AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY

APPLYING FOR ADJUSTMENT OF STATUS AFTER REENTERING THE UNITED STATES WITHOUT BEING ADMITTED: I-212s, 245(i) and VAWA 2005

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I. Introduction

Individuals who reentered the United States without being admitted and now are eligible for adjustment of status face various obstacles to obtaining relief. Not only are they subject to inadmissibility for entering without admission, but some would-be-applicants may be subject to permanent admissibility bars for having been deported or for previously having accrued more than one year of unlawful presence. Furthermore, individuals with prior removal or deportation orders may be subject to reinstatement of removal.

An I-212 waiver and/or adjustment of status under section 245(i) of the Immigration and Nationality Act (INA) or the Violence Against Women Act (VAWA) may cure these problems.[1] However, the government has taken the position that such relief is not available to adjustment applicants who are inadmissible under INA § 212(a)(9)(C), and some courts of appeals have agreed. This Advisory provides background on the statutory and case law governing these issues and provides advice on how to challenge the adverse decisions, depending upon in which circuit your client's case arises. This Advisory is intended to assist attorneys representing adjustment eligible individuals who illegally reentered and is accurate as of the issue date.

* We gratefully acknowledge the contributions of Matt Adams, Legal Director at the Northwest Immigrants' Rights Project, and Stephen Manning, Immigrant Law Group, LLP in Portland, Oregon.

[1] All of the cases discussed throughout this advisory involve adjustment of status under INA § 245(i). The courts' reasoning in those cases may be applicable to VAWA adjustment applicants as well.

II. Background

A. Statutory Provisions

Section 212(a)(9)(A) makes individuals who were removed (or deported) inadmissible for many years after the removal. The inadmissibility period may be waived if DHS grants consent or permission to the admission. This request for permission is filed on form I-212 and is commonly referred to as I-212 consent to reapply for admission. The regulations at 8 C.F.R. § 212.2 implement the consent to reapply for admission provisions. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner of INS, dated June 17, 1997, entitled "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)," http://www.aila.org/Content/default.aspx?docid=4548 ("June 17, 1997 Memo").

Section 212(a)(9)(C)(i) focuses on individuals who currently are present in the United States after previous immigration violations. This section is broken into two subsections:

> **Subsection (I):** This section is applicable to individuals who do not have previous removal orders. Under subsection (I), a person is inadmissible if he or she was unlawfully present for more than one year and then reenters or attempts to reenter.
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> **Subsection (II)**: This section is applicable to individuals who were ordered removed and then reentered unlawfully. It makes such individual removable if they entered or attempted to reenter any time on or after April 1, 1997. *See* June 17, 1997 Memo, http://www.aila.org/Content/default.aspx?docid=4548.
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> There is an exception and a waiver of both these subsections is available under **Section 212(a)(9)(C)(ii).** In general, a person will not qualify for the exception until ten years have passed. However, as discussed below, whether the 10-year wait applies may vary and whether the person must remain outside the United States during the entirety of the period is unsettled. The law on this issue is developing. The waiver is available to certain persons filing VAWA self-petitions. Additionally, applicants for benefits under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act are not subject to these provisions.

Section 241(a)(5) is the reinstatement of removal provision. It permits the government to reinstate a prior removal or deportation order if the person reenters the United States. It also makes the individual ineligible for relief under the immigration laws. However, the person may apply for withholding of removal, 8 C.F.R. § 241.8(e).

VAWA 2005: On January 5, 2006, the *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, 119 Stat. 2960 ("VAWA 2005"), became law. Section 813(b) of VAWA 2005 states:

> *813(b) DISCRETION TO CONSENT TO AN ALIEN'S REAPPLICATION FOR ADMISSION.—*

(1) IN GENERAL.—The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion.

(2) SENSE OF CONGRESS.—It is the sense of Congress that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), and relief under section 240A(b)(2) or 244(a)(3) of such Act (as in effect on March 31, 1997) pursuant to regulations under section 212.2 of title 8, Code of Federal Regulations.

119 Stat. at 3058.

B. Case Law

1) Section 212(a)(9)(C)(i)(I) – Unlawfully presence for more than 1 year (no prior removal order)

Persons who have been unlawfully present in the United States for more than one year and unlawfully reenter are subject to the bar at subsection (I) of Section 212(a)(9)(C)(i). To date, two circuit courts, the Ninth and Tenth, have said that such individuals may adjust their status under section 245(i). *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006); *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 *amended on reh'g by* 453 F.3d 1237 (10th Cir 2006). The courts held that section 245(i) exempts individuals from section 212(a)(9)(C)(i)(I).

