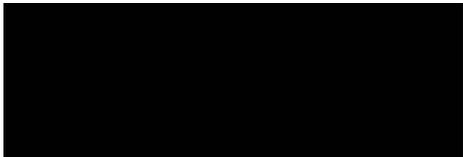


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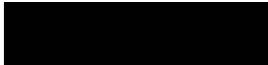


U.S. Citizenship
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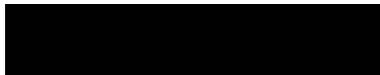
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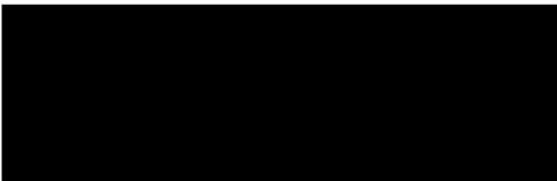
Office: LOS ANGELES, CA Date: AUG 03 2009

IN RE:



APPLICATION: 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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. 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 Mexico who was found to inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation on August 19, 1999. In addition, the applicant 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 and seeking readmission within 10 years of his last departure from the United States. The applicant is married to a U.S. citizen, has a U.S. citizen daughter and two lawful permanent resident sons. She seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the record failed to establish extreme hardship to her U.S. citizen spouse as a result of her inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated December 12, 2006.

On appeal, counsel states that the waiver application for unlawful presence was not necessary in the applicant's case as it falls within the purview of the Ninth Circuit decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). *Form I-290B*, dated January 11, 2007. Counsel also states that if a waiver was necessary, the hardship which the applicant's spouse would suffer reaches the requisite level of extreme hardship.

The AAO notes that it conducts the final administrative review and enters the ultimate decision for the United States Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *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).

In regards to counsel's assertions that the applicant's case falls within the purview of the Ninth Circuit decision in *Acosta v. Gonzales*, the AAO notes that the panel in that case held that its decision was controlled by *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) and the holding in *Perez-Gonzales* has been overturned by the Ninth Circuit. See *Gonzalez v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). In *Gonzales*, the Ninth Circuit held that it was bound by the Board of Immigration Appeals' (BIA) interpretation of section 212(a)(9)(C) of the Act in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), notwithstanding the Circuit's earlier panel decision in *Perez-Gonzales*. In *Matter of Torres-Garcia*, the BIA held that an applicant who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act is ineligible for a waiver of inadmissibility

because the alien is required to apply for permission to reenter the United States and can only make such application after ten years has elapsed from the date of departure. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The BIA also stated that the regulations in relation to the Act could not be interpreted “in a manner that would allow an alien to circumvent the statutory ten-year limitation on section 212(a)(9)(C)(ii) waivers by simply reentering unlawfully before requesting the waiver.” *Id.* The BIA issued a similar ruling in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) holding that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is ineligible for adjustment under section 245(i) of the Act.

The record indicates that the applicant entered the United States without inspection in April 1994. In 1999 the applicant departed the United States to visit her mother. On August 19, 1999 she attempted to enter the United States without inspection at the San Ysidro Port of Entry by concealing herself in the trunk of a car. When questioned by immigration officials at the port of entry she gave her name as that of a [REDACTED]. She was then expeditiously removed from the United States. Records indicate that at some point after August 19, 1999 the applicant reentered the United States and has been residing in the United States since 1999. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted under the Act until August 1999, when she departed the United States.

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

- (i) 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.

The AAO finds that the applicant is not inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting a material fact in an attempt to procure an immigration benefit. The Supreme Court in, *Kungys v. United States*, 485 US 759 (1988) found that the test of whether concealments or misrepresentations are “material” is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have has a natural tendency to affect, the legacy Immigration and Naturalization Service’s (now Citizenship and Immigration Services’) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are that the alien is excludable on the true facts, or the misrepresentation tends to shut off a line of inquiry which is relevant to the alien’s eligibility and which might well resulted in proper determination that he be excluded.

The AAO finds that when the applicant falsely stated her name, she had already been apprehended attempting to cross the border illegally and thus was not seeking to obtain an immediate immigration benefit from the false statement. The record shows that the applicant admitted that she lacked a legal entry document. In the applicant’s case, expedited removal would have occurred whether the applicant stated her true name or the false name.

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.

The AAO does find that the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Inadmissibility under section 212(a)(9)(B)(II) of the Act can be waived under section 212(a)(9)(B)(v) of the Act. However, the applicant is also inadmissible under section 212(a)(9)(C)(i) of the Act.

Section 212(a)(9)(C) 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 the applicant is still residing in the United States. To be granted permission to reapply for admission, the applicant must reside outside the United States for ten years. The applicant is currently not eligible to apply for an exception under section 212(a)(9)(C)(ii) of the Act and is thus inadmissible to the United States. Because of this inadmissibility no purpose would be served in discussing whether she qualifies for a waiver for being inadmissible under section 212(a)(9)(B) of the Act.

In proceedings for an application for a waiver of a ground of inadmissibility under the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.