foreign national reasonably relied on the *Perez-Gonzalez* rule, and whether following *Matter of Torres-Garcia* will impose an unwarranted burden on the foreign national. See *Garfias*, 712 F.3d at 1277.

[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/laws/policy-memoranda.

[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), https://www.uscis.gov/laws/policy-menoranda.

establishes that the Applicant's spouse was born in Nicaragua and has no ties to Mexico, the Applicant's native country. The record also establishes that the Applicant and her spouse have been married for over two decades. The record also contains psychological documentation establishing that the Applicant's spouse has been diagnosed with intellectual development disorder and he needs the Applicant's support and her ability to cope with the numerous tasks of daily living and the Applicant's absence would affect her spouse's emotional stability and occupational functioning. The Applicant has also submitted financial documentation to establish her employment and her spouse's reliance on her income to meet their financial obligations. We also note that the U.S. Department of State has issued a travel warning for [redacted] the Applicant's birthplace, urging Americans to reconsider travel there due to violent crime and gang activity. Based on a totality of the circumstances, we find that the burden of denial would be greater than the ordinary circumstances of removal.

The Applicant has established on appeal that when considering the *Montgomery Ward* factors, her application for permission to reapply for admission into the United States should be considered under *Perez-Gonzalez v. Ashcroft*, not *Matter of Torres-Garcia*.

2. Need for Form I-601 Waiver Application

As we noted earlier in this decision, the Applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for seeking admission into the United States through fraud or misrepresentation. The Applicant therefore requires a waiver under section 212(i) of the Act. USCIS may grant this discretionary waiver, filed on a Form I-601, if refusal of admission would result in extreme hardship to a qualifying relative.

The Applicant previously filed a Form I-601 in 2007 that was denied based on the Form I-212 denial. As more than 12 years have elapsed since the filing of her Form I-601, the Applicant should file a new Form I-601 to seek a waiver of her inadmissibility under section 212(a)(6)(C)(i) and any other ground that may apply. Once USCIS adjudicates the Form I-601, the Director should enter a new decision on the merits of the Form I-212. *See Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963)(providing that an approval of an application for permission to apply for admission serves no purpose in a situation where an applicant is inadmissible on another ground that cannot be waived).

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.