



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

MAY 19 2009

Memorandum

TO: USCIS Leadership

FROM: Michael Aytes 
Acting Deputy Director

SUBJECT: Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of *Gonzalez v. DHS*, 508 F.3d. 1227 (9th Cir. 2007)

1. Purpose

This memorandum supersedes and rescinds entirely the March 31, 2006 memorandum entitled, "Effect of *Perez-Gonzalez v. Ashcroft* on adjudication of Form I-212 applications filed by alien who are subject to reinstated removal orders under INA § 241(a)(5)" (the "Perez-Gonzalez" memorandum).

2. Relevant Authorities

Section 245(a) of the Immigration and Nationality Act (INA) permits certain aliens to adjust their status to permanent residence in the United States, rather than apply for an immigrant visa abroad. Aliens who entered the United States without being inspected and admitted or paroled (entries without inspection, or EWIs) or who are presently not in lawful immigration status (present without inspection, or PWIs) generally are ineligible for adjustment. See section 245(a) and (c) of the INA; 8 U.S.C. 1255(a) and (c). Section 245(i) of the INA provides an exception to the adjustment bars for certain aliens who were the beneficiaries of visa petitions or labor certification applications filed on or before April 30, 2001. See section 245(i) of the INA, 8 U.S.C. 1255(i). Aliens seeking section 245(i) adjustment, however, must still show they are admissible to the United States. Section 245(i)(2)(A) of the INA, 8 U.S.C. § 1255(i)(2)(A).

Section 212(a)(9)(C) of the INA renders inadmissible any alien who enters, or attempts to enter, without admission after a prior immigration violation. Under section 212(a)(9)(C)(i)(I) of the INA, an alien is inadmissible if the alien's entry or attempted entry without admission occurs after the alien has accrued, in the aggregate, more than one year of unlawful presence. If the alien's entry or attempted entry without admission occurs after the alien has been ordered

removed, the alien is inadmissible under section 212(a)(9)(C)(i)(II) of the INA. It is possible for an alien to be inadmissible under both provisions.

3. Litigation History

In 2004, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) holding that an alien is entitled to a decision on a Form I-212, Applications for Permission to Reapply for Admission into the United States After Deportation or Removal, filed before the reinstatement and execution of a prior removal order by Immigration and Customs Enforcement (ICE). As a result, on March 31, 2006, USCIS issued the Perez-Gonzalez memorandum which outlined how to adjudicate Form I-212 requests in light of the date of the alien's last departure from the United States; the date of ICE's reinstatement of a prior removal order (if applicable); and the Circuit in which the case arose.

On November 13, 2006, USCIS was enjoined by the district court in *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash., 2006) from following the March 13, 2006 field guidance and adjudicating cases in light of this guidance. As a result, USCIS placed a hold on all cases affected by the preliminary injunction.

In 2006, the Board of Immigration Appeals (BIA) issued an opinion in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), holding that an applicant who is inadmissible under section 212(a)(9)(C)(i)(II) of the INA is ineligible for a waiver of inadmissibility because the alien is required to apply for permission to reenter the United States and can only make such application after 10 years has elapsed from the date of last departure.¹ *Id.* at 876. The Board issued a similar ruling in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) holding that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the INA is ineligible for adjustment under section 245(i) of the INA.²

In November 2007, the Ninth Circuit overturned its holding in *Perez-Gonzalez*. See *Gonzalez v. Dep't of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). In *Gonzales*, the Ninth Circuit held that it was bound by the Board of Immigration Appeals' (BIA) interpretation of section 212(a)(9)(C) of the INA in *Matter of Torres-Garcia*, notwithstanding the Circuit's earlier panel decision in *Perez-Gonzalez*. The Ninth Circuit also vacated the 2006 injunction issued by the district court. The Court's mandate took effect January 23, 2009.

¹ The Board also noted that the regulations at 8 CFR 212.2, governing consent to reapply were promulgated prior to enactment of IIRIRA section 301(b), Pub. L. 104-208, which created new section 212(a)(9) of the INA and thus did not implement the new IIRIRA provisions. *Matter of Torres-Garcia*, 23 I&N Dec. at 876. The BIA also stated that even if these regulations were applicable they could not be interpreted "in a manner that would allow an alien to circumvent the statutory 10-year limitation on section 212(a)(9)(C)(ii) waivers by simply reentering unlawfully before requesting the waiver." *Id.*

² The Board also, by reference to its decision in *Matter of Torres-Garcia*, concluded that finding that an alien who is inadmissible under 212(a)(9)(C)(i)(I) of the INA is subject to the 10-year rule for consent to reapply. *Matter of Briones*, 24 I&N Dec. at 358-59.

