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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8
9 GUADALUPE RAMIREZ,

10 Plaintiff,

11 v.

12 JANET NAPOLITANO, *et al.*,

13 Defendants.

NO. C09-305RSL

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

14
15 **I. INTRODUCTION**

16 This matter comes before the Court on "Plaintiff's Motion for Summary Judgment" (Dkt.
17 # 15) and "Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Cross
18 Motion for Summary Judgment" (Dkt. # 19). Plaintiff alleges that United States Citizenship and
19 Immigration Services ("CIS") acted (1) in violation of applicable statutes and regulations and (2)
20 in an arbitrary and capricious manner when it denied Ms. Ramirez applications for adjustment of
21 immigration status and permission to reapply for readmission. The Attorney General responds
22 that CIS acted according to the applicable sections of the Immigration and Naturalization Act
23 ("INA") when it denied Ms. Ramirez's applications, citing the Ninth Circuit's decision in
24 Duran-Gonzales v. Dept. of Homeland Sec., 508 F.3d 1227 (9th Cir. 2007). Though the Court is
25 sympathetic to Ms. Ramirez's predicament, for the reasons that follow, the Court DENIES
26 plaintiff's motion for summary judgment and GRANTS defendants' motion for summary
27 judgment.

28 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT- 1

1 **II. FACTUAL BACKGROUND**

2 Plaintiff Guadalupe Ramirez (born Guadalupe Barrientos) is a native and citizen of
3 Mexico who first entered the United States without inspection in 1986 at the age of 15. She
4 married Mr. Angel Ramirez in 1996, and over the last decade has been a stay-at-home mother,
5 raising a family in Tacoma, Washington. Her husband is a legal permanent resident of the
6 United States. Her four children are all United States citizens.

7 In December 1998, Ms. Ramirez traveled to Mexico to visit her sick mother. On the way
8 back on January 18, 1999, Ms. Ramirez was apprehended by border officials attempting to use
9 another person’s documents to enter the United States. Ms. Ramirez was subsequently removed
10 from the country under INA § 212(a)(7)(A)(i), 8 U.S.C. § 1182(a)(7)(A)(i), for having invalid
11 entry documents, and INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting enter
12 the United States by fraud or misrepresentation. Under these subsections of the INA, Ms.
13 Ramirez was classified “inadmissible” to the United States for 5 years after her removal. Ms.
14 Ramirez, however, by her own admission entered the country without inspection approximately
15 a week later.

16 On February 16, 2000, Ms. Ramirez’s husband, who was by that time a legal permanent
17 resident of the United States, filed a I-130 petition on her behalf for an immigrant visa under
18 INA § 203(a)(2), 8 U.S.C. § 1153(a)(2). Mr. Ramirez inaccurately indicated on Question 16 of
19 the I-130 that his wife had never been under immigration proceedings. See Dkt. #19, Exh. E.
20 Nonetheless, the application was approved June 2, 2001. However, as is usual given the limited
21 number of visas available each year, no immigrant visa numbers were available at that time to
22 Ms. Ramirez. So, while waiting for her permanent visa, Ms. Ramirez applied for and was
23 granted a “nonimmigrant” V visa in 2004.¹

24 The parties dispute the particulars of the process by which Ms. Ramirez obtained her V
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26 ¹ As discussed in more detail later, pursuant to the Legal Immigration Family Equity (“LIFE”)
27 Act passed December 21, 2000, spouses and children of legal permanent residents were permitted to
28 obtain temporary nonimmigrant “V visas” while waiting to adjust their status to permanent resident.

1 visa. Plaintiff argues that USCIS considered and waived her previous immigration violations
2 and all grounds of inadmissibility arising from them when it granted Ms. Ramirez’s V visa in
3 2004. In support of this assertion, plaintiff points to: (1) a USCIS “Request for Additional
4 Evidence” sent to Ms. Ramirez on April 19, 2004 which explicitly refers to Ms. Ramirez’s 1999
5 illegal entry and expedited removal and (2) a form I-94, which shows proof of a legal visa issued
6 to Ms. Ramirez four months later on August 24, 2004. See Complaint (Dkt. #1), Exhs. B & H.
7 Plaintiff concludes that this means Ms. Ramirez was “lawfully admitted” in 2004, meaning that
8 she either received at that time an actual I-212 waiver of inadmissibility stemming from her
9 previous immigration violations or, at the least, an implicit waiver of that inadmissibility by
10 virtue of the “lawful status” conferred by her V visa. See, e.g., Plaintiff’s Motion for Summary
11 Judgment at 6, 10. As discussed in greater detail below, the government denies that Ms.
12 Ramirez was granted either an explicit or implicit waiver in 2004. While waiting for permanent
13 status to be approved, Ms. Ramirez renewed her V visa in 2006.

