

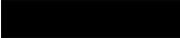


U.S. Citizenship
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FILE: 

Office: PHOENIX DISTRICT OFFICE

Date: NOV 21 2005

IN RE: 

APPLICATION: Application for Permission to Reapply for Admission Into the United States After Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Phoenix, Arizona, who certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed, though with some modification.

The record reflects that the applicant is a native of El Salvador who entered the United States without inspection in October 1995 and returned voluntarily to El Salvador in December 1999. In February 2000, the applicant attempted to enter the United States, was apprehended, and voluntarily returned to El Salvador. The applicant re-entered the United States without admission in February 2000. The applicant has been in the United States since that time. The applicant married a United States citizen on June 19, 1997 and is the beneficiary of an approved I-130 Petition for Alien Relative filed by her husband. The applicant filed an I-485 Application to Register Permanent Resident or Adjust Status on March 5, 2002. On February 11, 2005, the applicant filed an I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal.

The director found the applicant inadmissible under section 212(a)(9)(C)(i)(I) of the Act as an alien who entered the United States illegally after accruing more than one year of unlawful presence in the United States. The director denied the applicant's I-212. The director further found that even in situations where a Form I-212 is accepted, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), does not eliminate inadmissibility under section 212(a)(9)(C) of the Act. *Decision of the District Director*, Phoenix, Arizona, dated October 3, 2005.

In a motion to reconsider the director's denial of the applicant's I-485 and I-212, counsel contends that pursuant to the LIFE Act, the Ninth Circuit Court of Appeals decision in *Perez-Gonzalez*, and the general ruling of the Tenth Circuit Court of Appeals decision in *Padilla-Caldera v. Gonzalez*, 426 F.3d 1294 (10th Cir. 2005), the applicant is eligible to apply for an I-212 from within the United States to waive her unlawful presence for over one year, in conjunction with an application for adjustment of status pursuant to section 245(i) of the Immigration and Nationality Act (the Act). In support of the motion, counsel submitted a brief; materials related to the applicant's physical presence in the United States; and a copy of *Padilla-Caldera v. Gonzalez*.

Section 212(a)(9)(C)(i)(I) of the Act provides, 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 Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between--

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
 - (A) removal;
 - (B) departure from the United States;
 - (C) reentry or reentries into the United States; or
 - (D) attempted reentry into the United States.

The record indicates that the applicant entered the United States without inspection in October 1995, voluntarily left the United States in December 1999, attempted to enter the United States in February 2000, was apprehended and returned to Mexico without a formal order of removal, and then successfully entered the United States without admission the following day. The applicant accrued unlawful presence from April 1, 1997, the date that section 212(a)(9)(C) of the Act became effective, until December 1999, the date that she returned to El Salvador. The applicant re-entered the United States without admission in February 2000 and filed an I-485 on March 5, 2002. The applicant's returning to the United States without admission, after having been unlawfully present for more than one year, in the aggregate, makes her permanently inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act.

The director concluded that the applicant is not eligible to file an I-212 because, unlike the applicant in *Perez-Gonzalez*, who was formally removed from the United States and was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, the applicant in the instant case left the United States voluntarily and is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The director stated:

The policy of the Service has been that if an applicant was not deported or excluded from the United States, or if there is no order of removal, no record of removal, or no executed Warrant of Deportation/Removal in the file, an Application for Permission to Reapply for Admission Into the United States after Deportation or Removal, Form I-212, is not required. If an I-212 is filed when it is not required, the application is statistically [sic] denied, and the applicant is notified that consent to reapply is not needed. (See Adjudicator's Field Manual Chapter 43)

The AAO disagrees with the director's reason for denying the I-212. The section of the Adjudicator's Field Manual (AFM) quoted by the director deals with I-212's filed under section 212(a)(9)(A) of the Act, which specifically requires a formal removal. Section 43.1(a)(2) of the AFM deals with applications for permission

to reapply for admission under section 212(a)(9)(C) of the Act and notes the necessity of filing an I-212 for those aliens found inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

The AAO acknowledges the director's assertion that the Form I-212 refers to admission after deportation or removal. However, the AAO also notes that the name of a form is not always indicative of all of its uses, for example, the Form I-601 is still titled "Application for Waiver of Ground of Excludability" when, in fact, it deals with waivers of inadmissibility. The AAO, therefore, finds that an applicant who was not formally removed is eligible to file a Form I-212 provided the applicant is otherwise eligible to file. A discussion of the present applicant's eligibility follows.

