U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

Date: APR 0 4 2013 Office: LOS ANGELES, CA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted and the underlying application remains denied.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit, and section 212(a)(9)(C)(i)(II) of the Act for reentering the United States without inspection after having been removed. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse and denied the waiver application accordingly. The AAO dismissed a subsequent appeal, concluding that the applicant is ineligible to apply for permission to reapply for admission because she entered the United States without inspection after previously being removed from the United States. Therefore, the AAO concluded that no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative and dismissed the appeal accordingly.

Counsel has filed a motion to reopen and reconsider contending that the AAO erred in not providing the applicant with a copy of her file. In addition, counsel contends the AAO should hold the case in abeyance because the Court of Appeals for the Ninth Circuit granted rehearing en banc for *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), and a petition for rehearing en banc for *Duran Gonzales v. DHS*, 659 F.3d 930 (9th Cir. 2011), is pending.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel has submitted a brief and additional evidence in support of the applicant's waiver application. The applicant's submission meets the requirements of a motion to reopen and reconsider. Accordingly, the motion is granted.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006); *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez,* 25

I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, the BIA has held that it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission.

The applicant resides in the jurisdiction of the Ninth Circuit Court of Appeals. In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit Court of Appeals overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the BIA's holding that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving permission to reapply for admission prior to the expiration of the ten-year bar. The Ninth Circuit clarified that its holding in *Duran Gonzalez* applies retroactively, even to those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *Morales-Izquierdo v. DHS*, 600 F.3d. 1076 (9th Cir. 2010). *See also Duran Gonzales v. DHS*, 659 F.3d 930 (9th Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzales* prospectively only).

In *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), the Ninth Circuit further held that the BIA ruling in *Matter of Briones* that aliens inadmissible due to illegal reentry after accruing more than one year of unlawful presence could not apply for adjustment of status applied retroactively. On June 27, 2011, the petitioner in *Garfias-Rodriguez* filed a petition for panel rehearing and petition for rehearing en banc from the April 11, 2011 decision. On March 1, 2012, the Ninth Circuit Court of Appeals ordered that *Garfias-Rodriguez* be reheard en banc. *Garfias-Rodriguez v. Holder*, 672 F.3d 1125 (9th Cir. 2012).

The applicant submitted the Form I-290B, Notice of Appeal or Motion, on June 4, 2012. On October 19, 2012, the court issued its en banc decision in *Garfias-Rodriguez*. In this decision, the court held that it must defer to the BIA's decision in *Matter of Briones*, and held that the BIA's decision may be applied retroactively to the Petitioner. *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012).

The litigation on this issue has been resolved by the Ninth Circuit Court of Appeals, which has deferred to the BIA's holding that aliens who are inadmissible under section 212(a)(9)(C) of the Act may not seek adjustment of status under section 245(i) of the Act. The Court has further held that this ruling may be applied retroactively.

Here, the applicant attempted to enter the United States using an alien registration receipt card that was not her own, was detained for approximately three days, and was removed under an order of expedited removal. She subsequently entered the United States without inspection in approximately August 1997 and continues to reside in the United States. Therefore, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act and she is currently statutorily ineligible to apply for permission to reapply for admission. Accordingly, the appeal must be dismissed.

With respect to counsel's contention that the AAO erred in considering evidence outside of the record and that the AAO should have provided the applicant a copy of her file in order to give her the opportunity to rebut the evidence, the proper means to obtain a copy of the applicant's file is through a Freedom of Information Act (FOIA) request, which counsel has submitted. The AAO does not provide copies of information contained in an applicant's record. As noted on the instructions to the Form G-639, Freedom of Information/Privacy Act Request, "Do not submit your FOIA/PA request to your local USCIS office or Service Center. USCIS processes all FOIA/PA requests at the NRC." Any questions with respect to a FOIA request should be directed to the FOIA office.

As stated in the AAO's previous decision, our decision is based on the record before us. The record contains ample documentation that the applicant was placed in expedited removal proceedings, removed from the United States in August 1997, and subsequently reentered the United States without inspection. The record contains a copy of a Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A), dated August 25, 1997. The sworn statement indicates it was translated and read to the applicant in Spanish, her native language. The applicant, representing herself as [redacted] initialed each page of her sworn statement and signed it. In addition, the record contains a copy of Form I-213, Record of Deportable/Inadmissible Alien, which indicates that the applicant, representing herself as [redacted] was served with a Form I-860, Notice and Order of Expedited Removal, charged with inadmissibility pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Act, and summarily removed from the United States. The record also contains Form I-860, Notice and Order of Expedited Removal, ordering the applicant removed pursuant to section 235(b)(1) of the Act. Furthermore, the record contains Form I-296, Notice to Alien Ordered Removed/Departure Verification, dated August 25, 1997, notifying the applicant that she is prohibited from entering, attempting to enter, or being in the United States for five years as a consequence of having been found inadmissible as under section 235(b)(1) or 240 of the Act. The Form I-296 verifies she was removed from the United States on August 26, 1997. The AAO notes that Forms I-213, I-296, and I-860 all include a photograph of the applicant. Moreover, as counsel concedes in the first page of his brief:

> In approximately August 1997, [redacted] sought to enter the US from Mexico by using an alien registration receipt card that was not her own. . . . [She] was detained . . . by the US immigration authorities[,] signed one or more document(s)[,] and she was returned to Mexico. . . . Subsequently, in approximately August 1997, [redacted] entered the US without inspection.

Therefore, it is without question that the facts in this case show that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act.

To the extent counsel does not concede the applicant was in expedited removal proceedings, the AAO has no jurisdiction over any challenge to a removal order. The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28,

2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.

The applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act and is currently statutorily ineligible to apply for permission to reapply for admission. Accordingly, no purpose would be served in discussing whether the applicant has established extreme hardship to a qualifying relative and the underlying waiver application must be dismissed.

ORDER: The motion is granted and the underlying waiver application remains denied.