14 On July 17, 2007, Ms. Ramirez filed an I-485 application for adjustment of status to
15 permanent resident. In this application, she admits that she had been removed from the United
16 States in 1999 and had reentered without inspection one week later. Despite the fact that she
17 now claims to have received an implicit or explicit waiver of inadmissibility in 2004, Ms.
18 Ramirez also submitted, along with her I-485 adjustment application, an application for waiver
19 of inadmissibility, Form I-601, and an application for permission to reapply for admission, Form
20 I-212. On August 22, 2008, CIS sent Ms. Ramirez letters which denied all of her applications
21 and petitions. Defendants’ Motion for Summary Judgment, Exhs. M, N. CIS also revoked Ms.
22 Ramirez’s employment authorization and ordered her to leave the United States immediately.

23 **III. DISCUSSION**

24 **A. Summary Judgment Standard**

25 Summary judgment is appropriate only “if the pleadings, the discovery and disclosure
26 materials on file, and any affidavits show that there is no genuine issue as to any material fact
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1 and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party
2 moving for summary judgment has the burden of showing the absence of a genuine issue of
3 material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). “[S]ummary
4 judgment should be granted where the nonmoving party fails to offer evidence from which a
5 reasonable jury could return a verdict in its favor,” Triton Energy Corp. v. Square D Co., 68
6 F.3d 1216, 1221 (9th Cir. 1995), or where there is a “complete failure of proof concerning an
7 essential element of the nonmoving party’s case.” Celotex Corp. v. Catrett, 477 U.S. 317, 323
8 (1986). The Court must view the evidence and draw all reasonable inferences therefrom in the
9 light most favorable to the nonmoving party. U.S. v. Johnson Controls, Inc., 457 F.3d 1009,
10 1013 (9th Cir. 2006). However, “the mere existence of a scintilla of evidence in support of the
11 non-moving party’s position is not sufficient.” Triton, 68 F.3d at 1221. These standards also
12 apply to cross motions for summary judgment. Brown v. City of Los Angeles, 521 F.3d 1238,
13 1240 (9th Cir. 2008).

14 **B. Arbitrary and Capricious Standard**

15 The Administrative Procedures Act (“APA”) provides a cause of action to persons
16 “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. A reviewing court can find
17 an agency action unlawful and set aside findings that are, *inter alia*, “arbitrary, capricious, an
18 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Review
19 under the arbitrary and capricious standard is “narrow” and the court will generally “not
20 substitute [its] judgment for that of the agency.” Tucson Herpetological Soc. v. Salazar, 566
21 F.3d 870, 875 (9th Cir. 2009) (quoting The Lands Council v. McNair, 537 F.3d 981, 987 (9th
22 Cir. 2008) (en banc)). Thus, the Court can reverse “only if the agency relied on factors Congress
23 did not intend it to consider, entirely failed to consider an important aspect of the problem, or
24 offered an explanation that runs counter to the evidence before the agency or is so implausible
25 that it could not be ascribed to a difference in view or the product of agency expertise.” Lands
26 Council, 537 F.3d at 987 (internal citations omitted).

1 Additionally, to the extent the government’s arguments are predicated upon on CIS’s
2 interpretation of ambiguities inherent in the statute, the Court applies Chevron deference. Under
3 Chevron, the Court must not impose its own construction of ambiguities in the statutory scheme,
4 but rather decide whether the agency's position is based on a permissible construction of the
5 statute. National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S.
6 967, 982-83 (2005) (“Only a judicial precedent holding that the statute unambiguously
7 forecloses the agency's interpretation, and therefore contains no gap for the agency to fill,
8 displaces a conflicting agency construction”); see also Duran-Gonzales v. Department of
9 Homeland Sec., 508 F.3d 1227, 1236 (9th Cir. 2007) (applying Brand X and Chevron to the
10 INA).

