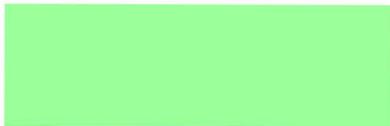




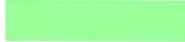
**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

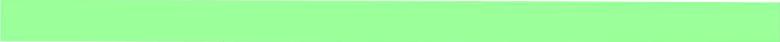


Date: **OCT 21 2013**

Office: LOS ANGELES, CA

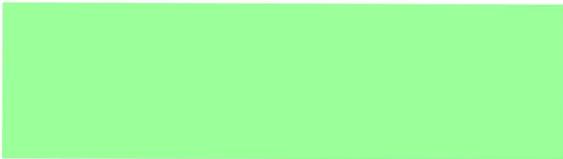
FILE: 

IN RE:

Applicant: 

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:



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 Field Office Director, Los Angeles, California, denied the waiver application. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion. The matter is now before the AAO on a second 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)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit, and section 212(a)(9)(C)(i)(II) of the Act for reentering the United States without inspection after having been removed. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse and 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 previously being removed from the United States. 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. On motion, counsel contended that the AAO should hold the case in abeyance because the Court of Appeals for the Ninth Circuit granted rehearing en banc for *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011), and a petition for rehearing en banc for *Duran Gonzales v. DHS*, 659 F.3d 930 (9<sup>th</sup> Cir. 2011), was pending. The AAO granted the motion, but denied the underlying application based on the Ninth Circuit's en banc decision in *Garfias-Rodriguez* which held that, under *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), 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, and that the holding in *Briones* may be applied retroactively to the petitioner. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512, 523 (9<sup>th</sup> Cir. 2012).

Counsel now submits a second motion contending, among other things, that the Ninth Circuit withdrew its decision in *Duran Gonzales v. DHS* and, therefore, it was improper as a matter of law for the AAO to rely on the case.

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, counsel has submitted a brief and additional evidence in support of the motion. The applicant's submission meets the requirements of a motion. Accordingly, the motion is granted.

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, 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.

The record reflects that on August 26, 1997, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act. The applicant subsequently entered the United States without inspection later the same month, in August 1997. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and requires permission to reapply for admission into the United States 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); see also *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). 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 *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 *Briones* may be applied retroactively to the Petitioner.<sup>1</sup> *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*, 702 F.3d at 518 (quoting *Montgomery Ward*, 691 F.2d at 1333).

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." *Id.* at 521-523. In addition, the court found that the two reliance

---

<sup>1</sup> 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).

interests identified by [REDACTED] 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 [REDACTED] 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.<sup>2</sup> The court also gave little weight to the fact that [REDACTED] 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 [REDACTED] 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 (9<sup>th</sup> Cir. 2004)). The court concluded that Garfias was not entitled to relief because the balance of factors favored the retroactive application of *Briones*. *Id.*

In the present case, counsel presents no specific facts to assert that the applicant relied on any former rule. The applicant was removed from the United States pursuant to section 235(b)(1) of the Act on August 26, 1997, and subsequently entered the United States without inspection in August 1997, prior to the Ninth Circuit’s rulings in *Perez-Gonzalez* or *Acosta*. In addition, the applicant filed an application for adjustment of status on December 8, 2006, after the BIA’s decision in *Torres-Garcia*, and therefore, she was on notice of *Perez-Gonzalez*’s vulnerability. *Cf. Garfias-Rodriguez*, 702 F.3d at 522-23 (stating that the ambiguity in the law was obvious and that any reliance the petitioner may have placed on the Ninth Circuit’s “generous reading of the statute” held some risk considering *Chevron* deference to the BIA). Thus, the applicant has not shown reliance on a former rule at the time of her application to adjust status. Furthermore, when applying the other factors of the *Montgomery Ward* test, the court in *Garfias-Rodriguez* found that the new rule in *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. Therefore, although the AAO acknowledges counsel’s contention that the Ninth Circuit withdrew its opinion in *Duran Gonzales II* in order for the lower court to apply the *Montgomery Ward* test to the petitioners in that case, here, after applying the *Montgomery Ward* factors to the applicant’s case, the AAO finds that the applicant has not met her burden of showing she is eligible to adjust her status.

---

<sup>2</sup> [REDACTED] 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 [REDACTED] 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.

In the present matter, the applicant last departed the United States in August 1997 and did not remain outside the United States for ten years since her last departure, but returned that same month. She is currently statutorily ineligible to apply for permission to reapply for admission and has not established that the decision in *Torres-Garcia* precluding relief under section 212(a)(9)(C)(ii) of the Act, and the decision in *Duran Gonzales I* adopting *Torres-Garcia*, should not be applied retroactively in her case.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant is not eligible to apply for consent to reapply at this time. Accordingly, no purpose would be served in evaluating whether the applicant has established extreme hardship to a qualifying relative and the underlying waiver application must be dismissed.

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 is granted and the underlying waiver application remains denied.