



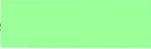
U.S. Citizenship
and Immigration
Services

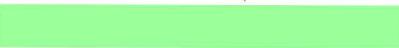
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Date: **JAN 24 2013**

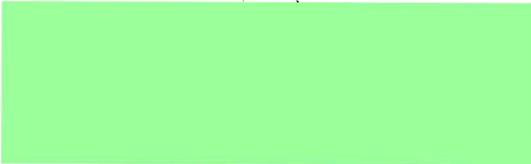
Office: SAN BERNARDINO

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 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,

f. 

Ron Rosenberg
Acting 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). 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 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. Consequently, the appeal was dismissed. *Id.*

On motion to reopen, counsel contends that, as the applicant's case arose in the Ninth Circuit, it is imperative to consider ongoing litigation in *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011), in which a petition for rehearing en banc was pending, as it would have a direct impact on the applicant's case.

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

(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

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).

(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....

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 January 5, 2012. On motion to reopen, counsel contends that, as the applicant's case arose in the Ninth Circuit, it is imperative to consider the on-going litigation in *Garfias-Rodriguez v. Holder*, as it would have a direct impact on the applicant's case. On March 1, 2012, the Ninth Circuit Court of Appeals ordered that the case 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.

The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, the applicant is statutorily ineligible to seek permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act.

As the applicant is not eligible to receive an exception from his section 212(a)(9)(C)(i) inadmissibility, the AAO finds no purpose would be served in considering whether he is eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. The appeal will therefore be dismissed.

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 application remains denied.

ORDER: The motion to reopen is granted and the waiver application remains denied.