11 **C. Applicable Substantive Law**

12 The INA and its corresponding federal regulations (“C.F.R.”) comprise a complex
13 statutory scheme made up of many, sometimes duplicative, not always completely congruous
14 subsections which have been interpreted to different effect at different times by various courts.
15 Both parties have in their briefs made extensive use of these provisions and the tensions between
16 them. Those most relevant to the Court’s reasoning are outlined below.

17 In 1994, Congress amended the INA, providing for adjustment of status for certain aliens
18 otherwise ineligible for such relief because of their unlawful status in the United States. Pub.L.
19 No. 103-317, Title V § 506(b), 108 Stat. 1724, 1765-66 (1994) (the special adjustment
20 provision). The special adjustment provision excepted these aliens from certain admissibility
21 requirements for adjustment of status, allowing the Attorney General to adjust the status of an
22 alien who had entered the United States without inspection to that of a legal permanent resident
23 provided that the alien was “admissible” to the United States and (in this first iteration) the
24 beneficiary of an immediately available immigrant visa. See INA § 245, 8 U.S.C. § 1255.

25 In 1998, Congress extended the availability of the special adjustment provision to aliens
26 who were the beneficiaries of an alien relative petition (I-130) filed on or before January 14,
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1 1998. Pub.L. No. 105-119, § 111, 11 Stat. 2440 (1997). Finally, in 2000 Congress revised the
2 special adjustment provision to include beneficiaries of an I-130 petition filed on or before April
3 30, 2001. LIFE Act Amendment of 2000, Pub.L. No. 106-554, § 1502(a), 114 Stat. 2763 (2000).
4 The 2000 provision requires that the beneficiary of the petition filed after January 14, 1998, be
5 physically present in the United States on December 20, 2000. INA § 245(i)(C), 8 U.S.C. §
6 1255(i)(C).

7 The LIFE Act also permits spouses and children of legal permanent residents who have
8 filed I-130 petitions on their behalf and who have been waiting for a visa number for at least
9 three years to obtain a so-called “nonimmigrant” V visa while waiting to apply for special
10 adjustment. INA § 101(a)(15)(V), 8 U.S.C. § 1101(a)(15)(V). It is relevant to note here that a V
11 visa is automatically revoked 30 days following the denial of an adjustment of status. C.F.R. §
12 214.15(j)(1)(iii).

13 In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility
14 Act (“IIRIRA”), also effecting large scale changes to the INA. Pub.L. No. 104-208, div. C, 110
15 Stat. 3009 (1996). Though various additional grounds of inadmissibility under IIRIRA are cited
16 in the parties’ briefs, two provisions pertaining to aliens who reenter the United States after
17 being previously removed or deported are particularly relevant here – INA § 212(a)(9)(C)(i)(II),
18 8 U.S.C. 1182(a)(9)(C)(i)(II), (the inadmissibility provision for previously removed aliens
19 unlawfully present in the United States), and INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), (the
20 reinstatement provision).

21 INA § 212(a)(9)(C)(i)(II), 8 U.S.C. 1182(a)(9)(C)(i)(II) provides a lifetime bar on
22 admission to aliens who have illegally reentered the U.S. after a removal order, subject to a
23 discretionary waiver by the Secretary of Homeland Security permitting an alien to reapply for
24 admission from abroad after at least ten years have elapsed since the alien's latest departure from
25 the United States. This "consent to reapply" exception provides that:

26 [The permanent bar to admissibility] shall not apply to an alien seeking admission
27 more than 10 years after the date of the alien's last departure from the United

1 States if, prior to the alien's reembarkation at a place outside the United States or
2 attempt to be readmitted from a foreign contiguous territory, the Attorney General
has consented to the alien's reapplying for admission.

3 The reinstatement provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), provides for the
4 reinstatement of a previous removal order “at any time” if the Attorney General finds that an
5 alien has reentered the United States illegally, and further declares that the alien may not apply
6 for any further relief:

7 If the Attorney General finds that an alien has reentered the United States illegally
8 after having been removed or having departed voluntarily, under an order of
removal, the prior order of removal is reinstated from its original date and is not
9 subject to being reopened or reviewed, the alien is not eligible and may not apply
for any relief under this chapter, and the alien shall be removed under the prior
order at any time after the reentry.

