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UNITED STATES DEPARTMENT HOMELAND SECURITY

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

ADMINISTRATIVE APPEALS OFFICE

WASHINGTON, D.C.

In the Matter of: ***** Applicant,	A ****

APPLICANT'S BRIEF IN SUPPORT OF APPEAL OF DENIAL OF I-212 WAIVER

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I. INTRODUCTION

Applicant, *** ***** ("Mr. *****"), though undersigned counsel, respectfully files for reconsideration and appeal of the Form I-212 Application to Reapply for Admission to the United States After Deportation or Removal. He further requests that upon reconsideration of this application, his Form I-601 Application for Waiver of Ground of Excludability and Form I-485 Application for Adjustment of Status, be reconsidered.

Mr. ***** is the subject of an executed January 9, 1998 removal order. He subsequently returned unlawfully to the United States on the following day. He filed for adjustment of status based on his marriage to his United States citizen wife and was otherwise eligible for adjustment of status pursuant to INA § 245(i). In reliance on the Ninth Circuit's decision in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir.2004), Mr. ***** filed applications for waivers of inadmissibility on Forms I-212 (prior removal order) and I-601 (misrepresentation). On ****, in light of the Ninth Circuit's decision in Duran Gonzales v. Department of Homeland Sec., 508 F.3d 1227 (9th Cir. 2007), USCIS issued denials of the Forms I-485, I-212, and I-601 because Mr. ***** had not been outside the United States for ten years after his deportation and had not sought permission to reenter prior to returning to the United States.

Mr. ***** asserts that he should be found to be eligible for an I-212 waiver, and his forms I-485 and I-601 should be reconsidered, because he filed the waiver in reliance on the Ninth Circuit's decision in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir.2004), and therefore the Duran Gonzales decision should not be retroactively applied to him. See e.g. Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322 (9th Cir. 1982). In addition, notwithstanding the application of Duran Gonzales, he is eligible for adjustment of status because it has been more than ten years since his 1998 removal and he his now eligible for the

nunc pro tunc adjudication of the form I-212. See INA § 212(a)(9)(C)(ii); 8 C.F.R. § 212.2(i)(2).

II. STATEMENT OF FACTS AND CASE

Mr. ***** attempted to enter the United States with a false alien registration card and was issued an order of expedited removal on January 9, 1998. He then subsequently returned unlawfully to the United States the following day. On May 31, 2000, Mr. ***** married his United States citizen wife **** and in August 2001 they gave birth to their United States citizen son. On March 14, 2001, Mr. *****'s wife filed a Form I-130 petition for alien relative on his behalf, and he concurrently filed a Form I-485 application for adjustment of status.

On August 13, 2004, the Ninth Circuit issued a published decision in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir.2004), concluding that individuals who had been previously removed and who entered unlawfully were eligible for adjustment of status if they submitted a Form I-212 prior to the issuance of an order of reinstatement of removal.

On December 8, 2005, in reliance on Perez-Gonzalez, Mr. ***** filed a Form I-212 to waive his prior removal order, in addition to a Form I-601 Application for Waiver of Ground of Excludability, to waive his prior fraud.

On November 30, 2007, the Ninth Circuit withdrew from its decision in Perez-Gonzalez and issued its decision in Duran Gonzales v. Department of Homeland Sec., 508 F.3d 1227 (9th Cir. 2007). In Duran Gonzales, the Ninth Circuit deferred to the Board of Immigration Appeals' ("BIA") decision in Matter of Torres-Garcia, 23 I. & N. Dec. 866 (BIA 2006), and held that individuals who were previously deported and who unlawfully reentered the United States were ineligible for adjustment of status under INA § 212(a)(9)(C)(i)(II) and that a waiver was not

available for ten years after the date of departure.[1]

On ****, USCIS issued a decision denying Mr. *****'s application for adjustment of status, and his applications for waivers on Forms I-212 and I-601. The basis for the denial was that Mr. ***** was inadmissible pursuant to INA § 212(a)(9)(C)(i)(II) because he had been previously removed and unlawfully entered the United States. USCIS concluded that Mr. ***** was not eligible for consent to reapply for admission pursuant to INA § 212(a)(9)(C)(ii) because he is not currently abroad and it has not been ten years since his last departure. Based on the finding , the Form I-485 Application for Adjustment of Status was also denied, and the Form I-601 was denied "as fruitless" because Mr. ***** was not otherwise eligible for adjustment of status.

