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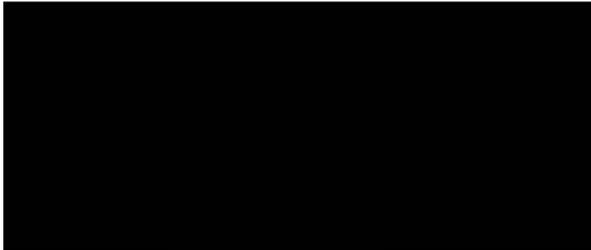
U.S. Department of Homeland Security
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U.S. Citizenship
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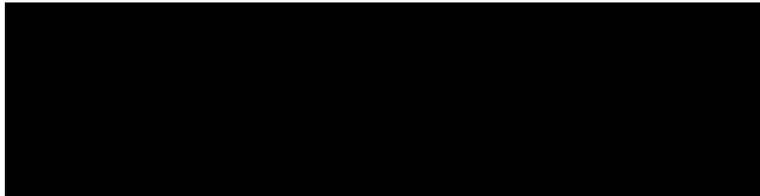
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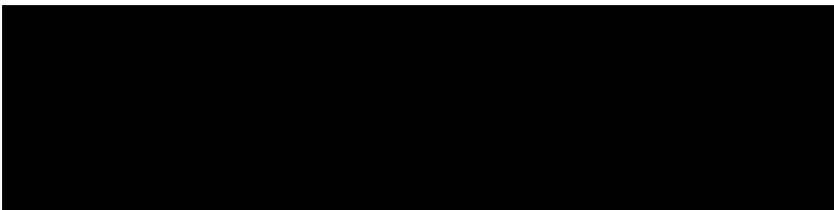
Applicant:



APPLICATION:

Application to Register Pennant Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:



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.

1 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Detroit, Michigan District Office denied the Application to Adjust Status (Form 1-485) and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the application will be returned to the director for further adjudication consistent with the following decision.

The applicant seeks adjustment of status to permanent residence under section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255, on the basis of an approved petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act as the abused spouse of a citizen of the United States.

The director denied the application because she determined that the applicant was not eligible to adjust status under either section 245(a) or section 245(i) of the Act, 8 U.S.C. § 1255(a), (i), because the applicant entered the United States without inspection after April 1, 1997 and had not demonstrated a substantial connection between her unlawful entry and her former husband's battery or extreme cruelty.

On certification, counsel submits a brief. Although we do not concur with counsel's interpretation of sections 245(a) and 212(a)(6)(A) of the Act, 8 U.S.C. § 1255(a), 1182(a)(6)(A), we find that the applicant is nonetheless eligible to adjust status under section 245(a) of the Act. Because the applicant first arrived in the United States prior to April 1, 1997, she is not required to demonstrate a connection between her unlawful entry and her former husband's abuse and she is consequently exempt from the inadmissibility bar at section 212(a)(6)(A)(i) of the Act.

1. The Applicant is Eligible to Adjust Status under Section 245(a) of the Act

Section 245(a) of the Act, 8 U.S.C. § 1255(a), states:

Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner¹ may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is **eligible** to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

¹ The term "VAWA [Violence Against Women Act] self-petitioner" means an alien who qualifies for relief under, *inter alia*, section 204(a)(1)(A)(iii) of the Act. Section 101(a)(51) of the Act, 8 U.S.C. § 1101(a)(51). The applicant has an approved self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act (receipt number EAC 03 018 50509, approved on October 6, 2003).

The director determined that the applicant was ineligible for adjustment under the second provision of section 245(a) of the Act because she entered the United States without inspection and was consequently inadmissible under section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), which states, in pertinent part:

Aliens Present Without Permission or Parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for Certain Battered Women and Children

Clause (i) shall not apply to an alien who demonstrates that -

(I) the alien is a VAWA self-petitioner;

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent ... and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prescribed that subclauses (II) and (III) of section 212(a)(6)(A)(ii) of the Act would not apply to aliens who demonstrate that they "first arrived" in the United States before the effective date of IIRIRA, April 1, 1997. IIRIRA §§ 301(c)(2), 309(a), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

The use of the term "first arrived" in section 301(c)(2) of IIRIRA is significant and draws a distinction from the former statutory definition of "entry" as construed by the Board of Immigration Appeals (BIA) prior to IIRIRA's enactment. See *Matter of Patel*, 20 I&N Dec. 368, 370 (BIA 1991) (finding "entry" to require physical presence, inspection and admission or evasion of inspection, and freedom from official restraint). Section 301(a) of IIRIRA replaced the former definition of "entry" with the following definition of "admission:" "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." IIRIRA § 301(a), codified at section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13).

Section 302(a)(1) of IIRIRA further amended the statute to define "applicants for admission:"

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.

IIRIRA § 302(a)(1), codified at section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1).