10 **D. The August 22, 2008 Denial Letters**

11 On August 22, 2008, CIS sent Ms. Ramirez a denial of adjustment of status. See
12 Defendants’ Motion for Summary Judgment, Ehx. M. In pertinent part, the letter stated: “You
13 were deported from the United States on 18 Jan 1999, and as such are inadmissible to enter the
14 United States for a period of 5 years. Records reflect you [*sic*] that you reentered the United
15 States without inspection on or about January 1999.” It continues: “Based upon the foregoing
16 facts and law and in accordance with Section 241(a)(5), it has been determined that the
17 application for status as a permanent resident be denied.” Id. The letter informs Ms. Ramirez of
18 imminent removal proceedings pursuant to Section 241(a)(5), that her employment authorization
19 has been revoked, and that she must depart the United States immediately. Id.

20 On the same day, CIS sent Ms. Ramirez another letter denying her Form I-212. See
21 Defendants’ Motion for Summary Judgment, Ehx. N. Again referring to Ms. Ramirez’s illegal
22 re-entry after removal, it cites INA § 212(a)(9)(C)(i)(II), 8 U.S.C. 1182(a)(9)(C)(i)(II) and states:
23 “You are required by law to remain outside the United States for a period of 10 years after 18
24 Jan 1999 before you can file Form I-212. You are statutorily ineligible to file Form I-212,
25 therefore your application must be, and hereby is denied.” The letter also cites the Ninth
26 Circuit’s decision in Duran-Gonzales, which held that an alien in violation of INA §
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1 212(a)(9)(C)(i)(II) who has not remained outside the United States for 10 years cannot apply for
2 a I-212 waiver. Duran-Gonzales adopted the reasoning of a recent Board of Immigration
3 Appeals (“BIA”) decision, and says in part:

4 In In re Torres-Garcia, the BIA held that an applicant who is inadmissible under
5 subsection (a)(9)(C)(i)(II) is also ineligible to adjust his status under the special
6 adjustment provision from within the United States. The alien is bound by
7 subsection (a)(9)(C)(ii), requiring that he obtain permission to apply for
8 readmission from outside the United States after ten years have lapsed from the
9 date of his last departure. The BIA's decision is clearly reasonable and is therefore
10 entitled to Chevron deference under Brand X.

11 Duran-Gonzalez v. Dept. of Homeland Sec., 508 F.3d 1227, 1242 (9th Cir. 2007).

12 The plain language of INA § 241(a)(5) and INA § 212(a)(9)(C)(i)(II) supports CIS’s
13 decisions. Together these provisions work to reinstate Ms. Ramirez’s previous removal order
14 and, at the least, prohibit her from applying for further relief under the INA unless the
15 application is made from outside the United States and at least 10 years after her last departure
16 from the United States.

17 Plaintiff offers two main arguments in response to this line of reasoning. First, she argues
18 that any consequences stemming from her illegal re-entry to the United States in 1999 were
19 waived, either explicitly or implicitly, by the CIS’s grant of a V visa in 2004. Second, Ms.
20 Ramirez argues that her applications should have been processed and decided under the rule of
21 Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), which allowed for filing of waiver
22 applications along with applications for special adjustment, regardless of the reinstatement
23 provision and Subsection (a)(9)(C)(i)(II), rather than under the rule of Duran-Gonzalez, which
24 overruled Perez-Gonzalez.

25 **E. The Alleged 2004 Waivers**

26 The Court has carefully considered the issue of whether any explicit or implicit waivers
27 of inadmissibility regarding special status adjustment were granted along with or by virtue of
28 Ms. Ramirez’s temporary nonimmigrant visa. On the one hand, from plaintiff’s standpoint, it is
reasonable to believe that, in light of CIS’s April 19, 2004 I-539 request for more information

1 concerning Ms. Ramirez’s illegal entry and deportation and CIS’s subsequent August 24, 2006
2 grant of V visa status, CIS did consider Ms. Ramirez’s removal from the United States in 1999
3 when it granted her V visa in 2004. See Complaint, Exhs. B, H. It also follows that if CIS was
4 made aware of Ms. Ramirez’s prior removal before it granted her V visa (as the I-539 Form
5 indicates), it should have reasoned that Ms. Ramirez had reentered the United States without
6 inspection because (1) Ms. Ramirez must have been present in the United States on December
7 20, 2000 to have been the beneficiary of an I-130 petition and (2) simply because Ms. Ramirez
8 was present in the United States when she applied for her V visa. Presumably, this reentry
9 would have triggered the same grounds of inadmissibility and reinstatement of removal in 2004
10 that CIS cites in the August 22, 2008 denial letters. Plaintiff argues that if CIS knew of Ms.
11 Ramirez’s previous immigration violations when it issued her V visa, then it necessarily must
12 have waived any inadmissibility arising from those violations. See, e.g., Plaintiff’s Motion at 6,
13 10.