The Fifth Circuit, however, rejected the argument that individuals who attempt to reenter after having been physically present for more than one year are eligible to adjust under section 245(i). *Mortera Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005).

The other circuits have yet to address this issue. The Board of Immigration Appeals acknowledged this issue, but declined to address it in *Matter of Torres-Garcia,* 23 I&N Dec. 866, 870 n.4 (BIA 2006) (discussed below).

2) Section 212(a)(9)(C)(i)(II) – Reentered, previously removed

To date, only the Fifth, Ninth and Tenth Circuits and the Board of Immigration Appeals have issued opinions addressing whether a person subject to subsection (II) of Section 212(a)(9)(C)(i) may adjust status under INA § 245(i). The Ninth Circuit is the only court to find that such individuals may file an I-212 application ("I-212") in conjunction with their adjustment applications in order to cure the unlawful reentry. *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The Tenth Circuit and the BIA (discussed below) both have held that such individuals are not eligible to adjust. The Fifth Circuit has indicated that it would also find such individuals ineligible.

The Ninth Circuit in *Perez-Gonzalez* pointed out that the regulations at 8 C.F.R. § 212.2(e) and (i) indicate that an I-212 will be given retroactive effect, thus curing *nunc pro tunc* the unlawful reentry. The court found that such consent would overcome a finding of inadmissibility under Section 212(a)(9)(C)(i), even if ten years had not passed prior to the person filing the consent to reapply waiver application. Consequently, the court ruled that the government may not reinstate a prior order of removal under section Section 241(a)(5) if a person has already applied for adjustment of status along with the I-212 (at least, not until any such application is properly adjudicated and denied). Importantly, to avoid section 241(a)(5)'s reinstatement bar, the I-212 must have been filed before the government issues a reinstatement order. *Cf. Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003) (Note: this is a different case than the Tenth Circuit *Padilla* decision discussed below.)

The Tenth Circuit rejected *Perez Gonzalez*'s reasoning in *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004). The Tenth Circuit held that individuals are not permitted to submit an I-212 after unlawfully reentering the United States. In a related case, *Mortera Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005) (discussed above), the Fifth Circuit indicated that it would follow *Berrum-Garcia* if presented with the same facts.

On January 26, 2006, the BIA held that an I-212, even if approved, cannot function to cure inadmissibility under subsection II of section 212(a)(9)(C)(i) (for reentry after removal). *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006). The Board further held that such inadmissibility can only be cured by the granting of a waiver after ten years have passed since the date of the person's departure from the United States (note: it remains unclear on what form, where, and how such waiver application is to be filed). Consequently, the Board found that the respondent was ineligible for adjustment of status. The Board specifically rejected the reasoning of *Perez-Gonzalez. Matter of Torres-Garcia*, 23 I. & N. Dec. at 875.[2]

The BIA reasoned that the regulations at issue, 8 C.F.R. § 212.2, were issued prior to the 1996 changes and, in the Board's view, did not purport to implement anything in Section 212(a)(9), which was introduced to the INA in 1996 by IIRIRA. *Matter of Torres-Garcia*, 23 I. & N. Dec. at 873-74. Given that the regulatory language at 8 C.F.R. § 212.2 did not appear to encompass the new statutory language implemented by IIRIRA, the Board rejected the explicit language of the regulation.

3) INA § 241(a)(5) – Reinstatement of Removal

Reinstatement of removal is related to the issue of adjustment of status and eligibility to file an I-212 from within the United States because individuals who are subject to subsection II of section 212(a)(9)(C)(i) (reentry after removal) are subject to reinstatement of removal under INA §

[2] Despite the Board's rejection of *Perez-Gonzalez*, the holding of *Perez-Gonzalez* should continue to govern in the Ninth Circuit until overruled or modified by the circuit court. *Mesa Verde Construction Co. v. No. Cal. District Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc) (prior judicial construction of unambiguous statute controls over contrary agency interpretation). *See also* footnote 3.

241(a)(5) as well. Both *Perez-Gonzalez* and *Berrum-Garcia* -- the cases addressing subsection (II) (discussed above) -- arose in the context of challenges to reinstatement orders. In *Perez-Gonzalez*, the court's finding that petitioner could apply for adjustment of status in conjunction with an I-212 waiver lead to its conclusion that ICE could not issue a reinstatement order if DHS approved the I-212 waiver application. Conversely, in *Berrum Garcia*, the court's finding that petitioner could not apply for adjustment of status in conjunction with an I-212 lead to its conclusion that ICE could issue a reinstatement order (regardless of whether DHS approved the I-212 waiver application).

