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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

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[REDACTED]

FILE:

Office: NEWARK, NJ

Date:

MAY 17 2010

; AND
(RELATE)

IN RE:

[REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and a motion to reconsider. The matter is now before the AAO on a second motion to reconsider. The motion to reconsider will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Ecuador who, on June 15, 1980, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on July 15, 1980. On September 8, 1980, the applicant was placed into immigration proceedings. On September 9, 1980, the immigration judge granted the applicant voluntary departure until October 13, 1980. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On November 24, 1980, a warrant for the applicant's removal was issued. On December 14, 1980, the applicant departed the United States, thereby executing the outstanding order of removal. The applicant has subsequently obtained nonimmigrant visas and entered the United States without prior obtainment of permission to reapply for admission.

On December 30, 1990, the applicant appeared at the Miami International Airport. The applicant presented a nonimmigrant visa. Immigration officers suspected that the nonimmigrant visa had been altered and referred the applicant to secondary inspections. The applicant admitted that the nonimmigrant visa had been altered from a D nonimmigrant visa to a B-2 nonimmigrant visa. The applicant was permitted to withdraw his application for admission and was returned to Ecuador on December 31, 1990.

On February 22, 2001, the applicant's naturalized U.S. citizen mother filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 28, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a second Form I-130 filed on his behalf by his adult U.S. citizen son. On November 15, 2007, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Newark, New Jersey Field Office. The applicant testified that he had last entered the United States without inspection on October 1, 2000. On the same date, the Form I-130 filed by the applicant's son was approved. On December 14, 2007, the applicant filed the Form I-212, along with an Application for Waiver of Grounds of Inadmissibility (Form I-601), indicating that he continued to reside in the United States. On June 26, 2008, the Form I-130 filed by the applicant's mother was approved. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for a period of ten years. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen mother and adult U.S. citizen son.

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for attempting to illegally reenter the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated December 13, 2007.

On July 6, 2009, the AAO dismissed the applicant's appeal because the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed and being ineligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. *Decision of AAO*, dated July 6, 2009.

In the motion to reconsider, former counsel contended that the applicant is eligible to apply for permission to reapply for admission under section 212(a)(9)(C)(iii) of the Act because it has been more than ten years since the applicant's last departure from the United States. Additionally, former counsel contended that the applicant remained outside the United States for the required five year period after having been removed from 1985 until 1990. *See Form I-290B*, dated July 29, 2009. In support of his motion to reconsider, former counsel only submitted the referenced Form I-290B.

On September 24, 2009, the AAO dismissed the applicant's motion to reconsider because the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed and is not eligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. *Decision of AAO*, dated September 24, 2009.

In the second motion to reconsider, former counsel contends that the AAO erred factually and legally in determining that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act. Former counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(A) of the Act because the applicant remained outside the United States for the required five year period after having been removed from 1985 until 1990. Former counsel contends that the applicant is eligible for adjustment of status pursuant to section 245(i) of the Act and that the applicant is eligible to apply for permission to reapply for admission under section 212(a)(9)(C)(iii) of the Act because it has been more than ten years since the applicant's last departure from the United States. *See Form I-290B*, dated October 15, 2009. In support of her motion to reconsider, former counsel submits the referenced Form I-290B and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.- Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

....

(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 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(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.

In support of the second motion to reconsider, despite AAO's prior discussion of the applicant's inadmissibility under section 212(a)(9)(A) and 212(a)(9)(C) of the Act, former counsel contends that the applicant is not inadmissible under section 212(a)(9)(A) of the Act because he is only required to obtain permission to reapply for admission if he does not remain outside the United States for a period of five years. Former counsel contends that the applicant remained outside the United States for a period of five years from 1985 until 1990, as explained in his statement. Former counsel's contentions are unpersuasive. As discussed in the AAO's dismissal of the applicant's appeal and motion to reconsider, even if an applicant has remained outside the United States for the required period of inadmissibility under his or her removal order, and is, therefore, no longer inadmissible under section 212(a)(9)(A) of the Act, if he or she reenters the United States illegally at any time after the removal order, he or she becomes inadmissible under section 212(a)(9)(C)(i) of the Act. In order to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, an applicant must be

subsequently lawfully admitted to the United States if reentry occurred after April 1, 1997, the date of enactment of section 212(a)(9)(C) of the Act. Additionally, 8 C.F.R. § 212.2 was not promulgated to implement the current section 212(a)(9) of the Act. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); and *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007).

In support of the second motion to reconsider, former counsel contends that the applicant's case differs from those cases to which the AAO cites because it has been more than ten years since the applicant's last departure from the United States. Former counsel's contentions are unpersuasive. As discussed in the AAO's dismissal of the applicant's appeal and motion to reconsider, the statute clearly states that an alien who has been ordered removed and enters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking admission more than ten years after the date of the alien's last departure from the United States, *if*, the applicant receives permission to reapply for admission prior to reentering the United States and case law citing that inadmissibility under section 212(a)(9)(C) of the Act may be waived only after the alien has been *outside* the United States for ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007); *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); and *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).

In support of the second motion to reconsider, former counsel contends that the applicant is eligible to adjust status under section 245(i) of the Act. Former counsel's contentions are unpersuasive. As discussed in the AAO's dismissal of the applicant's appeal and motion to reconsider, the statute and relevant case law clearly reflect that an applicant for adjustment of status under section 245(i) of the Act is subject to inadmissibility under section 212(a)(9)(C) of the Act and must receive permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007); *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); and *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).¹

As such, former counsel's contentions are unpersuasive and do not form a basis for a motion to reconsider.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the second motion to reconsider meet the requirements of a motion to reconsider. Accordingly, the second motion to reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion to reconsider is dismissed. The order dismissing the appeal will be affirmed.

¹ The AAO notes that USICE may reinstate an applicant's prior removal order under section 241(a)(5) of the Act at any time, even though he or she reentered prior to April 1, 1997, and he or she may have filed a Form I-212, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422 (S. Ct. 2006).