14 In response, the government denies it issued any waivers in 2004. Moreover, it argues
15 that its approval of a V visa in 2004 was “error” because “Ms. Ramirez remained ineligible
16 based on prior inadmissibility.” Defendants’ Motion at 10. Further, it argues that the grant of a
17 V visa does not waive inadmissibility for the purposes of special adjustment of status. The
18 Court addresses these arguments in turn.

19 *1. The Evidence Does Not Indicate Explicit Waivers Were Granted in 2004*

20 The Court finds that the evidence does not indicate that Ms. Ramirez was issued any
21 explicit waivers in 2004, even when viewing the evidence and drawing all reasonable inferences
22 therefrom in the light most favorable to plaintiff. If Ms. Ramirez had indeed applied for and
23 been granted a waiver of her previous grounds of inadmissibility, some proof or claim of it
24 would show up in her papers or file. As the government points out, while Ms. Ramirez has
25 produced numerous immigration documents and the CIS has provided her “A-file” under seal
26 (Dkt. #13), there is no mention of any 2004 I-212 or I-601 waiver among these papers. In fact, a
27 letter in that file from Ms. Ramirez’s counsel to CIS dated July 25, 2007 indicates that Ms.

1 Ramirez did not possess or claim to have any waivers when she applied for adjustment of status,
2 admitting at one point that “Ms. Ramirez may be subject to reinstatement of her prior removal
3 order” and elsewhere that Ms. Ramirez “is also applying for an I-601 waiver because she
4 presented a false document at the time of her apprehension in 1999.” Dkt. #13 at L129.

5 Further, the record is void of any affirmative signed declaration by Ms. Ramirez that she
6 ever possessed such a document. It is also notable that though plaintiff’s current argument for
7 the existence of a waiver is predicated upon the fact that CIS “specifically asked her to respond
8 to a request for evidence regarding” a removal order (Dkt. #22 at 5), she nowhere alleges how,
9 when, or even if she actually responded to that request. Further, the I-212 and I-601 applications
10 plaintiff submitted in 2007 with her application for change in status imply that she did not
11 already possess a waiver.

12 In sum, plaintiff has failed to show facts sufficient to establish that such any waivers were
13 issued in 2004. Celotex, 477 U.S. at 322 (Summary judgment is appropriate if the nonmoving
14 party “fails to make a showing sufficient to establish the existence of an element essential to that
15 party’s case, and on which that party will bear the burden of proof at trial”). Further, as
16 discussed below, the Court also finds that even if such waivers were issued, they would not
17 affect the legal bases of CIS’s 2008 denial letters.

18 2. *Ms. Ramirez Was Ineligible for a V visa in 2004*

19 The Court agrees with defendants that Ms. Ramirez was issued a V visa in error given her
20 inadmissibility arising from INA § 212 (a)(9)(C)(i)(II). As defendants note, while the C.F.R.
21 which sets forth the conditions under which a beneficiary of a timely I-130 petition may apply
22 for a non-immigrant V visa specifically exempts consideration of certain grounds of
23 inadmissibility (“in determining the alien’s admissibility in V nonimmigrant status, sections
24 212(a)(6)(A), (a)(7), and (a)(9)(B) of the Act do not apply”), it does not similarly prohibit
25 consideration of permanent inadmissibility under INA § 212 (a)(9)(C)(i)(II). See 8 C.F.R. §
26 214.15(f). Thus, as an illegal reentrant after removal, Ms. Ramirez was by a plain reading of
27 INA § 212 (a)(9)(C)(i)(II) and 8 C.F.R. § 214.15(f) inadmissible to the United States in 2004

1 even for the limited purposes of admissibility in temporary nonimmigrant status.

2 Plaintiffs argue in response that Ms. Ramirez was eligible for a waiver of INA § 212
3 (a)(9)(C)(i)(II) inadmissibility. See Dkt. #22 at 5. However, as stated previously, while waivers
4 of INA § 212 (a)(9)(C)(i)(II) inadmissibility are available to aliens who seek readmission from
5 outside the United States more than 10 years after their last departure from the United States,
6 Ms. Ramirez would not have been eligible to apply for a waiver as she had not remained outside
7 of the United States for 10 years. Therefore, even had the CIS sought to grant Ms. Ramirez the
8 necessary waivers in 2004 (of which there are no records), under a plain reading of the statute, it
9 would not have been capable to waive inadmissibility under INA § 212 (a)(9)(C)(i)(II) at that
10 time.

