



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **MAR 28 2013** OFFICE: HARLINGEN, TX

FILE: [REDACTED]

IN RE: APPLICANT: [REDACTED]

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Harlingen, Texas, 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 was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure a visa, other documentation, admission to the United States, or another benefit under the Act through fraud or misrepresentation. The applicant is the spouse of a lawful permanent resident and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her lawful permanent resident spouse and U.S. Citizen children.

The Field Office Director concluded that the applicant failed to demonstrate the existence of extreme hardship to a qualifying relative given her inadmissibility and denied the application accordingly. *See Decision of Field Office Director* dated August 23, 2010. The AAO issued a notice of intent to dismiss the appeal, indicating that the applicant was also inadmissible pursuant to section 212(a)(9)(C) of the Act. *See AAO Notice*, February 4, 2013.

In response to the AAO's notice, counsel for the applicant submits a brief. Therein, counsel asserts that the applicant may establish eligibility for an exemption to inadmissibility under section 212(a)(9)(C) of the Act while in the United States, and that the Ninth and Tenth Circuit Court of Appeals have held that an applicant may be granted adjustment of status despite such inadmissibility.

The record includes, but is not limited to, briefs in support, the documents listed above, psychological evaluations, medical records, letters from family and friends, evidence of birth, marriage, residence, and citizenship, documentation of finances and property ownership, other applications and petitions, evidence of entry into the United States, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (i) 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.

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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.

The AAO found the applicant was not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for her statements to immigration officials on January 5, 1999 and February 9, 1999. *See AAO Notice*, February 4, 2013. However, the AAO found she was inadmissible under section 212(a)(6)(C)(i) of the Act for falsely representing on her Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the Form I-130, Petition for Alien Relative, that her last entry into the United States was in 1998. *Id.* Inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act is not currently contested. The AAO therefore affirms that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) 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 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--

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- (A) removal;
- (B) departure from the United States;
- (C) reentry or reentries into the United States; or
- (D) attempted reentry into the United States.

In the notice, the AAO found, based on the present record, that the applicant entered the United States on or about February 10, 1999, and returned to Mexico after a year had elapsed, before her nonimmigrant visa interview on December 28, 2000. The applicant subsequently entered the United States without inspection, as she was not granted a visa and she was present for the birth of her daughter in the United States on October 29, 2003. The AAO concluded that the applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act because she accrued more than one year of unlawful presence and thereafter entered the United States without inspection.

Counsel contends that USCIS's May 6, 2009 memo (USCIS Memo) on unlawful presence as well as an unpublished AAO decision indicate that an applicant may establish eligibility for an exemption to the bar imposed in section 212(a)(9)(C) of the Act while in the United States. These assertions, however, do not assist the applicant with her inadmissibility pursuant to section 212(a)(9)(C) of the Act. Firstly, an unpublished AAO decision does not have precedential value, and cannot be cited as support for legal conclusions. The AAO further notes that the unpublished decision counsel uses as support is inapplicable in the present case because it evaluates inadmissibility under section 212(a)(9)(B) of the Act, not section 212(a)(9)(C) of the Act. Secondly, the only instance in which the USCIS Memo explicitly indicates that an applicant may apply for a waiver under section 212(a)(9)(C) of the Act while in the United States is in cases of refugee or asylee adjustment, where the inadmissibility arises after an individual's application for refugee classification, or if the ground of inadmissibility was not known to the officer who approved the individual for such status. *See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy*, p. 50, dated May 6, 2009. The applicant is not a refugee or asylee, nor has the applicant been classified under section 204(a)(1)(A)(iii), (iv), or (v), or section 204(a)(1)(B)(iii), (iv), or (v). As such, the applicant is not eligible to apply for a waiver or exception to inadmissibility under section 212(a)(9)(C) of the Act while in the United States.

Counsel also asserts that the Ninth and Tenth Circuit Court of Appeals have previously recognized that applicants for adjustment of status under section 245(i) of the Act who are deemed inadmissible pursuant to section 212(a)(9)(C) of the Act may nevertheless be granted adjustment of status. However, both courts have since reversed the cases counsel cites as support. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) and *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011). The AAO declines counsel's invitation to adjudicate the applicant's

based on law which is no longer controlling.¹ Contrary to counsel's contentions, current law mandates that 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 10 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); and *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* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under section 212(i) of the Act.

In proceedings for a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.

¹ The AAO moreover notes that the applicant does not live within the jurisdiction of the Ninth or the Tenth Circuit Courts of Appeals.