4. Field Guidance

A. *General*

All section 245(i) adjustment cases that were previously placed on hold in light of the November 2006 injunction should now be adjudicated in accordance with the guidance contained in this memorandum and the current processing guidelines for consent to reapply applications. These instructions are prospective and apply to all section 245(i) adjustment of status applications and section 212(a)(9)(C)(ii) Form I-212 filings that are currently pending or will be filed in the future with USCIS, regardless of the Circuit in which the case arose or is adjudicated.³

B. *Aliens Seeking Consent to Reapply Prior to Expiration of Required 10-year Period as Specified Under Section 212(a)(9)(C)(ii) of the INA*

If an alien is inadmissible under section 212(a)(9)(C)(i)(I) or (II) of the INA (reentry or attempted reentry without admission after having accrued 1 year of unlawful presence, in the aggregate, or after executing a removal order), the alien's application for consent to reapply cannot be approved unless the alien is outside the United States and at least 10 years have elapsed from the date of last departure. The 10-year period commences from the alien's date of last departure from the United States after becoming inadmissible under section 212(a)(9)(C)(i) of the INA.

A Form I-212 should be denied in any case where the alien:

- (1) is in the United States after subsequent reentry without admission; or
- (2) is abroad but has not been outside the United States for a period of at least 10 years since the date of last departure.

Adjudicators should cite to *Matter of Briones* for cases involving inadmissibility under section 212(a)(9)(C)(i)(I) of the INA (reentry after aggregate of 1 year unlawful presence) and *Matter of Torres-Garcia* for cases involving inadmissibility under section 212(a)(9)(C)(i)(II) of the INA (reentry after execution of a removal order).⁴ Denials should include the following language:

“You were removed from the United States under a removal order [or insert

“You departed the United States on [date] after having accrued 1 year of

³ Thus, for cases arising in the Ninth and Tenth Circuit, adjudicators should follow the BIA decisions *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). This guidance also does not affect requests for consent to reapply or adjustment applications that were previously approved based on the original 2006 *Perez-Gonzalez* memorandum guidance.

⁴ Note if an alien has returned or attempted to return without admission after removal or sufficient unlawful presence, the alien incurs a *new* basis for inadmissibility each time he or she returns or attempts to return without admission. Thus, the alien must leave the United States and remain abroad for another 10-year period. Also, *Matter of Torres-Garcia* and *Matter of Briones* make clear that “nunc pro tunc” (retroactive) and advance (prospective) approval provisions formerly contained in 8 CFR 212.2 do not apply to consent requests under section 212(a)(9)(C)(ii) of the INA. 23 I&N Dec. at 875; 24 I&N Dec. at 358.

unlawful presence, in the aggregate” if applicable] and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i) [insert appropriate subclause (I) or (II)] of the Immigration and Nationality Act (the Act). Under section 212(a)(9)(C)(ii) of the Act, you are required to obtain consent to reapply for admission to the United States. Consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted if: (1) you have left the United States, (2) are currently abroad, and (3) are seeking admission to the United States at least 10 years after the date of your last departure. [Insert *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); or *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), whichever is applicable].

Our records indicate that you do not meet the requirements for consent to reapply because you [insert either “currently are in the United States after reentering illegally and you have not departed since your return or prior to filing your application” or “reentered the United States illegally on [insert date] and departed [insert date] but 10 years have not elapsed since the date of your last departure”, whichever is appropriate]. Accordingly, your application is denied.”

C. Aliens Inadmissible Under Section 212(a)(9)(C)(i) of the Act and Subject to Removal Orders Reinstated Prior to Filing of Form I-212

Adjudicators should deny Form I-212s filed by aliens who are:

- (1) inadmissible under section 212(a)(9)(C)(i)(II) of the INA only, or both section 212(a)(9)(C)(i)(I) and (II); and
- (2) subject to a reinstated removal order under section 241(a)(5) of the INA that occurred prior to the filing date of the Form I-212.

The denial notice should include the following language:

“You were removed from the United States under a removal order [insert “and you also departed the United States on [date] after having accrued 1 year of unlawful presence, in the aggregate” if applicable] and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i)(II) [or insert “under section 212(a)(9)(C)(i)(I) and (II)” if applicable] of the Immigration and Nationality Act (the Act). On (date), U.S. Immigration and Customs Enforcement (ICE) reinstated the removal order entered against you. This reinstatement makes you ineligible for “any relief” under the immigration laws. Section 241(a)(5) of the Act, 8 U.S.C. section 1231(a)(5). Section 241(a)(5) of the Act bars approval of the applicant's Form I-212. *Delgado v. Mukasey*, 516 F.3d 65, *cert. denied* 129 S.Ct. 299 (2009); *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004); *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003). You filed the application after ICE reinstated the removal order. Accordingly, the application is denied.”

