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U.S. Citizenship  
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22

MAR 25 2005

[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX DISTRICT OFFICE

Date:

IN RE:

[REDACTED]

APPLICATION:

Application for Permanent Residence Pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

ON BEHALF OF APPLICANT:

[REDACTED]

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.

The record reflects that the applicant is a native and citizen of Mexico. The applicant is married to a United States Citizen (USC) and seeks to adjust his status to that of a lawful permanent resident under the Immigration and Nationality Act (the Act) § 245(i), 8 U.S.C. § 1255(i), as the beneficiary of an immediate relative petition filed on his behalf by his USC wife on April 30, 2001. The applicant filed an Application to Register Permanent Residence or Adjust Status (I-485) on August 31, 2001.

The director found the applicant inadmissible under section 212(a)(9)(C)(i)(I) of the Act and denied the application as a matter of discretion. *Decision of the District Director, Phoenix, Arizona, dated August 24, 2004.*

On certification, counsel contends that section 212(a)(9)(C) of the Act is inapplicable to the applicant because he was never placed in removal proceedings, therefore no grant of voluntary departure could have ever been issued pursuant to section 240B of the Act. Counsel maintains that even if the applicant is subject to section 212(a)(9)(C), he should be allowed to submit an Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal (Form I-212). In the alternative, counsel asserts that if the applicant was granted voluntary departure, he is subject to 212(a)(9)(B) of the Act and should be allowed to file a waiver.

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 reflects that a United States Citizenship and Immigration Services (USCIS) officer interviewed the applicant under oath on August 20, 2004 regarding his adjustment of status application. The applicant testified as follows regarding his dates of entry into the United States and his returns to Mexico. He first entered the United States without inspection sometime in 1993. On February 7, 1997, he voluntarily returned to Mexico. He entered the United States without inspection on or about March 7, 1997. He voluntarily returned to Mexico on January 2, 1998. He entered the United States without inspection on or about February 2, 1998. He voluntarily returned to Mexico on February 24, 1999. He entered the United States without inspection on or about March 24, 1999, and has been here since that time. USCIS records reflect that the applicant was voluntarily returned to Mexico on the following dates: February 6, 1997; February 7, 1997; November 10, 1997; January 2, 1998; July 29, 1998; and February 24, 1999.

Based on the applicant's entries to the United States and the length of time he was in the United States without a valid status, the director concluded that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act as an alien who entered the United States without inspection after being unlawfully present in the United States for an aggregate period of more than one year. The director further concluded that the applicant was not eligible for the exception contained in 212(a)(9)(C)(ii) of the Act.

The AAO holds that the director correctly concluded that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The applicant's interview makes clear that, since April 1, 1997, he has been unlawfully present in the United States for an aggregate period exceeding one year. He last entered the United States without being inspected or admitted. Section 212(a)(9)(C)(i)(I) does not, by its terms, apply only to aliens who leave pursuant to a grant of voluntary departure. Section 212(a)(9)(C)(i)(II), for example, clearly requires removal proceedings and a removal order before an alien will be inadmissible under that provision; section 212(a)(9)(C)(i)(I) does not have a similar requirement.

The AAO also notes the decision of the U.S. Court of Appeals for the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004). In that case, the court held that approval of a Form I-212 in connection to an alien's inadmissibility under section 212(a)(9)(C) would render the alien eligible for adjustment of status under section 245(i) of the Act. The AAO believes that *Perez-Gonzalez* was wrongly decided. See *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10<sup>th</sup> Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8 (1<sup>st</sup> Cir. 2004). The applicant, however, lives in Arizona, and so the law of the Ninth Circuit applies to his case. 28 U.S.C. § 41.

As noted, counsel argues on certification that the applicant should be "allowed" to file a Form I-212. It is not clear from the record that the applicant was actually prevented from doing so. Since he has not filed a Form I-212, whether the applicant would be eligible to receive consent to reapply for reentry after removal is not before the AAO. Even in light of *Perez-Gonzalez*, however, it is noted that section 212(a)(9)(C)(ii) of the Act permits an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act to apply for consent to reapply for reentry after removal only if at least 10 years have elapsed since the alien's last departure. That is, although the applicant may certainly file a Form I-212, it appears that he would not be eligible for relief under 212(a)(9)(C)(ii) until February 25, 2009.

The final issue that counsel raised on certification is that the applicant should be able to seek a waiver under section 212(a)(9)(B)(v) of the Act of his inadmissibility under section 212(a)(9)(B)(i). Section 212(a)(9)(B)(i) provides, in pertinent part:

(B) Aliens Unlawfully Present.—

(i) In general.—Any alien (other than an alien lawfully admitted for permanent residence) who—

- I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
- II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

A review of USCIS records reveals that there was no single period of unlawful presence that exceeded one year. As the provisions of section 212(a)(9)(B) of the Act do not apply to an aggregate period of unlawful presence, section 212(a)(9)(B)(i)(II) does not apply. As we only have the applicant's statement regarding his dates of return, and they do not coincide with all the known voluntary returns, we will base our decision on the maximum period of time between the known departures. Several of these periods exceed 180 days, which would render the applicant inadmissible under section 212(a)(9)(B)(i)(I), precluding him from seeking admission within three years of his last departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Because there has been no final decision made on the I-485 application, the applicant is still seeking admission. The applicant last departed the United States on February 24, 1999, which means he is seeking admission more than 3 years since his last departure. Therefore, he is no longer inadmissible under section 212(a)(9)(B)(i)(I)

of the Act. Since he is not inadmissible under section 212(a)(9)(B)(i)(I), no waiver under section 212(a)(9)(B)(v) is needed.

**ORDER:** The director's decision is affirmed. The application is denied.