U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

Date: NOV 0 3 2012 Office: NEWARK, NEW JERSEY [redacted]

IN RE: Applicant: [redacted]

APPLICATIONS: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i), and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

[redacted]

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.r.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who entered the United States with a nonimmigrant visa in August 1995 with permission to remain until September 30, 1995. The applicant remained beyond the period of authorized stay. The applicant did not depart the United States until April 4, 1998. On April 19, 1998, the applicant attempted to enter the United States by fraud or misrepresentation. Specifically, the applicant indicated that she was seeking entry to the United State to visit Niagara Falls for two or three days but the applicant later admitted that she was seeking entry to the United States to resume unlawful residence in the United States. The applicant withdrew the application for admission and was returned to Canada under legacy INS escort. On April 30, 1998, the applicant re-entered the United States without inspection. Shortly thereafter, a routine stop lead to questioning by U.S. Customs and Border Patrol agents. The applicant misrepresented her name to disguise her identity and previous encounters with immigration officials. The applicant has remained in the United States to date.

The applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation on multiple occasions when attempting to procure entry to the United States; and section 212(a)(9)(B)(i)(II) of 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 and seeking readmission within 10 years of her last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having procured entry to the United States without being admitted after having been unlawfully present in the United States for an aggregate period of more than one year. The applicant seeks a waiver of inadmissibility so that she may remain in the United States with her U.S. citizen spouse.

The field office director noted that there was no waiver available to the applicant based on her inadmissibility under section 212(a)(9)(C)(i)(I) of the Act because she had not waited outside the United States for 10 years as required by law. The applicant's Form I-601, Application for Waiver of Grounds of Excludability (Form I-601) was denied accordingly. *Decision of the Field Office Director,* dated August 6, 2010.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
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> ....
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> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides, in pertinent part, that:

> (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

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

. . . .

(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.

. . . .

(v) Waiver.-The [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

(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 Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary 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—
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> (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.

In support of the appeal, counsel for the applicant submits a brief. Counsel for the applicant asserts that the USCIS erred in finding that the applicant is statutorily ineligible for adjustment of status under section 245(i) of the Act because she remains inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act. *See Brief in Support of Appeal,* dated October 4, 2010. Counsel relies on *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006) to support the assertion that section 245(i) applies to individual who are inadmissible under section 212(a)(9)(C). The AAO notes that in *Duran Gonzales v. DHS,* 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that an individual cannot qualify for adjustment of status under the plain language of section 245(i) of the Act if he is inadmissible under section 212(a)(9)(C) of the Act and has not remained outside the United States for ten years since the date of the person's last departure from the United States, as the individual is not eligible for permission to reapply for admission.[1]

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[1] Counsel also relies on *Padilla-Caldera v. Gonzales,* 453 F.3d 1237 (10th Cir. 2006) to support the assertion that the applicant is eligible for adjustment of status under section 245(i) of the Act, but the AAO notes that the Tenth Circuit Court of Appeals overturned that decision and, deferring to the BIA in *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007), found that an individual cannot qualify for adjustment of status under section 245(i) of the Act if he is inadmissible under section 212(a)(9)(C) of the Act and has not remained outside the United States for a period of ten years. See *Padilla-Caldera v. Holder,* 637 F.3d 1140 (10th Cir. 2011).

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 10 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, 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. In the present matter, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver application at this time.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to her spouse or whether she merits a waiver as a matter of discretion. 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 appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.