In June 2006, the Supreme Court issued a decision on reinstatement of removal, *Fernandez-Vargas v. Gonzales*, 547 U.S. __, 126 S.Ct. 2422, 2006 U.S. LEXIS 4892 (June 22, 2006). This case addressed whether § 241(a)(5) may be applied to individuals who reentered the U.S. before April 1, 1997 and who did not take any affirmative steps to legalize their unlawful status in the United States before that date (the date §241(a)(5) took effect). The Court held that it did apply in this limited situation. Significantly, the Supreme Court did not address any of the issues relevant to the courts' analysis in the I-212 cases: *Perez-Gonzalez, Berrum-Garcia,* or *Mortera-Cruz*.

C. USCIS Memorandum

On March 31, 2006, USCIS headquarters issued a memorandum regarding *Perez-Gonzalez* and adjudicating I-212s. *See* Memorandum from Michael Aytes, USCIS Acting Associate Director for Operations, and Dea Carpenter, Acting Chief Counsel, to the field, dated March 31, 2006, entitled "Effect of *Perez-Gonzalez v. Ashcroft* on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA § 241(a)(5)," http://www.aila.org/content/default.aspx?docid=20233 The memo lays out procedures for adjudicating I-212s in all circuits, but provides special rules for handling Ninth Circuit cases. Importantly, this memo applies *only* in situations where the person has a prior removal order and is removable under subsection II of section 212(a)(9)(C)(i). It does not address procedures for individuals who subject to subsection I of section 212(a)(9)(C)(i).

The memo advises that upon the filing of an I-212:

1) Field officers shall deny the I-212 "in any case" where ten years have not elapsed from the date of departure from the United States, regardless of the circuit in which the case arises. This instruction conflicts directly with *Perez-Gonzalez v. Ashcroft*, where the petitioner was found eligible for relief even though ten years had not passed.[3]

2) Field officers shall deny the I-212s where ICE has reinstated a prior removal order. The memo notes that this rule does not conflict with *Perez-Gonzalez* because the petitioner in that case filed his I-212 waiver application before ICE reinstated the removal order.

[3] This provision is being challenged in *Duran Gonzalez v. U.S. Dept. of Homeland Security*, C-06-1422, which was filed in the United States District Court for the Western District of Washington on September 28, 2006. For information about this suit, see http://www.ailf.org/lac/lac_lit_92806.shtml.

3) In cases where ten years have elapsed from the date of the last departure from the United States, field officers shall refer the case to ICE. If ICE reinstates the removal order, CIS must deny the I-212. Exception: if the case arises in the Ninth Circuit, CIS shall adjudicate the I-212 and not refer.

III. STRATEGIES AND ARGUMENTS

The following suggested strategies for people inadmissible under INA § 212(a)(9)(C)(i) are separated into two categories: (1) strategies for people who do not have a prior order of removal (subsection (I)) and (2) strategies for those that have been removed and have reentered unlawfully (subsection (II)). Further, these two categories are broken into subcategories depending upon the circuit in which the case arises.

A. Inadmissible Under Subsection I (unlawful presence of more than 1 year)

Individuals who are inadmissible under INA § 212(a)(9)(C)(i)(I) (unlawfully present for more than one year) who enter or attempt to reenter may argue that they are eligible to adjust under INA § 245(i) and do not need an I-212 or an I-601 application of waiver of grounds of inadmissibility ("I-601"). The March 31, 2006 USCIS Memo is inapplicable to this group.

1. All Circuits Except Fifth, Ninth and Tenth

Except for the Fifth, Ninth and Tenth Circuits, the courts have not issued decisions addressing whether INA § 245(i) trumps INA § 212(a)(9)(C)(i)(I). Potential applicants should take into account the unsettled status of the law when considering whether to file an affirmative application for adjustment of status under INA § 245(i).

The decisions in *Acosta* and *Padilla-Caldera* indicate that § 245(i) penalty-fee adjustment applicants are exempt from Subsection I; consequently, no I-601 is required. However, individuals filing affirmative adjustment applications in other circuits may want to file an accompanying I-601.

