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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 25 2006

IN RE:

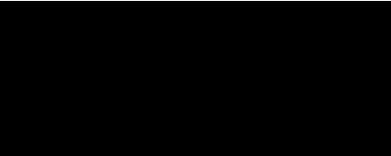
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States pursuant to inadmissibility under section 212(a)(9)(C)(i)(I) the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I)

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center and 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 entered the United States without a lawful admission or parole on an unknown date, but prior to April 30, 1992, the date his mother filed a Petition for Alien Relative (Form I-130) on his behalf. The applicant departed the United States in March 1995 and reentered illegally shortly thereafter, in the same month. The record reflects that the applicant remained in the United States until March 1999 when he departed the United States and traveled to Mexico. The applicant reentered the United States in March 1999 without a lawful admission or parole. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for an aggregate period of more than one year. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. He seeks permission to reapply for admission into the United States in order to remain in the United States and reside with his U.S. citizen spouse and Lawful Permanent Resident (LPR) mother.

The Director determined that the applicant was inadmissible pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for one year of more, and section 212(a)(9)(C)(i)(I) of the Act. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated August 2, 2005.

The proceeding in the present case is for an application for permission to reapply for admission into the United States and, therefore, the AAO will not discuss the applicant's potential grounds of inadmissibility under section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section 212(a)(9)(B) of the Act, he would be eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on his marriage to a U.S. citizen.

Section 212(a)(9)(C) of the Act states 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 [now the Secretary of Homeland Security, "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 -

- (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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar, with limited exceptions, to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief in which the applicant states that the Director erred in denying the Form I-212, and he believes that there is adequate information in the file to approve the application. The applicant states that he has a U.S. citizen spouse and a LPR mother who both depend on him for support. The applicant does not dispute the fact that he has resided in the United States illegally for approximately ten years. Finally, the applicant states that he does not have any criminal record and requests that his Form I-212 be granted.

In its February 23, 2006, decision, *Acosta v. Gonzales* 439 F.3d 550 (9<sup>th</sup> Cir. 2006), the Ninth Circuit Court of Appeals indicates [REDACTED] eligible” for adjustment under section 245(i) of the Act. *Id.* A close reading of the opinion, however, indicates that the panel’s decision does not mean that section 245(i) of the Act, by itself, waives inadmissibility of section 212(a)(9)(C)(i) of the Act. The *Acosta* panel held that its decision was controlled by *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004) *Id.* at 553. Under *Perez-Gonzalez*, however, approval of a Form I-212 is necessary in order for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act to be eligible for adjustment under section 245(i) of the Act. 379 F.3d at 797. “If the agency chooses to exercise its discretion in his favor on both the Form I-212 and § 212(i) relief, he will be eligible for adjustment of status.” *Id.* The *Acosta* panel also concluded there was no principle reason to treat aliens who are inadmissible under section 212(a)(9)(C)(i)(I) differently from those inadmissible under section 212(a)(9)(C)(i)(II) of the Act. 439 F.3d at 554. These considerations must mean that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, like the alien in *Perez-Gonzalez*,

who was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, must obtain approval of a Form I-212 before the alien may obtain adjustment of status under section 245(i) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than 10 years have elapsed 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)(i) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that CIS has consented to the applicant's reapplying for admission. The applicant is currently statutorily ineligible to apply for permission to reapply for admission. The AAO will, however, review the discretionary factors as presented in the record.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

*Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that:

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and LPR mother, an approved Form I-130, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his disregard for the immigration laws of this country shown by departing the United States and reentering at least twice without an admission or parole, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. In addition, after a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed with each of the above stated reasons considered as an independent and alternative basis for dismissal.

**ORDER:** The appeal is dismissed.