III. ARGUMENT

A. MR. ***** IS ELIGIBLE FOR ADJUSTMENT OF STATUS BECAUSE HE ACTED IN RELIANCE ON THE NINTH CIRCUIT'S DECISION IN *PEREZ-GONZALEZ*

USCIS should reconsider its decision and conclude that Mr. ***** is eligible for an I-212 waiver because the Duran Gonzales decision cannot be retroactively applied to him. In Duran Gonzales, the Ninth Circuit deferred to the Board of Immigration Appeals' ("BIA") decision in Matter of Torres-Garcia, 23 I. & N. Dec. 866 (BIA 2006), which had disagreed with Perez-Gonzalez's holding. As the Ninth Circuit adopted the agency's decision, it is proper to apply the Ninth Circuit's decision in Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322 (9th Cir. 1982)

[1] Duran Gonzales remains pending at the Ninth Circuit, and the class action asserts that individuals who filed I-212 waivers in reliance on Perez-Gonzalez should remain eligible for adjustment of status. See Duran Gonzalez, et al v. DHS, No. 09-35174 (9th Cir.). Mr. *** is a member of this class.

to assess whether Duran Gonzales can be applied retroactively to Mr. *****.

In Montgomery Ward, the Ninth Circuit established five non-exhaustive factors for determining when an agency's retroactive application of an adjudicatory decision is invalid:

> (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.

691 F.2d at 1333. These factors are meant to "balance [ ] a regulated party's interest in being able to rely on the terms of a rule as it is written against an agency's interest in retroactive application of an adjudicatory decision." Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007) citing Chang v. United States, 327 F.3d 911, 928 (9th Cir. 2003). According to the Ninth Circuit, an agency may "clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." Montgomery Ward, 691 F.2d at 1328. See also Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. at 60 n.12.

In applying the Montgomery Ward factors, the Ninth Circuit has noted that "retroactive application generally is not favored." Great Western Bank v. Office of Thrift Supervision, 916 F.2d 1421, 1431 (9th Cir. 1990). In Chang v. United States, 327 F.3d 911, 928 (9th Cir. 2003), the Ninth Circuit applied these factors to immigrant investors who sought to become lawful permanent residents based on their investments and consequent job creation within the United States. After the legacy Immigration and Naturalization Service (INS) had approved the plaintiffs' initial residency petitions, and they submitted their investments and had come to the United States in reliance on the approved petitions, the agency then issued a number of precedent decisions undermining their applications.

These decisions changed the rules midstream, rendering plaintiffs ineligible for residency based on the very same investments legacy INS had previously approved. As a result, the Ninth Circuit applied the Montgomery Ward factors to these cases and found that the application of the new agency decisions was impermissibly retroactive. Chang, 327 F.3d at 929.

Similarly, in Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007), the Ninth Circuit applied the Montgomery Ward five-part test to the Attorney General's decision in Matter of Y-L-, 23 I. & N. Dec. 270 (Op. Att'y Gen. 2002), to determine if the agency decision applied to convictions entered prior to the Attorney General's decision. In Matter of Y-L-, the Attorney General issued a decision finding that controlled substance trafficking offenses were presumed to bar eligibility for asylum and withholding of removal, which was a new rule and a departure from past agency decisions. Utilizing the Montgomery Ward test, the Ninth Circuit concluded in Miguel-Miguel that the Attorney General's decision could not be retroactively applied to a plea bargain entered prior to the agency's change in position.

Application of the Montgomery Ward test is appropriate here to determine whether the new rule of Matter of Torres-Garcia, adopted by Duran Gonzales, may apply retroactively.

a. Matter of Torres-Garcia was not a case of first impression.

The first factor under Montgomery Ward is whether the administrative case was one of first impression. This factor "is directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule." Miguel-Miguel, 500 F.3d at 951. It also ensures that agencies do not issue advisory opinions. Id.