If the adjustment and/or waiver applications are denied, the applicant may challenge the denial in federal district court. The Ninth and Tenth Circuit cases, *Acosta v. Gonzalez* and *Padilla-Caldera v. Gonzales* (discussed above), provide a helpful roadmap of arguments to present. The applicant also may renew (or file in the first instance) the application in removal proceedings. Because there is no BIA precedent governing inadmissibility under Subsection I, the applicant may ask the IJ (and BIA on appeal, if necessary) to adopt the reasoning of the Ninth and Tenth Circuits in *Acosta v. Gonzales* and *Padilla-Calderon v. Gonzales*. If the Board denies the adjustment application, the applicant may renew his or her arguments at the court of appeals by filing a petition for review. *See* AILF Practice Advisory, "How to File a Petition for Review" (April 17, 2006) *available at* http://www.ailf.org/lac/lac_pa_chrono.shtml.

Contact clearinghouse@ailf.org if you have a case at the district court or the court of appeals.

2. Ninth and Tenth Circuits

Under Ninth and Tenth Circuit case law, *Acosta v. Gonzalez* and *Padilla-Calderon v. Gonzales*, INA § 245(i) exempts applicants from INA § 212(a)(9)(C)(i)(I). Therefore, § 245(i) eligible applicants may file their adjustment applications directly with USCIS or with the immigration judge. There are reports from both circuits that indicate that some USCIS officers are requiring adjustment applicants to file an I-601 in order to cure the unlawful presence. This requirement is spurious; *Acosta* and *Padilla-Caldera* are clear in this regard that the adjustment applications are to be adjudicated without regard to Subsection I. The applicants in *Acosta* and *Padilla-Caldera* did not file I-601s.

3. Fifth Circuit

Because the Fifth Circuit has held that individuals subject to Subsection I are not eligible to adjust under section 245(i), *Mortera Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005), applicants in this circuit may expect that both affirmative applications (filed with USCIS) and defensive applications filed with immigration judges and appealed to the BIA will be denied. For this reason, it generally is not advisable for Fifth Circuit individuals subject to INA § 212(a)(9)(C)(i)(I) to file affirmative adjustment applications under INA § 245(i).

Applicants who file defensive adjustment applications before the IJ may preserve the record by filing a completed application (perhaps including the I-601). If the IJ and BIA deny the adjustment application, the applicant may seek judicial review at the Fifth Circuit. *See* AILF Practice Advisory, "How to File a Petition for Review" (April 17, 2006) *available at* http://www.ailf.org/lac/lac_pa_chrono.shtml. However, arguably, only the Fifth Circuit sitting *en banc* will be able to reconsider the court's holding in *Mortera-Cruz*. Contact AILF's Litigation Clearinghouse at clearinghouse@ailf.org if you have a case at the Fifth Circuit.

B. Inadmissible Under Subsection II (reentry after removal)

1. All Circuits Except the Fifth, Ninth, and Tenth

Except for the Fifth, Ninth, and Tenth Circuits, the circuit courts have not issued decisions on whether a person inadmissible under Subsection II may file an I-212 waiver application along with their adjustment application. The Board of Immigration Appeals' decision in *Matter of Torres-Garcia* (discussed above), however, held that an I-212 waiver application, even if approved, does not cure inadmissibility under Subsection II. The March 31, 2006 USCIS memo commands field officers to deny all I-212 waiver requests for non-Ninth Circuit applicants in compliance with *Matter of Torres-Garcia.* Therefore, unless and until the courts hold otherwise, USCIS and immigration judges will deny affirmative applications. As such, it generally is not advisable to file affirmative applications outside of the Ninth Circuit.

If the client is in removal proceedings, advocates may make all available arguments why the IJ should have jurisdiction over the I-212 in order to preserve the record for appeal. The applicant may ask the IJ and BIA to reconsider *Matter of Torres-Garcia*, particularly in light of statutory

changes (arguments discussed below). However, applicants should be prepared for the IJs and BIA to follow *Matter of Torres-Garcia* and thus deny the adjustment application and order removal. The Board's removal order is reviewable by a petition for review in the court appeals. Contact clearinghouse@ailf.org if you have a case on appeal at the court of appeals.

The following discussion provides arguments that may be made to preserve the record before the IJ and BIA and before the court of appeals.

2. Challenging *Matter of Torres-Garcia*

Matter of Torres-Garcia is fundamentally flawed because its reasoning is based on the erroneous premise that the regulations at 8 C.F.R. § 212.2 are inapposite to determining the meaning of section 212(a)(9) of the INA or Congressional intent. As Congress recently said in Section 813(b) of VAWA 2005, the regulations remain intact and continue to govern the adjudication of consent for admission claims.

