

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

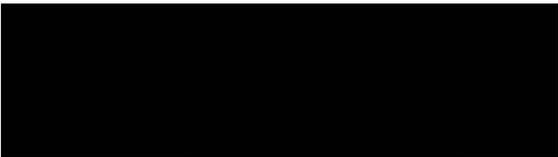
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

#3



FILE: [Redacted]

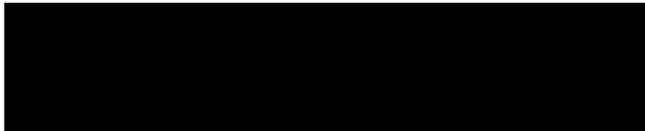
Office: LOS ANGELES

Date: JUN 23 2008

IN RE: [Redacted]

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed and the prior decision of the AAO affirmed.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to 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 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 U.S. citizen wife.

The district director concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on a qualifying relative and denied the waiver application accordingly. *Decision of District Director*, dated September 24, 2004. The AAO affirmed the district director's decision on appeal. *Decision of AAO*, dated March 27, 2006.

In the present motion to reopen and reconsider, counsel contends that under the recent decision by the Ninth Circuit Court of Appeals in *Acosta v. Gonzalez*, 439 F.3d 550 (9th Cir. 2006), the applicant is not required to apply for a waiver of inadmissibility because he is eligible for (and had met the requirements of) penalty-fee adjustment of status under section 245(i) of the Act.

The regulation at 8 C.F.R. § 103.5(a) states in pertinent part:

(a) Motions to reopen or reconsider

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

....

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed

The present motion is properly characterized as a motion to reconsider, as counsel has asserted that a precedent decision establishes that the AAO's decision was incorrect based on the evidence of record at the time of that decision, rather than on new facts to be provided in a reopened proceeding.

However, counsel's motion is based on a misreading of the *Acosta* opinion and must therefore be dismissed. [REDACTED] had been found inadmissible under section 212(a)(9)(C)(i)(I) of the Act, which is a different ground of inadmissibility than section 212(a)(9)(B)(i)(II), the section under which the applicant is inadmissible, a distinction noted by the *Acosta* court itself. See 439 F.3d at 556-57. Counsel contends that the two provisions are analogous, as both provide for the inadmissibility of aliens who have accrued unlawful presence in the United States in excess of one year. Notwithstanding the similarity between sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I), counsel has misinterpreted the *Acosta* decision as excusing an alien eligible to apply for penalty-fee adjustment of status under section 245(i) from establishing that he or she is admissible to the United States in order to be granted adjustment of status under that section.

The *Acosta* court found [REDACTED] "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).

Similarly, the *Acosta* decision does not excuse an applicant for adjustment of status under section 245(i) of the Act, if that applicant is inadmissible under section 212(a)(9)(B), from first obtaining a waiver of inadmissibility under section 212(a)(9)(B)(v). Indeed, in spite of having found [REDACTED] a "eligible" for adjustment of status under section 245(i), the court stated that it had "to reach to question of whether he is eligible for" a waiver of inadmissibility under section 212(a)(9)(B)(v) as he had claimed. 439 F.3d at 556. The court, noting the distinction between sections 212(a)(9)(B) and 212(a)(9)(C), held that the waiver of inadmissibility provided for in 212(a)(9)(B)(v) is not available to an alien who is inadmissible under section 212(a)(9)(C). *Id.* In concluding that it was required to address the issue, however, the court acknowledged that section 245(i) does not, by itself, waive inadmissibility under either sections 212(a)(9)(B) or 212(a)(9)(C).

Because counsel has failed to establish that the decision was based on an incorrect application of law or Service policy to the evidence of record at the time of the initial decision, the motion must be dismissed.

ORDER: The motion is dismissed and the previous decision of the AAO affirmed.