Section 212(a)(9)(C)(ii) of the Act gives the Secretary discretion to consent to the applicant's re-applying for admission. Granting consent to reapply, however, relieves an alien of inadmissibility only if the alien is seeking admission more than 10 years after the date of the alien's last departure from the United States. The alien last departed the United States in December 1999. For this reason, granting consent to reapply would relieve her of inadmissibility only if she were seeking admission in December 2009 or later.

The AAO notes that [REDACTED] does not compel the approval of the applicant's Form I-212. [REDACTED] presented for decision the issue of the proper scope of section 241(a)(5) of the Act, which provides that an alien who is subject to a reinstated removal order is not eligible for any relief from removal. Before the United States Immigration and Customs Enforcement (USICE) had reinstated the removal order, the alien in [REDACTED] had filed a Form I-212, seeking consent to reapply. Noting that 8 CFR 212.2(e) and (i)(2) allow for "nunc pro tunc" filing of a Form I-212 together with an adjustment application, the court held that USICE could not execute a reinstated removal order so long as the United States Citizenship and Immigration Services (USCIS) had not adjudicated the Form I-212 and the related Form I-485. 379 F.3d at 788.

As the [REDACTED] court noted, the fact that the applicant has already returned to the United States does not preclude the applicant from filing a Form I-212. The regulation, 8 CFR 212.2(i)(2), provides that approval of a Form I-212 relates back to the date of the alien's last re-embarkation to the United States. The AAO must consider, therefore, whether the applicant would have been eligible for relief under section 212(a)(9)(C)(ii) of the Act in February 2000, when she last traveled to the United States. Under the plainly stated language of the statute, at least 10 years must have elapsed since the alien's last departure before the alien may request consent to reapply. Because less than 10 years have elapsed since the applicant last left the United States in December 1999, section 212(a)(9)(C)(ii) of the Act does not permit USCIS to consent to her re-applying for admission.

Whether to approve a Form I-212, moreover, is a matter entrusted to USCIS discretion. 379 F.3d at 788. In determining whether to exercise this discretion favorably, USCIS may consider the unlawful conduct that makes the waiver necessary. See *INS v. Yang*, 519 U.S. 26 (1996). The AAO notes that the applicant is the spouse of a U.S. citizen, and that the applicant has three children who are United States citizens and a child who is a lawful permanent resident of the United States. These are favorable equities. Nevertheless, the fact that one has married a citizen and has children who are citizens will not ordinarily warrant a favorable exercise of discretion under section 212(a)(9)(C)(ii) of the Act, when weighed against a long history of unlawful presence and repeated unlawful entries or attempted entries into the United States. The favorable equities are further undermined by the fact that the applicant was accruing unlawful presence when she married her husband. The applicant entered the United States unlawfully at least twice, and attempted to do so on at least one other occasion. The second unlawful entry, in fact, occurred on the very same day as the unsuccessful attempt to enter. Even assuming *arguendo* that the alien's failure to wait for at least 10 years since her last departure before applying for consent to reapply for admission does not absolutely bar a grant of

relief under section 212(a)(9)(C)(ii) of the Act, the AAO concludes that the applicant does not merit a favorable exercise of discretion.

Counsel asserts, finally, that according to the Tenth Circuit decision in *Padilla-Caldera, supra*, Congress intended section 245(i) of the Act to trump section 212(a)(9)(C)(i)(I) of the Act. The AAO notes that this Tenth Circuit case is not binding precedent in the Ninth Circuit where the applicant lives. For cases outside the Tenth Circuit, the AAO will follow *Mortera-Cruz v. Gonzales*, 409 F.3d 246 (5th Cir. 2005). That is, the AAO concludes, as the 5th Circuit did, that section 245(i) of the Act does not relieve an alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

As the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, the director properly concluded that the applicant is ineligible to become a lawful permanent resident of the United States.

ORDER: The director's decision is affirmed.