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

(b)(6)

U.S. Citizenship and Immigration Services

Date: OCT 0 2 2013 Office: SAN BERNARDINO FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Bernardino, California. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). A motion to reconsider was granted by the AAO, and the AAO affirmed its previous decision. The matter is again before the AAO on a motion. The motion will be granted and the prior decision of the AAO will be affirmed.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The record indicates that the applicant is the son of Lawful Permanent Residents of the United States and the father of three U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his family.

The Field Office Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated May 22, 2009.

The AAO, reviewing the applicant's Form I-601 on appeal, also found the applicant to be inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act.[1] On his Form I-485, Application to Register Permanent Resident or Adjust Status, the applicant indicates that he last entered the United States in March 2006 without inspection. As the applicant reentered the United States without inspection after having accrued unlawful presence of more than one year, he is inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act. The AAO found that the applicant was residing in the United States and had not remained outside the United States for ten years after his last departure, making him statutorily ineligible to apply for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. Consequently, the appeal was dismissed. *Decision of the AAO*, dated December 8, 2011.

On January 5, 2012, the applicant, through counsel, filed a motion to reconsider the AAO's decision. The AAO granted the motion to reopen, and affirmed the prior decision. *Decision of the AAO*, dated January 24, 2013. The applicant subsequently, through counsel, filed a second motion to reopen the AAO's decision of February 20, 2013, which was received by the AAO on June 20, 2013.

On motion to reconsider, counsel contends that, as the applicant's case arose in the Ninth Circuit, the AAO failed to consider that the Ninth Circuit cases Duran Gonzales v. DHS, 508 F.3d 1227 (9th Cir. 2007) and *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), as both cases leave open room to allow the applicant a waiver of inadmissibility. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent

[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As the applicant has stated reasons for reconsideration supported by precedent decisions, the motion to reconsider will be granted.

Section 212(a)(9)(C) of the Act, provides:

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general. -Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
>
> and who enters or attempts to reenter the United States without being admitted is inadmissible.
>
> (ii) Exception.—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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The record reflects that the applicant entered the United States without inspection in January 1994. In removal proceedings, the applicant was granted voluntary departure by an immigration judge on December 11, 1998, and departed the United States on April 6, 1999. The applicant began accruing unlawful presence on April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[2] and continued his unlawful presence until his departure on April 6, 1999, a period of more than one year. The applicant subsequently entered the United States without inspection in March 2006. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act and may not apply for consent to reapply unless the applicant has been outside the United States for more than ten years since the date of his last departure under section 212(a)(9)(C)(ii) of the Act.

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

[2] No period of unlawful presence prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

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 Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) *(Duran Gonzales I),* 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)(II) 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. On October 25, 2011, the court held that its decision in *Duran Gonzales I* had full retroactive effect. *Duran-Gonzales v. DHS*, 659 F.3d 930, 939-41 (9th Cir. 2011). *(Duran Gonzales II)*. In a separate decision, the court deferred to the decision of the BIA in *Matter of Briones* that section 212(a)(9)(C)(i)(I) of the Act bars aliens from adjustment of status under section 245(i), overturning its prior decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). *Garfias-Rodriguez v. Holder,* 649 F.3d 942, 949 (9th Cir. 2011). The court further held that *Matter of Briones* could be applied retroactively. *Id.* at 949-50.

On March 1, 2012, the Ninth Circuit Court of Appeals ordered that *Garfias-Rodriguez* be reheard en banc, and in its en banc decision, the court adopted a multi-factor retroactivity test based on the decision in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). After applying the *Montgomery Ward* factors, the court again found that the BIA decision in *Matter of Briones* may be applied retroactively to the Petitioner.[3] *Garfias-Rodriguez v. Holder,* 702 F.3d 504 (9th Cir. 2012) (en banc). *See also Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1071-72 (9th Cir. 2013) (applying the *Montgomery Ward* test and holding that the BIA decision in *Torres–Garcia* applied retroactively to an alien who applied for adjustment of status several weeks before the issuance of the decision in *Duran Gonzales I* adopting *Torres–Garcia* as the law of the circuit).

The five factors of the *Montgomery Ward* test applied in *Garfias-Rodriguez* include the following:

> (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.

Garfias-Rodriguez at 518 (quoting *Montgomery Ward,* 691 F.2d at 1333).

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[3] In light of the intervening en banc decision in *Garfias-Rodriguez,* the court withdrew the opinion in *Duran Gonzales II*, vacated the district court's judgment in the matter and remanded the case to apply the *Montgomery Ward* test to determine whether *Duran Gonzales I* should be applied retroactively to the plaintiffs in the matter. *Gonzales v. DHS*, 712 F.3d 1271, 1276-78 (9th Cir. 2013).

The court found that the first factor was developed in a different context, was not well-suited for application to immigration law and did not weigh in favor of either side. *Id.* at 520-21. The court found that the second and third factors were closely intertwined and favor the government, as the new rule in *Briones* did not constitute an "abrupt departure from well-established practice" on which a party's reliance would more likely be reasonable, and that ambiguity in the law and the tension between sections 212(a)(9)(C) and 245(i) of the Act "should have given Garfias no assurances of his eligibility for adjustment of status." *Garfias-Rodriguez* at 521-523. In addition, the court found that the two reliance interests identified by Garfias, the payment of a $1000 penalty fee and his admission of his unlawful presence in the United States by applying for adjustment of status, did not favor Garfias because he filed his application well in advance of any decision finding that section 212(a)(9)(C) inadmissibility did not bar him from adjusting his status under section 245(i) of the Act.[4] The court also gave little weight to the fact that Garfias admitted to his illegal presence in the United States by applying for adjustment of status. *Id.* at 522. The court found that the fourth factor, the burden of possible or certain deportation, strongly favored Garfias, while the fifth factor -- the statutory interest in applying a new rule -- favors the government "because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well-established." *Id.* at 523 (*citing Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). The court concluded that Garfias was not entitled to relief because the balance of factors favored the retroactive application of *Briones*. *Id.* at 523.

In the present case the applicant accrued unlawful presence in the United States between April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and April 6, 1999, the date of his departure. The applicant subsequently re-entered the United States without inspection in March 2006. The applicant filed an application for adjustment of status on March 26, 2008, which was subsequent to BIA ruling in *Matter of Briones*, and the Ninth Circuit ruling in *Duran Gonzales I.* When applying the other factors of the *Montgomery Ward* test the court in *Garfias-Rodriguez* found that the new rule in *Matter of Briones* did not represent an abrupt departure from well-established practice, but merely attempted to fill a void in an unsettled area of law, and the statutory interest in applying a new rule favored the retroactive application of the decision.

In the present matter, the applicant last departed the United States in April 1999 and did not remain outside the United States for ten years since his last departure, but returned in March 2006. He is currently statutorily ineligible to apply for permission to reapply for admission and has not established that the decisions in *Matter of Torres-Garcia* and *Matter of Briones* precluding relief

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[4] Garfias had applied for adjustment of status in 2002, two years before *Perez-Gonzalez* was decided and four years before the decision in *Acosta*, which held that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) of the Act are eligible for adjustment of status under section 245(i). The court stated,

> The only window in which Garfias' reliance interest based on our previous rule might have been reasonable is the 21-month period in 2006 and 2007 between the issuance of *Acosta* and *Briones*. After *Briones* was issued, he was on notice of *Acosta's* vulnerability. *Garfias-Rodriguez* at 522.

under section 212(a)(9)(C)(ii) of the Act and the decision in *Garfias-Rodriguez* adopting *Briones* should not be applied retroactively in his case.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the prior decision of the AAO is affirmed.