The regulation implementing the pertinent provisions of IIRIRA also created a definition of the term "arriving alien" as, in pertinent part: "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry[.]" 8 C.F.R. § 1.1(q). *See* 62 Fed. Reg. 10312, 10331 (Mar. 6, 1997) (interim rule creating definition of "arriving alien"); 63 Fed. Reg. 19382, 1983-84 (Apr. 20, 1998) (amending the definition). These statutory and regulatory provisions indicate that "arrival" in the United States is distinct from, and not equivalent to, admission. Accordingly, we interpret the term "first arrived," as used in IIRIRA § 301 (c)(2), to require physical presence, but not formal admission or entry into the United States.

The director determined that the applicant was ineligible for the exemption prescribed by IIRIRA § 301(c)(2) because the record contained no documentation that the applicant "entered" the United States in 1996, as she indicated on her Form 1-485 application. The director overlooked pertinent Citizenship and Immigration Services (CIS) records, which show that the petitioner was apprehended at Hidalgo, Texas on August 18, 1995 when her request for a border crossing card was denied. These records are consistent with the applicant's testimony (submitted with her Form 1-360 petition), that she met her former husband in Texas approximately three years before they were married in Hidalgo on April 20, 1998. The record thus indicates that the applicant first arrived in the United States prior to April 1, 1997. Subclauses (II) and (III) of section 212(a)(6)(A)(ii) of the Act do not apply to the applicant and, because she is a VAWA self-petitioner, she is not subject to the inadmissibility bar at section 212(a)(6)(A)(i) of the Act.² Accordingly, the applicant is eligible for adjustment of status to permanent residency under section 245(a) of the Act. The director's decision to the contrary is hereby withdrawn.

II. Interpretation of Sections 245(a) and 212(a)(6)(A) of the Act

Although the issue is not dispositive of this case, we briefly address counsel's claim that a VAWA self-petitioner who entered the United States without inspection, admission or parole is eligible to adjust status under section 245(a) of the Act regardless of the inadmissibility bar of section 212(a)(6)(A) of the Act. Counsel cites the first clause of section 245(a) of the Act, which states: "The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General[.]" Counsel claims that VAWA self-petitioners who unlawfully entered the United States are eligible to adjust status under section 245(a) of the Act because the statute uses the disjunctive word "or," thereby distinguishing between aliens who have been inspected and admitted or paroled and VAWA self-petitioners who have not. Counsel then contends that the second enumerated requirement

² We acknowledge the applicant's conflicting statements regarding her residences in the United States and Mexico from 1996 through 1997 and the date she "last arrived" in the United States, as noted by the director. However, IIRIRA § 301 (c)(2) requires only that the applicant show she "first arrived" - not resided - in the United States prior to April 1, 1997.

for adjustment under section 245(a) - "the alien is . . . admissible to the United States for permanent residence" - does not apply to VAWA self-petitioners because section 245(a) of the Act falls within the "savings clause" at the beginning of section 212(a) of the Act, "Except as otherwise provided in this Act[.]" Counsel analogizes the adjustment of VAWA self-petitioners who entered without inspection, admission or parole to the adjustment of aliens who entered without inspection under section 245(i) of the Act.³

Counsel's analogy is not persuasive. Unlike aliens who entered without inspection and admission or parole who are eligible to adjust status under section 245(i) of the Act notwithstanding the inadmissibility bar at section 212(a)(6)(A)(i) of the Act, VAWA self-petitioners have an explicit exception to the inadmissibility bar at section 212(a)(6)(A)(ii) of the Act. That section exempts VAWA self-petitioners who entered without admission or parole if they demonstrate the requisite battery or extreme cruelty and a substantial connection between the abuse and their unlawful entry. Counsel's interpretation renders this statutory provision meaningless. This exception would be superfluous if, as counsel contends, section 212(a)(6)(A)(i) of the Act did not apply to VAWA self-petitioners who entered without admission or parole and seek adjustment under section 245(a) of the Act. Counsel's interpretation thus violates the fundamental tenet of statutory construction that "a legislature is presumed to have used no superfluous words." *See Bailey v. U.S.*, 516 U.S. 137, 145 (1995) (quoting *Platt v. Union Pacific R. Co.*, 99 U.S. 48, 58 (1879); *U.S. v. Nash*, 175 F.3d 429, 434 (6th Cir. 1999) ("The Supreme Court has said that we are to assume that Congress intended each of its terms to have meaning and should hesitate to treat statutory terms as surplusage." (citing *Bailey*)). Congress is presumed to legislate with knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

We note that the disjunctive clause referring to VAWA self-petitioners was first added to section 245(a) of the Act in 2000, four years after the exception to inadmissibility at section 212(a)(6)(A)(ii) of the Act for VAWA self-petitioners was added in 1996.⁴ However, the chronology of these amendments also does not support counsel's contention. Congress is presumed to be "aware of existing law when it passes legislation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19,32 (1990)). The normal assumption is that

³ In support of this position, counsel cites the 1997 legacy Immigration and Naturalization (INS) memorandum finding that the inadmissibility bar at section 212(a)(6)(A) of the Act would not be applied to aliens otherwise eligible to adjust status under section 245(i) of the Act. Memo. from David Martin, INS General Counsel, *The Impact of the 1996 Act on Section 245(i) of the Act* (Feb. 19, 1997), reprinted in 74 Interpreter Releases 516 (Mar. 24, 1997) [hereinafter 1997 INS memorandum].