D. Aliens Inadmissible Under Section 212(a)(9)(C)(i) of the INA and Subject to Removal Orders Reinstated at the Time of Adjudication of the Form I-212

Adjudicators should deny Form I-212s filed by aliens who are:

- (1) inadmissible under section 212(a)(9)(C)(i) of the INA only, or both section 212(a)(9)(C)(I) and (II); and
- (2) subject to a reinstated removal order under section 241(a)(5) at the time of adjudication of the Form I-212.

The denial should include the following language:

“You were removed from the United States under a removal order [insert “and you also departed the United States on [date] after having accrued 1 year of unlawful presence, in the aggregate” if applicable]and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i)(II) [or insert “ under section 212(a)(9)(C)(i)(I) and (II)” if applicable] of the Immigration and Nationality Act (the Act). On (date), U.S. Immigration and Customs Enforcement (ICE) reinstated the removal order entered against you. This reinstatement makes you ineligible for "any relief" under the immigration laws. Section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). Section 241(a)(5) of the Act bars approval of an applicant's Form I-212. *Delgado v. Mukasey*, 516 F.3d 65, *cert. denied* 129 S.Ct. 299 (2009); *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004); *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003).”

[Insert the following paragraph below for cases involving inadmissibility under section 212(a)(9)(C)(i)(I) and (II) of the Act]

“Additionally, because of your illegal return to the United States on or about (date), you are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. You are required to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act before you can seek admission to the United States. Consent to reapply under section 212(a)(9)(C)(ii) of the Act may be granted only if: (1) you have left the United States and are currently abroad and (2) are seeking admission more than ten (10) years after the date of your last departure. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). Our records indicate that you do not meet the requirements for consent to reapply as listed above.

Accordingly, your Form I-212 is denied.”

E. Aliens Inadmissible Under Section 212(a)(9)(C)(i)(II) With No Reinstatement of a Prior Removal Order At the Time of the Adjudication of Form I-212

If the alien is present in the United States, but ICE chooses not to reinstate the removal order at the time of the adjudication of Form I-212, adjudicators should follow the guidance provided in section B of this memorandum.

F. Adjudications of Form I-212s for Aliens Eligible to File for Consent to Reapply

If an alien inadmissible under section 212(a)(9)(C)(i) of the INA is abroad for the requisite period of 10 years since the alien's last departure, the alien may properly apply for consent to reapply. Adjudicators should exercise their discretion and analyze the alien's eligibility for relief considering both positive and negative factors as guided by current published precedent. The alien's inadmissibility under section 212(a)(9)(C)(i) of the INA is, itself, a negative factor that USCIS may properly consider in determining whether to exercise discretion favorably.

G. VAWA Self-Petitioners Inadmissible Under Section 212(a)(9)(C)(i) of the INA

Aliens who qualify as VAWA self-petitioners under section 204(a)(1)(A)(vii) or (B) of the INA but are inadmissible under section 212(a)(9)(C)(i) of the INA may seek a waiver of inadmissibility under section 212(a)(9)(C)(iii) of the INA, rather than consent to reapply by filing Form I-212 under section 212(a)(9)(C)(ii) of the INA. This waiver is not subject to the 10-year absence requirement that applies in consent to reapply cases. Also, VAWA self-petitioners who are inadmissible only under section 212(a)(9)(C)(i)(I) of the Act based on reentry after prior unlawful presence in the United States in an aggregate of 1 year are not subject to reinstatement under section 241(a)(5) of the Act, because there was no prior removal order. Approval of a waiver under section 212(a)(9)(C)(iii) of the INA, therefore, could lead to approval of a section 245(i) adjustment application.⁵

Adjudicators encountering cases involving VAWA self-petitioners who are inadmissible under section 212(a)(9)(C)(i) of the INA should coordinate adjudication through appropriate channels and guidelines in place for handling VAWA cases.

5. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

⁵ **NOTE:** VAWA self-petitioners who are inadmissible under section 212(a)(9)(C)(i)(II) of the INA are subject to reinstatement based on a prior removal order. Adjudicators should follow the guidance in Sections C, D, and E above related to adjudication of cases involving reinstated (or potential reinstatement of) removal orders.

6. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, in the Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

Attachments: (1) *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006)
(2) *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007)