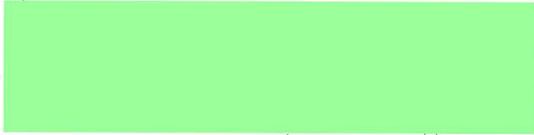


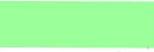


U.S. Citizenship
and Immigration
Services

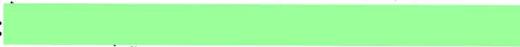
(b)(6)



DATE: FEB 11 2013 Office: FRESNO, CA

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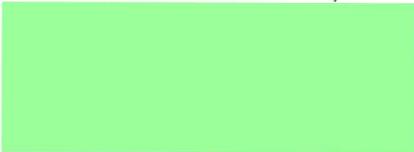
IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality 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, Fresno, California. The denial was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The applicant filed a motion to reopen and reconsider the AAO decision, which is now before the AAO. The motion to reconsider will be granted and previous decisions of the field office director and AAO will be affirmed.

The applicant is a native and citizen of Mexico. She was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having misrepresented material facts when applying for admission to the United States. She is married to a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen husband, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 18, 2009. The AAO found that the applicant was ineligible to apply for re-admission without having resided outside the United States for a period of 10 years and dismissed the appeal on September 28, 2011.

On motion, counsel for the applicant asserts that the AAO should consider the holding in *Nunez-Reyes v. Holder*, 636 F.3d 684, (9th Cir. 2011), and that the applicant had relied on the holdings in *Acosta v. Gonzalez*, 439 F. 3d 550, (9th Cir. 2006), and *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), when she applied for adjustment of status under section 245(i) of the Act. *Form I-290B*, received October 13, 2011.

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: (1) 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 USCIS policy; and (2) 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).

In this case, the applicant has not articulated any new facts to be proved in the case, and as such the motion does not warrant granting as a motion to reopen. Counsel for the applicant has asserted that United States Citizenship and Immigration Services (USCIS) should apply the law as it was constituted at the time the applicant filed for adjustment of status, and has cited to a recently decided case in the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). While it is not evident counsel's assertions hold merit, this assertion nonetheless meets the standard for a motion to reconsider, and as such the AAO will grant the motion to consider the matter.

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

(C) Aliens unlawfully present after previous immigration violations

(b)(6)

(i) In general.-Any alien who-

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

(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, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. . . .

On January 6, 1999, the applicant attempted to enter the United States by presenting a border crosser card that did not belong to her and she was removed, pursuant to section 235(b)(1) of the Act. She then re-entered the United States without inspection some time prior to February 1, 1999. The applicant remained in the United States, married a U.S. citizen and applied for adjustment. As the applicant was removed from the United States and re-entered without inspection she is inadmissible under section 212(a)(9)(C)(i)(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 10 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 10 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. In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit 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 10-year bar (*Duran Gonzalez II*). The Ninth Circuit clarified that its holding in *Duran Gonzalez II* 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)(*Duran Gonzalez III*).

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 October 12, 2011. On motion to reconsider, counsel contends that the applicant's case arose in the Ninth Circuit and the law as of the date of the applicant's Form I-485 application to adjust status should be applied to the present matter. Specifically, counsel asserts that *Matter of Briones* should not be applied to the applicant's case. However, on March 1, 2012, the Ninth Circuit Court of Appeals ordered that *Garfias-Rodriguez v. Holder* 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. As such, the AAO does not find any legal basis for overturning its prior decision.

As the applicant is statutorily ineligible to file an application for permission to reapply for admission into the United States, she remains inadmissible under section 212(a)(9)(C)(i) of the Act. Accordingly, no purpose would be served in determining whether she is eligible for a waiver under section 212(i) of the Act, and the Form I-601 remains denied as a matter of discretion.

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