⁴ Section 301(c)(1) of IIRIRA amended section 212(a)(6)(A) of the Act with the exception for VAWA self-petitioners in 1996. Section 1506(a)(1)(A), Title V, Division B, Violence Against Women Act of 2000, Pub. L. 106-386 (Oct. 28, 2000), amended section 245(a) of the Act.

"where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole." *Markham v. Cabell*, 326 U.S. 404, 411 (1945). See *Erlenbaugh v. Us.*, 409 U.S. 239,244 (1972) (citing *Markham* for "the principle that individual sections of a single statute should be construed together."). If section 245(a) of the Act is read to allow the adjustment of VAWA self-petitioners regardless of their inadmissibility under section 212(a)(6)(A)(i) of the Act, then section 212(a)(6)(A)(ii) of the Act is rendered meaningless. Yet, when read together, these sections allow VAWA self-petitioners who were not admitted or paroled to adjust status under section 245(a) of the Act if they demonstrate their eligibility for the exception at section 212(a)(6)(A)(ii) of the Act. This interpretation reads the statute as a whole and comports with fundamental canons of statutory construction.⁵

Accordingly, we do not concur with counsel's interpretation that VAWA self-petitioners who entered without inspection and admission or parole are eligible to adjust status under section 245(a) of the Act without demonstrating their eligibility for the exception to the inadmissibility bar at section 212(a)(6)(A)(ii) of the Act. This issue is not dispositive of this case, however, because the applicant entered the United States prior to April 1, 1997 and is therefore not required to demonstrate that the exception applies to her.

III. Section 245(i) of the Act

The director also determined that the applicant was ineligible to adjust status under section 245(i) of the Act, although she included no discussion of the issue in her decision. The director failed to address the pertinent documents in the record, which show that the applicant is the beneficiary of an approved immigrant visa petition filed before 2001, which, if she were to establish her eligibility under the remaining grounds, would also enable the petitioner to adjust status under section 245(i) of the Act.

Section 245(i) of the Act, 8 U.S.C. § 1255(i), states, in pertinent part:

Adjustment of Status for Aliens Physically Present in the United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-

(A) who-

(i) entered the United States without inspection

* * *

(B) who is the beneficiary . . . of-

⁵ In this respect, counsel's reliance on the 1997 INS memorandum is misguided. The INS explicitly cited "basic rules of statutory construction" to support its reading of the statute as a whole so as not to interpret the inadmissibility bar at section 212(a)(6)(A) of the Act as rendering section 245(i)(1)(A)(i) of the Act superfluous. 1997 INS memorandum, *supra* n.3.

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001

* * *

(C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted December 21, 2000];

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application

CIS records show that the applicant is the beneficiary of a Form 1-130, Petition for Alien Relative, filed by her former husband, a U.S. citizen, and approved in 1999 (receipt number SRC 99 155 52212). Accordingly, the applicant is the beneficiary of a petition for classification under section 204(a)(1)(A)(i) of the Act as an immediate relative and she meets the eligibility requirement of section 245(i)(1)(B) of the Act. The fact that the petitioner divorced her former husband on September 2, 2003 is not disqualifying.⁶ See 8 C.F.R. § 245.10(a)(3)-(4).

Because the applicant seeks adjustment of status under section 245(a) of the Act, she has not submitted evidence of her physical presence in the United States on December 21, 2000 or paid the \$1,000 penalty fee, as required for adjustment under section 245(i) of the Act. Accordingly, we do not reach a determination regarding the petitioner's eligibility for adjustment under section 245(i) of the Act. We merely note that the petitioner is the beneficiary of an approved immigrant petition filed before April 30, 2001 and we withdraw the portion of the director's decision to the contrary.

IV. Conclusion

The applicant is eligible to adjust status to lawful permanent residency under section 245(a) of the Act. She is the beneficiary of an approved petition for classification as a VAWA self-petitioner and an immigrant visa was and remains immediately available to her. Although the applicant entered the United States without inspection, she is exempt from the corresponding inadmissibility bar pursuant to section 212(a)(6)(A)(ii) of the Act because she first arrived in the United States before April 1, 1997. The director's decision to the contrary must consequently be withdrawn. The case will be returned to the director who shall continue the adjudication of the application.

ORDER: The February 8, 2005 decision of the director is withdrawn.

⁶ The petitioner's divorce was granted by the Circuit Court of Oceana County, Michigan, File Number [REDACTED]