11 If the grant of a V visa was indeed error, the next logical question is whether CIS's grant
12 of a V visa in 2004 somehow constitutes an implicit waiver of inadmissibility or estops CIS from
13 later denying her special adjustment of status. This possibility is foreclosed by the Ninth
14 Circuit's holding that a mistaken procedural admission does not equal a lawful admission under
15 the INA:

16 Admission is not lawful if it is regular only in form. The term "lawfully" denotes
17 compliance with substantive legal requirements, not mere procedural regularity . . .
18 . The provisions concerning deportation demonstrate that what is essential is
19 lawful status, not regular procedure. An alien is subject to deportation if at the time
20 of entry [he] was within one or more of the classes of aliens excludable by the law
21 existing at the time of such entry.

22 Monet v. I.N.S., 791 F.2d 752, 753 -754 (9th Cir. 1986) (quoting Matter of Longstaff, 716 F.2d
23 1439, 1441 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984)); see also In Lai Haw Wong v.
24 I.N.S., 474 F.2d 739, 741 (9th Cir. 1973) (approving the BIA's ruling that aliens' admissions on
25 visas to which they were not entitled conferred no lawful status on the aliens for purposes of
26 obtaining relief from deportation).

27 3. *The INA Does Not Indicate that Admissibility in Temporary V Status Equals*
28 *Admissibility for Special Status Adjustment*

Finally, the INA itself indicates that even were waivers granted in 2004, and even if they
were not error, they would not serve as waivers for purposes of special status adjustment.

1 Plaintiff argues that a waiver of inadmissibility was available to Ms. Ramirez in 2004 through
2 INA § 212(d)(3), 8 U.S.C. § 1182(d)(3). See Dkt. #22 at 5. However, INA § 212(d)(3) by its
3 terms only grants an alien found inadmissible under INA § 212(a) and seeking a “nonimmigrant”
4 visa “temporary” admission into the United States. See INA § 212(d)(3)(i), 8 U.S.C. §
5 1182(d)(3)(i) (providing that an alien applying for a non-immigrant visa and known to be
6 ineligible due to inadmissibility under INA § 212(a) “may, after approval by the Attorney
7 General of a recommendation by the Secretary of State or by the consular officer that the alien
8 be *admitted temporarily despite his inadmissibility*, be granted such a visa and may be admitted
9 into the United States *temporarily as a non-immigrant* in the discretion of the Attorney
10 General”); INA § 212(d)(3)(ii), 8 U.S.C. § 1182(d)(3)(ii) (providing that an alien inadmissible
11 under INA § 212(a) who is seeking admission and who possesses appropriate documents or is
12 granted a waiver of such documents “may be admitted into the United States *temporarily as a*
13 *non-immigrant* in the discretion of the Attorney General”) (emphases added).

14 Plaintiff’s argument that the grant of a V visa *ipso facto* implies a waiver of
15 inadmissibility applying to status adjustment is also belied by the C.F.R. C.F.R. § 214.15(f),
16 discussed above, like INA § 212(d)(3)(I) only contemplates admissibility “in V nonimmigrant
17 status.” Further, C.F.R. § 214.15(j), which provides for the revocation of V status following
18 denial of, *inter alia*, an application for adjustment of status, obviously contemplates V visa
19 holders who are inadmissible on other grounds:

- 20 j) Termination of status—(1) General. The status of an alien admitted to the United
21 States as a V nonimmigrant under section 101(a)(15)(V) of the Act shall be
22 automatically terminated 30 days following the occurrence of any of the following:
23 (i) The denial, withdrawal, or revocation of the Form I–130, Petition for Immediate
24 Relative, filed on behalf of that alien;
25 (ii) The denial or withdrawal of the immigrant visa application filed by that alien;
26 (iii) The denial or withdrawal of the alien’s application for adjustment of status to
27 that of lawful permanent residence;

28 In sum, it appears that CIS was in error when it granted Ms. Ramirez a V visa in 2004,
and correct when it subsequently denied her adjustment application in 2008. Its apparent error in
2004 did not waive Ms. Ramirez’s inadmissibility in 2007, as the 2004 admission was