Importantly, the Board in *Matter of Torres-Garcia* makes no mention of VAWA 2005, Congress' most recent understanding of the INA.[4] As such, to the extent *Matter of Torres-Garcia* does not address nor conform to this statutory language, the Board's decision must be reconsidered and rejected.

In challenging the BIA's holding in *Matter of Torres-Garcia*, advocates should focus on the language of section 813(b) of VAWA, including the following:

- The statute's command that various immigration officials "shall continue" to have authority to decide I-212 waiver applications underscores the continuing vitality of 8 C.F.R. § 212.2. It confirms that 8 C.F.R. § 212.2 is not an outdated regulation that fails to adequately implement the changes brought about by IIRIRA. The central rationale of *Matter of Torres-Garcia*, i.e., that the regulations at 8 C.F.R. § 212.2 do not provide the waiver referenced in section 212(a)(9)(C)(ii), is completely undermined by section 813(b) of VAWA 2005. In fact, 8 C.F.R. § 212.2 was modified on two separate occasions after IIRIRA in order to implement other statutory changes. *See* 65 Fed. Reg. 15846, 15854 (Mar. 24, 2000); 64 Fed. Reg. 25755, 25766 (May 12, 1999). With VAWA 2005, the statute explicitly confirms that 8 C.F.R. § 212.2 continues to be "good law."

- The language specifies that not only the Secretaries of Homeland Security and State have authority to grant I-212 waiver applications, but that the Attorney General also has authority to grant them. This necessarily demonstrates that persons can request/apply for an I-212 waiver if they are seeking admission by consular processing (Department of State), affirmative adjustment applications (Department of Homeland Security), and in removal proceedings (Attorney General). This provides support for the argument that

[4] The Board issued *Matter of Torres-Garcia* on January 26, 2006. VAWA 2005 was enacted three weeks earlier on January 5, 2006. Given the proximity of the enactment Act and the issuance of the decision, it is unlikely that either party submitted briefs addressing VAWA 2005.

waiver may be obtained inside the United States. *Matter of Torres-Garcia*, however, states that "Congress has given the Attorney General no authority to grant an alien a waiver…"

- The language states that immigration officials "shall continue to have" authority to grant such applications. This makes clear that such authority is nothing new, and thus, prior court decisions that did not recognize such authority were utilizing too narrow of an interpretation. Therefore, the adverse decisions in the Fifth and Tenth Circuits should not be afforded authoritative weight and may be reconsidered and overruled.

2. Ninth Circuit

Pursuant to the March 31, 2006 USCIS Memo (see above), USCIS will adjudicate I-212s and INA § 245(i) applications for individuals if ten years have elapsed since the applicant's last departure from the United States. Unfortunately, most individuals do not fall within this group. The memo instructs field officers to deny I-212 applications for individuals in cases where ten years have not elapsed. This policy conflicts with *Perez-Gonzalez*. A class action lawsuit was filed on September 28, 2006 challenging this unlawful policy. For information about the lawsuit, please see AILF's webpage at http://www.ailf.org/lac/lac_lit.shtml.

3. Fifth and Tenth Circuits

Because the Fifth and Tenth Circuits have said that individuals subject to Subsection II cannot apply for I-212s from within the United States and are not eligible to adjust under INA § 245(i), *Mortera Cruz v. Gonzales*[5] and *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004), 409 F.3d 246 (5th Cir. 2005), applicants in these circuit may expect that both affirmative applications (filed with USCIS) and defensive applications filed with IJs and appealed to the BIA will be denied. For this reason, it generally is not advisable to file affirmative applications in the Fifth Circuit.

Applicants in removal proceedings may file defensive adjustment applications and I-212s before the IJ to preserve the record. The applicant may seek judicial review at the Fifth or Tenth Circuit and ask the court to reconsider its decisions in light of VAWA 2005. Contact AILF's Litigation Clearinghouse at clearinghouse@ailf.org if you have a case at the Fifth or Tenth Circuit.

[5] Arguably, the Fifth Circuit's holding with respect to I-212s is dicta. The petitioner in *Mortera-Cruz v. Gonzales* was not subject to Subsection II of INA § 212(a)(9)(C)(i) (illegal entry after removal) and was not seeking adjudication of an I-212 waiver application.