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U.S. Citizenship
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FILE: [REDACTED] Office: LOS ANGELES

Date: OCT 02 2009

IN RE: [REDACTED]

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

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant, [REDACTED], is a native and citizen of Mexico who has resided in the United States since 1991, when he entered without inspection. The applicant returned to Mexico in 1995 and reentered without inspection in 1996. The applicant returned to Mexico in 1999 and reentered the United States in 2000. The director found the applicant 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 admission within 10 years of his last departure from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), in order to remain in the United States with his spouse, [REDACTED]

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant never needed an I-601 waiver in light of the Ninth Circuit Court of Appeals decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). Counsel states that in *Acosta v. Gonzales*, the Ninth Circuit held that section 245(i) exempts individuals from section 212(a)(9)(C)(i)(I), therefore the applicant does not need an I-601 waiver. Counsel contends that in the alternative the applicant's I-601 waiver should be granted if deemed necessary.

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

(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 Attorney General [now the Secretary of Homeland Security (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.

Beyond the decision of the director, the AAO finds under its de novo review that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for reentering the United States without admission after having been in the U.S. unlawfully for an aggregate period of more than one year.¹

Section 212(a)(9)(C)(i)(I) of the Act provides in pertinent part:

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. . . . 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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver -- The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between --

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

A violation under section 212(a)(9)(C)(i)(I) of the Act constitutes a permanent bar to admission to the United States. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must have entered or attempted to enter the United States

¹ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

without being admitted.² Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.³

In the present matter, the evidence reflects that the applicant was unlawfully present in the United States for an aggregate period of more than one year between April 1, 1997 and 1999. The applicant departed the United States in 1999, and he reentered the U.S. without inspection in 2000. The applicant is therefore inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The record contains no evidence to establish that the applicant filed a self-petition under VAWA, or that the waiver requirements set forth in section 212(a)(9)(C)(iii) of the Act have been met. The applicant has additionally failed to establish that he qualifies for an exception to his ground of inadmissibility under section 212(a)(9)(C)(ii) of the Act.

On appeal, counsel asserts that the applicant never needed an I-601 waiver in light of the Ninth Circuit Court of Appeals decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). Counsel states that in *Acosta v. Gonzales*, the Ninth Circuit held that section 245(i) exempts individuals from section 212(a)(9)(C)(i)(I), therefore the applicant does not need an I-601 waiver.

However, counsel's appeal is based on a misreading of the *Acosta* opinion. The *Acosta* court found Mr. Acosta "eligible" for adjustment under section 245(i) of the Act. 439 F.3d at 556. A close reading of the opinion, however, indicates that the holding does not mean that section 245(i), by itself, waives inadmissibility under section 212(a)(9)(C)(i)(I). More precisely, the court held that Mr. Acosta was "entitled to *consideration* of his application." *Id.* (emphasis added). In rendering its opinion, the court relied on its prior decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *Id.* at 553. In *Perez-Gonzalez*, the court held that an exception to otherwise permanent inadmissibility obtained through approval of an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), as permitted by section 212(a)(9)(C)(ii), is necessary in order for an alien inadmissible under section 212(a)(9)(C)(i)(II) to be eligible for adjustment under section 245(i). 379 F.3d at 796. As the court stated in *Perez-Gonzalez*, "[i]f the agency chooses to exercise its discretion in [the petitioner's] favor on both the Form I-212 and § 212(i) relief, he will be eligible for adjustment of status." *Id.* The *Acosta* court concluded there was no principled reason to treat aliens inadmissible under section 212(a)(9)(C)(i)(I) differently from those inadmissible under section 212(a)(9)(C)(i)(II). 439 F.3d at 554. These considerations must mean that an alien who is inadmissible under section 212(a)(9)(C)(i)(I), like an alien inadmissible under section 212(a)(9)(C)(i)(II), must first be granted permission to reapply for admission under section 212(a)(9)(C)(ii) before the alien may be granted adjustment of status under section 245(i).

² USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.

³ *Id.*

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). 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 U.S. Citizenship and Immigration Services has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in 2000. The applicant is currently residing in the United States after his illegal reentry in 2000 and therefore, has not remained outside the United States for 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(a)(9)(B)(v) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 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 because he has not established that he is otherwise admissible to the United States even if a waiver under section 212(a)(9)(B)(v) were granted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.