1 procedural and not substantive. Moreover, even if the V visa was not granted in error, its
2 existence in no way constitutes a waiver of INA § 212(a)(9)(C)(i)(II) or of the reinstatement
3 provision with regard to her application for status adjustment.²

4 The Court therefore finds that CIS’s interpretation of the INA and C.F.R in its
5 submissions and denial letters, which tracks the Court’s reasoning outlined above, is clearly
6 reasonable and not arbitrary or capricious. Finding no statutory direction otherwise, the Court
7 defers to CIS’s construction that admission in V status does not waive inadmissibility for the
8 purposes of special status adjustment.

9 **F. The “Retroactive” Effect of Duran-Gonzales**

10 Plaintiff finally argues that CIS should not have applied Duran-Gonzales’s rule
11 precluding aliens subject to §§ 212(a)(9)(C)(i)(II) and 241(a) from applying for I-212 and I-601
12 waivers concurrent with their status adjustment applications. Plaintiff argues instead that this
13 Court should apply the rule of Perez-Gonzales v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), which
14 was Ninth Circuit law when she applied for adjustment of status on July 17, 2007 and which was
15 effectively overturned by Duran-Gonzales.

16 Without reopening the actual issues in these decisions (which have, in any case, been
17 covered largely by the statutory analysis in this decision), the Court finds the law here is clear
18 regarding retroactivity – Duran-Gonzales’s rule applies. “The principle that statutes operate
19 only prospectively, while judicial decisions operate retrospectively, is familiar to every law
20 student.” Rivers v. Roadway Exp., Inc., 511 U.S. 298, 311-12 (1994). Thus, “[a] judicial
21 construction of a statute is an authoritative statement of what the statute meant before as well as
22 after the decision of the case giving rise to that construction.” Id. at 312-13. When a court

23
24 ² Plaintiff’s statutory arguments as to whether the reinstatement provision should apply to a V
25 visa holder who is an illegal reentrant are also unavailing. For example, plaintiff cites twice to a single
26 sentence from 8 C.F.R. § 241.8(a)(3), which specifies the procedure for reinstatement of removal under
27 Section 241(a)(5) (“The immigration officer shall attempt to verify an alien’s claim, if any, that he or
she was lawfully admitted, which shall include a check of Service data systems available to the
officer.”) The Court fails to see how it follows from that one sentence that temporary V status
admission bars reinstatement of a previous removal order.

1 “applies a rule of federal law to the parties before it, that rule is the controlling interpretation of
2 federal law and must be given full retroactive effect in all cases still open . . . and as to all
3 events, regardless of whether such events predate or postdate [the] announcement of the rule.”
4 Harper v. Va. Dept. of Taxation, 509 U.S. 86, 97 (1993). Indeed, the Ninth Circuit implicitly
5 foreclosed plaintiff’s retroactivity argument when it denied the appeal of the similarly situated
6 plaintiffs in Duran-Gonzales, who themselves argued that Perez-Gonzales should apply to their
7 applications. The District Court on remand similarly held: “Contrary to Plaintiffs’ argument, the
8 Ninth Circuit’s silence on the retroactivity of its decision requires this Court to assume that it
9 carries full retrospective effect.” Gonzalez v. Dept. of Homeland Sec., 2009 WL 302283, at *5
10 (W.D. Wa. Feb. 6, 2009).

11 III. CONCLUSION

12 In conclusion, because the evidence is not sufficient to show there was an actual waiver in
13 2004, because any explicit or implicit waiver would likely be error and not in accord with
14 substantive law, and because the mere existence of a temporary nonimmigrant visa is not in itself
15 proof of a waiver of inadmissibility as to permanent status adjustment, plaintiff has failed to
16 show the existence of a material fact sufficient to withstand summary judgment. Further, it is
17 clear under Duran-Gonzalez that Ms. Ramirez was not eligible to apply for a waiver of her
18 inadmissibility concurrent with her application for status adjustment and that the CIS’s denial of
19 that application was not arbitrary and capricious.

20 For the foregoing reasons, the Court GRANTS defendants’ motion for summary
21 judgment and DENIES plaintiff’s motion for summary judgment. The Clerk of Court is directed
22 to enter judgment against plaintiff and in favor of defendant.

23 DATED this 20th day of January, 2010.

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25 

26 Robert S. Lasnik
27 United States District Judge