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)

[redacted]

Date: FEB 05 2013 Office: FRESNO, CA FILE: [redacted]

IN RE: [redacted]

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:

[redacted]

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, Fresno, California. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be dismissed 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 pursuant to section 212(a)(9)(C)(i)(II) of the Act for reentering the United States without inspection after being removed. The field office director found that since fewer than ten years have elapsed since the applicant last left the United States, she is ineligible to apply for consent for admission and denied the waiver application accordingly. The AAO dismissed a subsequent appeal, also concluding that the applicant is ineligible to apply for consent for admission because she entered the United States without inspection after her removal. Therefore, the AAO concluded that no purpose would be served in discussing whether she has established the existence of extreme hardship to a qualifying relative and dismissed the appeal accordingly.

Counsel has filed a motion to reopen and reconsider. In response to the question asking for the basis for the appeal, counsel states, in pertinent part, "[s]ee attached the brief the content of which is incorporated for this motion to reconsider and reopen. The applicant filed for adjustment of status before the change of law. In light of *Nunez-Reyes v. Holder*, [646 F.3d 684 (9th Cir. 2011)], the service center should reconsider the decision. The applicant filed for the adjustment of status before the change of law. The applicant should not be penalized because her case was adjudicated after the change of law." *Notice of Appeal or Motion (Form I-290B)*, dated January 4, 2012.

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, the applicant's filing does not meet the requirements of a motion. Counsel has not stated any new facts to be proved in the reopened proceedings. Therefore, the motion does not meet the requirements of a motion to reopen. In addition, the motion does not meet the requirements of a motion to reconsider. Although counsel states that the reason for reconsideration is based on "the change of law" in light of *Nunez-Reyes v. Holder*, the AAO's prior decision had already addressed, and rejected, that argument. The AAO's decision explicitly cited *Nunez-Reyes v. Holder*, which was decided *en banc*, and concluded that the applicant is currently ineligible to reapply for permission for admission. *AAO Decision*, dated December 13, 2011 ("*See also Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the courts."). The fact that counsel may disagree with the holding in the cases cited in the AAO's previous decision is insufficient to meet the requirements of a motion to reconsider, absent support from any pertinent precedent decisions. To the extent counsel submits a brief and incorporates the contents of it for the instant motion, the submitted brief

requests a rehearing *en banc* for a Ninth Circuit Court of Appeals' case, *Garfias-Rodriguez v. Holder*, Case No. 09-72603. The AAO's previous decision did not rely on *Garfias-Rodriguez v. Holder* and counsel provides no explanation for how this brief is relevant to the instant motion. Counsel has not supported the motion with any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or Service policy at the time of the decision. In any event, the AAO notes that 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*, 2012 WL 5077137 (2012 C.A.9). 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)(i)(I) 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.

The motion does not meet the applicable requirements of a motion. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed and the underlying application is denied.