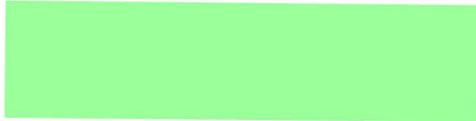


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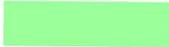


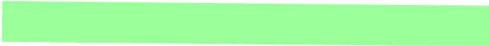
U.S. Citizenship
and Immigration
Services



Date: **NOV 18 2014**

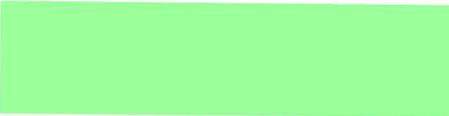
Office: NEWARK

FILE: 

IN RE: Applicant: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. An appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before the AAO on a motion to reconsider. The motion will be granted and the prior decision to dismiss the appeal will be affirmed.

The applicant is a native and citizen of Belize. The record indicates that on July 28, 1996 the applicant attempted to enter the United State claiming that he was a U.S. Citizen, born in St. Croix, Virgin Islands. The applicant was deported from the United States on July 29, 1996. The applicant was thus found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States through fraud or misrepresentation. The applicant did not contest this finding of inadmissibility, but rather sought a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), to reside in the United States with his U.S. Citizen spouse.

The record indicates that, subsequent to his deportation on July 29, 1996, the applicant reentered the United States without inspection in December 1997. Thus, the applicant was also found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who was removed from the United States and who subsequently reentered the United States without being admitted.

The Field Office Director found the applicant inadmissible under section 212(a)(9)(C)(i)(II) of the Act, a ground of inadmissibility for which there is no waiver available. The Field Office Director denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 19, 2009.

We reviewed the applicant's Form I-601 on appeal and concurred with the Field Office Director that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, a ground of inadmissibility for which there is no waiver available. *Decision of the AAO*, dated September 5, 2012.

On motion, filed on October 5, 2012 and received by the AAO on October 11, 2014, counsel submits a brief in which he contends that the Congressional intent with respect to the LIFE Act indicates that the applicant qualifies for adjustment of status under section 245(i) of the Act even if he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and has not remained outside the United States for a period of ten years. Counsel cites decisions of the U.S. Courts of Appeals for the Eighth and Tenth Circuits, noting that the issue has not been decided in the U.S. Court of Appeals for the Third Circuit.¹

According to 8 C.F.R. § 103.5(a)(3), 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 that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As counsel has submitted reasons for reconsideration citing precedent decisions, the motion to reconsider will be granted.

¹ This matter arises in Newark Field Office, which is within the jurisdiction of the Third Circuit Court of Appeals.

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.

The record indicates that the applicant attempted to enter the United State falsely claiming that he was a U.S. Citizen, born in St. Croix, Virgin Islands, and was deported from the United States on July 29, 1996. As the applicant did not apply for admission to the United States after his deportation, but rather reentered the United States in December 1997 without inspection, he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

Counsel asserts that the applicant is seeking adjustment of status pursuant to Section 245(i) of the Act and the LIFE Act, which allows aliens who are the beneficiaries of immigrant visa petitions filed before April 30, 2001 to apply for adjustment of status pursuant to section 245(i) of the Act. Counsel notes that members of Congress speaking in support of the LIFE Act emphasized that family reunification for illegal entrants and status violators who otherwise “played by the rules” was the overriding goal of the LIFE Act, and that therefore Congress did not intend the LIFE Act’s effect to be blocked by section 212(a)(9)(C)(i)(II) of the Act or other grounds of inadmissibility.

Counsel cites *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2006) to support the assertion that the applicant is eligible for adjustment of status under section 245(i) of the Act, noting that the Tenth Circuit Court of Appeals initially found that the LIFE Act gives the Attorney General discretion to consider applications for adjustment of status despite such applications being barred by other statutes. He concedes that the Tenth Circuit Court of Appeals overturned that decision and, deferring to the Board of Appeals in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), found that an individual cannot qualify for adjustment of status under section 245(i) of the Act if he is

inadmissible under section 212(a)(9)(C) of the Act and has not remained outside the United States for a period of ten years. See *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011). However, counsel contends that the Tenth Circuit distinguished its 2011 decision from its prior decision, in which the facts of the case included the situation that the alien had a previous removal order reinstated. Counsel contends that the Tenth Circuit did not specifically address whether one who was not subject to a reinstated removal order could not have the previous order cured by section 245(i) of the Act. Counsel further cites *Flores v. Ashcroft*, 354 F. 3d 727 (8th Cir. 2003), which also included a factual situation where the individual's previous removal order had been reinstated in finding that the individual cannot qualify for adjustment of status under section 245(i) of the Act if he is inadmissible under section 212(a)(9)(C) of the Act.

Counsel contends that the applicant's situation in the current case is distinguishable from *Padilla-Caldera v. Holder* and *Flores v. Ashcroft* due to the fact that the previous removal order for the applicant has not been reinstated, and the applicant is currently not under an order of removal. Counsel further contends that this issue has not been decided in the U.S. Court of Appeals for the Third Circuit, thus it remains to be determined whether this argument would withstand judicial scrutiny.

We find counsel's contentions to be unpersuasive. There is no requirement in section 212(a)(9)(C)(i)(II) of the Act that an alien be subject to a reinstated removal order in order to be found inadmissible under this provision. An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission 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 for 10 years and USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is still in the United States, and will not be eligible to reapply for admission until he departs the United States and remains outside the United States for more than 10 years. The applicant is currently statutorily ineligible to apply for permission to reapply for admission. The appeal of the denial of the waiver application is therefore dismissed as a matter of discretion as its approval would not result in the applicant's admissibility to the United States.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the prior decision dismissing the appeal is affirmed.