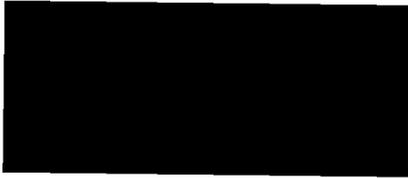


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H4

Date: APR 03 2012

Office: PHOENIX, AZ

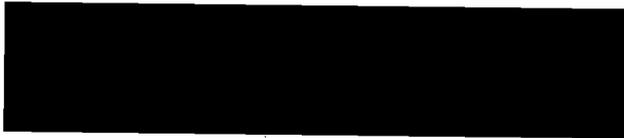


IN RE: Applicant



APPLICATION: Application for Permission to Reapply for Admission into the United States after Previous Immigration Violations under Section 212(a)(9)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)

ON BEHALF OF APPLICANT:



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 \$630. 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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit and section 212(a)(9)(C) of the Act for reentering the United States without inspection after being unlawfully present in the United States for more than one year and having been ordered removed. The applicant is the daughter of lawful permanent resident parents and seeks permission to reenter the United States after her removal in order to reside with her parents and her children in the United States.

The field office director found the applicant inadmissible to the United States pursuant to section 212(a)(9)(C)(i) of the Act and that she is ineligible for an exception to this ground of inadmissibility. The field office director denied the application accordingly.

On appeal, counsel contends the Ninth Circuit Court of Appeals' decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), is controlling in this case. According to counsel, even though the Court in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), overruled its holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the Court did not overrule *Acosta*. Counsel asserts that the applicant is eligible to adjust his status notwithstanding section 212(a)(9)(C) of the Act.

Section 212(a)(9) 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 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.

In this case, the record shows, and counsel concedes, that the applicant began living in the United States in 1991 until her departure in July 1998. The record also shows, and counsel concedes, that on July 6, 1998, the applicant attempted to reenter the United States using an alien registration card that belonged to someone else, and that the applicant was expeditiously removed from the United States the same day. Furthermore, the record shows, and counsel concedes, that on July 13, 1998, the applicant reentered the United States without inspection and continues to reside in the United States. The applicant accrued more than one year of unlawful presence beginning on April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure in July 1998. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more. In addition, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit because she used an alien registration card that belonged to someone else in an attempt to enter the United States. Moreover, because the applicant reentered the United States without being admitted after being unlawfully present in the United States for more than one year as well as after having been ordered removed, she is also inadmissible to the United States under sections 212(a)(9)(C)(i)(I) and (II) of the Act.

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 ten 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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 CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in July 1998. The applicant is currently residing in the United States and therefore, has not remained outside the United States for ten years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission.

Counsel's contention that the applicant may adjust her status notwithstanding section 212(a)(9)(C) of the Act based on the Ninth Circuit's decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), is unpersuasive. The Ninth Circuit has explicitly rejected this argument and modified its prior holding in *Acosta*. See *Garfias-Rodriguez v. Holder*, 649 F.3d 942, 950 (9th Cir. 2011) ("we hold that adjustment of status under [section 245(i) of the Act] is unavailable to aliens inadmissible under [section 212(a)(9)(C)(i)(I) of the Act]. In doing so, we are not creating a new rule of law, but rather we are correcting our prior reading of the statutes in *Acosta* based on the BIA's authoritative ruling in *Briones*"). Because the applicant is mandatorily inadmissible under section 212(a)(9)(C) of the Act and she is ineligible for the exception to this ground of inadmissibility until she has remained outside the United States for ten years, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States.

In proceedings for an application for admission, 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.