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: JAN 3 1 2013 Office: SEATTLE, WA [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)

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,

Ellen C. Johnson

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Seattle, Washington. 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)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and section 212(a)(9)(C)(i)(I) of the Act for reentering the United States without inspection after having been unlawfully present in the United States for more than one year. The applicant is the daughter of a lawful permanent resident and married to a U.S. citizen, and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act in order to reside with her mother, her husband, and their children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse. In addition, the field office director found that the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied pursuant to section 212(a)(9)(C) of the Act because the applicant reentered the United States illegally and ten years had not elapsed since the date of her departure. As such, the field office director found that the applicant's Form I-601 should be denied as a matter of discretion. The field office director 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 her unlawful presence of more than one year. 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 based on the Court of Appeals for the Ninth Circuit's Order granting a rehearing *en banc* in *Garfias-Rodriguez v. Holder*, 649 F.3d 942, 950 (9th Cir. 2011). According to counsel, the Ninth Circuit "has ordered a rehearing en banc for class members who applied for adjustment of status before November 30, 2007, pursuant to the decisions of *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and/or *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007)." Counsel contends the Ninth Circuit's Order "withdraws all aspects of the 2011 *Garfias-Rodriguez* decision."[1]

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

[1] The AAO notes that counsel requests that the AAO grant the applicant's Form I-485 adjustment application, Form I-601 waiver application, and Form I-212 application for permission to reapply for admission. As stated in our previous decision, there is no evidence in the record showing the applicant filed a separate appeal of the initial denial of the Form I-212 application, and the AAO does not have jurisdiction over the denial of a Form I-485. Therefore, this decision pertains only to the Form I-601 waiver application.

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 a copy of the Ninth Circuit Court of Appeals' Order. 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.

The applicant submitted the Form I-290B, Notice of Appeal or Motion, on March 12, 2012. 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). On October 19, 2012, the court issued its en banc decision in the matter. 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.

Here, as counsel concedes, the applicant entered the United States without inspection in January 1992, departed the United States in April 2002, reentered the United States without inspection in August 2002, and continues to reside in the United States. Therefore, it is uncontested that she is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act and that she is currently statutorily ineligible to apply for permission to reapply for admission. Accordingly, the appeal must be dismissed.

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