In the instant case, as in Miguel-Miguel, the issue addressed by the BIA in Matter of Torres-Garcia was not an issue of first impression; the Ninth Circuit had previously addressed

the issue in Perez-Gonzalez. In fact, the agency acknowledged that its decision was contrary to the Ninth Circuit's interpretation. Matter of Torres-Garcia, 23 I. & N. Dec. at 873. Furthermore, like Miguel-Miguel, the agency's published decision in Matter of Torres-Garcia was an unrelated proceeding. Importantly, there was no reason for the BIA to consider the issue of retroactive application to applicants who relied on Perez-Gonzalez given that Matter of Torres-Garcia arose outside of the Ninth Circuit where there was no conflicting precedent on point and there was no indication that the BIA planned to apply its decision in the Ninth Circuit.

b. The new rule regarding I-212 waiver eligibility is completely opposite to the prior rule.

The second factor under Montgomery Ward is 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. Here, the BIA's interpretation in Matter of Torres-Garcia unquestionably represents a departure from the holding and rule established by the Ninth Circuit in Perez-Gonzalez, as the two reach contrary results. The agency was previously required to follow Perez-Gonzalez in cases arising in the Ninth Circuit. See Matter of K-S-, 20 I. & N. Dec. 715 (BIA 1993) (requiring the Board to follow circuit precedent in cases arising in that judicial circuit); Matter of Anselmo, 20 I. & N. Dec. 25 (BIA 1989) (same).

However, by deferring in Duran Gonzales to the agency's contrary interpretation, the Ninth Circuit's adoption of an agency interpretation represents a clear departure from the previously established rule. See Chang, 327 F.3d at 928 ("[t]he approval of Appellants' own I-526 petitions containing such provisions shows that this practice continued at least until shortly before the publication of the precedent decisions; the rules introduced in those decisions were an abrupt departure"). Thus, the second factor also favors a prospective application of the new rule.

c. Mr. *** relied on the old rule, under which he was eligible to have his I-212 waiver application adjudicated.**

The third factor under Montgomery Ward is the extent to which the party against whom the new rule is applied relied on the former rule. In Miguel-Miguel, the Ninth Circuit noted that at the time Miguel plead guilty to his controlled substance offense, he had a "realistic chance" of winning at the BIA. Miguel-Miguel, 500 F.3d at 952. Similarly, when Mr. ***** filed his I-212 and adjustment applications prior to the Ninth Circuit's adoption of Matter of Torres-Garcia, he also had a "realistic chance" of success before USCIS. Here, Mr. ***** paid thousands of dollars in filing fees and attorneys fees, in unequivocal reliance on the law of this Circuit, as affirmed by Perez-Gonzalez.[2]

d. Retroactive application of the new rule would unduly burden Mr. ***.**

The fourth factor under Montgomery Ward is the degree of the burden which a retroactive order imposes on a party. Here, it is clear that retroactive application imposes an immense burden on Mr. *****, who filed an I-212 waiver in reliance on Perez-Gonzalez. If Duran Gonzales' adoption of Matter of Torres-Garcia is applied retroactively, he is subject to removal from the United States, including under "reinstatement of removal" which renders him ineligible for any other relief and subject to removal without a hearing before an immigration judge. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8. He will have lost thousands of dollars, and may

[2] In addition, subsequent Ninth Circuit case law reinforced the holding in Perez-Gonzalez. See Acosta v. Gonzales, 439 F.3d 550, 553-54 (9th Cir. 2006) (restating the holding in Perez-Gonzalez and finding that the decision controls whether a different group of individuals – those inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) – are eligible for § 245(i) relief).

be subject to summary expulsion and indefinite separation from his United States citizen wife and children.

e. DHS' statutory interest in applying the new rule is negligible.

The fifth factor under Montgomery Ward is the statutory interest in applying a new rule despite the reliance of a party on the old standard. In Duran Gonzales the Ninth Circuit ruled that the prior panel in Perez-Gonzalez held that Congress's intent was ambiguous regarding whether individuals who were previously removed and unlawfully reentered could qualify for lawful permanent residency with an I-212 waiver. Duran Gonzales, 508 F.3d at 1237 ("[w]e conclude that, despite some language to the contrary, Perez-Gonzalez was based on a finding of statutory ambiguity that left room for agency discretion"). Because Congress was ambiguous regarding its intent, there is no clear statutory interest in *denying* Mr. *****'s permanent residency.

