



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

Date: **APR 08 2013** Office: SAN FRANCISCO FILE: [Redacted]  
IN RE: Applicant: [Redacted]

APPLICATIONS: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 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, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or the willful misrepresentation of a material fact; and section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for being unlawfully present in the United States for an aggregate period of more than 1 year and reentering the United States without being admitted. Additionally, counsel indicates and the record reflects that the applicant is also inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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 and seeking readmission within ten years of his last departure from the United States.<sup>1</sup> The record indicates that the applicant is married to a U.S. citizen and is the father of a U.S. citizen child and stepchild. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his spouse and children.

The Field Office Director determined that even if the applicant had established extreme hardship to a qualifying relative, he has not remained outside of the United States for ten years, and he does not warrant a favorable exercise of discretion. *Decision of the Field Office Director*, dated June 29, 2012. She denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, the applicant, through counsel, claims that the applicant's wife will suffer extreme hardship if the applicant's waiver application is denied. *Form I-290B, Notice of Appeal or Motion*, filed July 24, 2012. Additionally, counsel claims that courts "have struggled with the interplay" between sections 245(i) and 212(a)(9)(C)(i) of the Act, and have "consistently found that the permanent bar was trumped" by section 245(i); therefore, the applicant is eligible for adjustment of status because he is the beneficiary of a petition filed before May 1, 2001. *Counsel's appeal brief*, dated August 22, 2012. The record establishes that the petition filed before May 1, 2001, was filed by the applicant's first wife and they are now divorced. The applicant's second petition, based on his marriage to his second wife, was filed on November 23, 2011 and was approved on February 15, 2012.

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The Field Office Director determined that the applicant was not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, but this determination is not supported by the record.

Section 212(a)(9) of the Act states, in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

- (I) has been unlawfully present in the United States for an aggregate period of more than 1 year,

....

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 Secretary has consented to the alien's reapplying for admission.

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, based on current law, to avoid inadmissibility under section 212(a)(9)(C) of the Act, 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 United States Citizenship and Immigration Services 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 (Ninth Circuit) overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the Board of Immigration Appeals' (Board) 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. *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010); *see also Duran Gonzalez v. DHS*, 659 F.3d 930 (9<sup>th</sup> Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzalez* prospectively only).

In *Garfias-Rodriguez v. Holder*, 672 F.3d 1125 (9<sup>th</sup> Cir. 2012), the Ninth Circuit held that it must defer to the Board's decision in *Matter of Briones* and that the Board's decision may be applied retroactively to the petitioner. The litigation on this issue has been resolved by the Ninth Circuit, which has deferred to the Board'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 record establishes that the applicant initially entered the United States in December 1989 without inspection. He departed the United States in May 1998. In June 1998, the applicant attempted to enter the United States by presenting a fraudulent border crossing card; he was apprehended and returned to Mexico. A few days later, he reentered the United States without inspection. The applicant accrued unlawful presence between April 1, 1997 and his departure in June or July 1998. He subsequently entered without inspection in August 1998. He has not remained outside the United States for 10 years since his last departure. He is thus currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(i) of the Act.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen spouse or whether he merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.