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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

**PUBLIC COPY**

HS



Date: DEC 14 2011 Office: PHOENIX, ARIZONA

FILE: 

IN RE: Applicant: 

APPLICATIONS: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i); and 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:

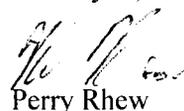


INSTRUCTIONS:

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 waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or the willful misrepresentation of a material fact; and 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 ten years of her last departure from the United States. The record indicates that the applicant is married to a lawful permanent resident of the United States and the mother of three United States citizen children. She is the beneficiary of an approved Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i); and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her children.

The District Director found that the applicant was subject to the inadmissibility provisions of section 212(a)(9)(C) of the Act and ineligible for the exception under section 212(a)(9)(C)(iii), and he denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated December 2, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Service (USCIS) deemed that the applicant does “not need an approved Form I-212 before applying for adjustment of status.... Therefore, all that is left to decide is whether or not [USCIS] misapplied the law in this case where [a]pplicant is 245(i) eligible.” *Counsel’s appeal brief attached to Form I-290B*, dated December 30, 2008. Counsel contends that section 245(i) supersedes section 212(a)(9)(C) of the Act, and the applicant is eligible to apply for adjustment of status. *Id.* Counsel cites *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir.2006), in support of his argument that “[t]here is nothing in either [212(a)(9)(C)(i)(I) or 212(a)(9)(C)(i)(II)] to suggest that an alien who re-enters the country after accruing more than one year of unlawful presence is ineligible for penalty-free adjustment of status.” Additionally, counsel claims that “there was no showing that Congress intended disparate treatment of two classes of permanently inadmissible aliens whereby one class would be eligible for penalty-free adjustment and the other was not.” Further, counsel claims that section “813(b) of VAWA supports a remand in this case for further review.

The record includes, but is not limited to, counsel’s appeal brief, a statement from the applicant, a letter of support, a counseling assessment for the applicant, birth certificates for the applicant’s children, household bills, insurance and tax documents, employment documents for the applicant’s husband, and documents from the applicant’s expedited removal. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

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

(B) Aliens Unlawfully Present.-

- (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 [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.

In the present case, the record indicates that in September 1990, the applicant entered the United States without inspection. In May 1998, the applicant departed the United States. In August 1998, the applicant attempted to enter the United States by presenting a Border Crosser card (Form I-586) in another individual's name. On August 8, 1998, the applicant was expeditiously removed from the United States. On an unknown date in 1998, the applicant reentered the United States without inspection.

The applicant accrued more than one year of unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until May 1998, the date she departed the United States. The

applicant's departure from the United States following this period of unlawful presence triggered the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. As noted above, the applicant reentered the United States without inspection in 1998. The applicant has remained in the United States since that time. Although the applicant's last departure from the United States was more than ten years ago, the AAO finds that the applicant remains inadmissible under section 212(a)(9)(B)(i)(II). The AAO notes that the applicant has been accruing unlawful presence since she entered the United States without inspection in 1998. The AAO finds that allowing an alien to serve any portion of the period of inadmissibility in the United States while simultaneously accruing additional unlawful presence would reward recidivism and is contrary to well-established principles of statutory construction and the congressional intent underlying the creation of section 212(a)(9) of the Act. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006), *followed*. In that the applicant returned to the United States within the same year of her departure, she remains inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Additionally, based on the applicant's use of a Form I-586 in another individual's name in an attempt to procure admission to the United States in August 1998, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. Further, the AAO finds that based on the applicant's reentry to the United States without inspection on an unknown date after August 8, 1998, the applicant is also inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act for having been unlawfully present in the United States for an aggregate period of more than one year and entering the United States without inspection. Finally, the AAO also finds the applicant inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed under section 235(b)(1) of the Act on August 8, 1998 and entering the United States without inspection.

Section 212(a)(9)(C)(i) 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 admitted 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.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must file for permission to reapply for admission (Form I-212). However, consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted to one who has left the United States, is currently abroad and is seeking admission to the United States at least ten years after the date of his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The record does not reflect that the applicant in the present matter has met these requirements.

As noted above, counsel cites *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir.2006), in support of his argument that the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. As noted by counsel, the ninth circuit in *Acosta v. Gonzales* relied on its holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004). However, in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its decision in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the BIA’s holding that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving discretionary waivers of inadmissibility prior to the expiration of the ten-year bar. The Ninth Circuit clarified that its holding in *Duran Gonzalez* applies retroactively, even to those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *Morales-Izquierdo v. DHS*, 600 F.3d. 1076 (9th Cir. 2010). *See also Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (stating that the general default principle is that a court’s decisions apply retroactively to all cases still pending before the courts).

Additionally, as the applicant is a VAWA self-petitioner, she may be eligible to seek a waiver of inadmissibility under 212(a)(9)(C)(iii) of the Act. As stated above, in order to qualify for such a waiver, there must be a connection between the applicant’s battering or subjection to extreme cruelty and her departure, attempted reentry, removal and/or reentry into the United States. As noted in the District Director’s decision, in a statement dated February 19, 2006, the applicant claims that she departed the United States “to give the last goodbye to [her] grandparents due to their death.” The AAO notes that the applicant has not provided any evidence or made any assertions on appeal to establish a connection between the battering or subjection to extreme cruelty and her departure, attempted reentry, removal and/or reentry into the United States. Thus, the AAO finds that the record does not establish that the applicant departed the United States because of the battery or extreme cruelty she was subjected to by her husband. Therefore, the applicant is statutorily ineligible to seek an exception from or waiver of her inadmissibility under section 212(a)(9)(C)(i)(I) or section 212(a)(9)(C)(i)(II) of the Act, and the AAO finds no purpose would be served in considering the merits of her Form I-601 waiver application under section 212(i) and section 212(a)(9)(B)(v) of the Act. The appeal will be dismissed.

**ORDER:** The appeal is dismissed.