In addition, the interests of INA § 245(i) (8 U.S.C. § 1225(i)) are served because that provision exists for individuals, like Mr. *****, who have unlawfully entered the United States. As previously noted, Mr. ***** is eligible for adjustment of status under § 245(i), by paying the penalty fee of $1,000, in addition to the filing fees for the adjustment application and the waivers in order for USCIS to accept his applications. See Chang, 327 F.3d at 929 ("[f]rom Appellants' perspective, the INS's approving and receiving the benefits of their investments, only to renege on the promise of LPR status once those benefits were garnered, must seem very unfair"). The last factor therefore also counsels in favor of Mr. *****.

As such, USCIS should conclude that Mr. ***** remains eligible for adjustment of status, with the I-212 waiver, and that Perez-Gonzalez continues to apply to his case.

B. ALTERNATIVELY, MR. ***** IS ELIGIBLE FOR ADJUSTMENT OF STATUS BECAUSE MORE THAN TEN YEARS HAVE ELAPSED SINCE HIS 199** EXPEDITED REMOVAL AND CONSENT TO REAPPLY FOR ADMISSION MAY BE GRANTED *NUNC PRO TUNC*

Alternatively, if USCIS concludes that Duran Gonzales retroactively applies to Mr. *****, then it should nevertheless find that he is eligible for a waiver under INA § 212(a)(9)(C)(ii) because more than ten years have elapsed since his 19** departure under the expedited removal order. USCIS erred in stating that Mr. ***** was required to remain outside of the United States for a period of ten years before applying for a waiver for purposes of INA § 212(a)(9)(C)(ii). That provision states:

> 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 of Homeland Security has consented to the alien's reapplying for admission.

INA § 212(a)(9)(C)(ii). Nowhere in the statute is there the requirement that the applicant must wait outside the United States before applying for a waiver under INA § 212(a)(9)(C)(ii). Rather the language of the statute is comparable to the language of INA § 212(a)(9)(A)(iii), which is the waiver for a prior removal order (without a subsequent illegal reentry). That provision states:

> Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

The main difference in the two waivers is that the provision at INA § 212(a)(9)(C)(ii) requires that the applicant wait for ten years before applying, and the waiver at INA § 212(a)(9)(A)(iii) does not. Otherwise the language of the two statutes is virtually identical. The regulations provide for a "nunc pro tunc" I-212 waiver which allows the applicant to apply for

the waiver after having unlawfully entered the United States. 8 C.F.R. § 212.2(i)(2). That "nunc pro tunc" I-212 waiver should apply to INA § 212(a)(9)(C)(ii) as well, once ten years have elapsed since the removal. That regulation states:

> (i) Retroactive approval.
>
> > (2) If the alien filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.

8 C.F.R. § 212.2(i)(2) (emphasis added). While the Duran Gonzales decision concludes that this regulation does not apply when ten years have not elapsed since the applicant's last departure, there is no reason that the regulation should not apply once there have been more than ten years since the departure. The regulation must continue to have some meaning since it has not been withdrawn by the agency, despite numerous amendments made since the enactment of the relevant statutory provision at INA § 212(a)(9)(C). In addition, the regulation at 8 C.F.R. § 212.2 was recently amended in June 2009, and the "nun pro tunc" provision was not altered, further evidencing the agency's acknowledgement that the "nunc pro tunc" I-212 waiver continues to have effect. 74 Fed. Reg. 26933, 26938 (June 5, 2009). As such, 8 C.F.R. § 212.2(i)(2) should be read to apply to the waiver at INA § 212(a)(9)(C)(ii), in that an applicant may nunc pro tunc reapply for admission if ten years have elapsed since the execution of the removal order. As Mr. ***** returned to the United States **** 1998, the waiver should be retroactive to that date of reembarkment. 8 C.F.R. § 212.2(i)(2). As such, Mr. ***** should be found to be eligible for the waiver and therefore eligible for adjustment of status.

IV. CONCLUSION

For all of the above reasons, Mr. ***** respectfully requests that USCIS's decision of **** be reversed and that it grant his I-212 waiver, as well as reconsider his I-601 waiver and his Form I-485 application for adjustment of status.

Dated: ****, 2009

Respectfully Submitted,

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