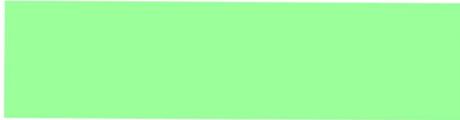


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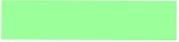


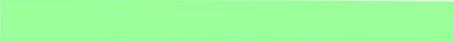
U.S. Citizenship
and Immigration
Services



DATE: JAN 13 2015

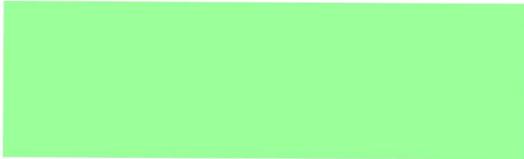
OFFICE: LOS ANGELES

FILE: 

IN RE: 

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 that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Los Angeles, California denied the waiver application. A subsequent appeal and motion to reopen and reconsider were dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a second motion. The motion will be granted and the prior decision of the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Guatemala who was found to be inadmissible 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 seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States with his U.S. citizen spouse and lawful permanent resident children.

The Field Office Director determined that the applicant had failed to demonstrate that a qualifying relative would experience extreme hardship upon denial of his waiver application and denied the application accordingly. *See Decision of Field Office Director*, dated March 26, 2009. On appeal, the AAO determined that the applicant is also inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and dismissed the applicant's appeal on this basis. *See Decision of the AAO*, dated August 26, 2013. On motion, the AAO determined that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, and affirmed its prior decision. *See Decision of the AAO*, dated February 27, 2014.

On motion, counsel for the applicant asserts that the enactment of the Legal Immigration Family Equity (LIFE) Act allows the applicant to adjust status despite his inadmissibility. Counsel further asserts that the applicant did not accrue the requisite amount of unlawful presence in the United States to be inadmissible under section 212(a)(9)(C)(i)(I) of the Act and that there is no ten year bar applicable to inadmissibility under section 212(a)(9)(C)(i)(II) of the Act.

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

- (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 that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 record reflects that the applicant attempted to enter the United States on November 7, 1999 by presenting a border crossing card belonging to another individual. Accordingly, the applicant is inadmissible under section 212(a)(6)(C) of the Act for attempting to procure admission into the United States through willful misrepresentation. The applicant does not dispute this ground of inadmissibility on motion.

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 applicant entered the United States without admission or parole in November 1990 and departed from the United States in August 1998. The applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in August 1998. The applicant subsequently entered the United States without admission or parole on November 9, 1999 and has not departed from the United States since that date.

Counsel for the applicant asserts that applicant did not accrue unlawful presence in the United States, as his pending asylum application provides an exception to this ground of inadmissibility. The applicant filed a Form I-589, Request for Asylum in the United States, on April 20, 1992 and subsequently withdrew this application on February 11, 2008. Section 212(a)(9)(B)(iii)(II) states that the period of time during which an alien has a bona fide application for asylum pending is not

taken into account in determining a period of unlawful presence under section 212(a)(9)(B)(i). However, this exception does not apply to inadmissibility under section 212(a)(9)(C)(i). INS Acting Executive Associate Commissioner Memorandum, *Implementation of Section 212(a)(6)(A) and 212(a)(9) Grounds of Inadmissibility*, dated March 31, 1997. The only exception to the provisions of section 212(a)(9)(C)(i) are contained in section 212(a)(9)(C)(ii). As such, the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, as he entered the United States without authorization subsequent to accruing over one year of unlawful presence.

On November 8, 1999, the applicant was removed from the United States pursuant to section 235(b)(1) of the Act. The applicant subsequently entered the United States without inspection on November 9, 1999. The applicant is, therefore, also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i) 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); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). As such, an applicant who is inadmissible under either 212(a)(9)(C)(i)(I) or 212(a)(9)(C)(i)(II) of the Act is subject to this restriction. Thus, to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, the BIA has held that 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.

Aliens who reside within the jurisdiction of the Ninth Circuit Court of Appeals, however, may be eligible for consent to reapply for admission even if they are presently inadmissible under section 212(a)(9)(C)(i)(II) of the Act, if they meet specific requirements under the terms of *Duran-Gonzales v. DHS*, No. C06-1411(W.D. Wash., 2014) (settlement agreement).

The settlement agreement defines a class member as any person who:

1. Is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:
 - a. the beneficiary was physically present in the United States on December 21, 2000, or
 - b. If a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.
2. Is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act ("INA"), because he or she entered or attempted to reenter the United States without being admitted after April 1, 1997, and without permission after having previously been removed;

3. Properly filed a Form I-485 (Application to Adjust Status) and Form I-485 Supplement A (Adjustment of Status Under Section 245(i)) while residing within the jurisdiction of the Ninth Circuit on or after August 13, 2004, and on or before November 30, 2007;
4. Filed a Form I-212 (Application for Permission to Reapply for Admission Into the United States After Deportation or Removal) on or after August 13, 2004, and on or before November 30, 2007;
5. Form I-485, Form I-485 Supplement A, and Form I-212 were denied by U.S. Citizenship and Immigration Services (“USCIS”) and/or the Executive Office for Immigration Review (“EOIR”) on or after August 13, 2004, or have not yet been adjudicated;
6. Is not currently subject to pending removal proceedings under INA § 240, or before the United States Court of Appeals for the Ninth Circuit on a petition for review of a removal order resulting from proceedings under INA § 240; and
7. Did not enter or attempt to reenter the United States without being admitted after November 30, 2007.

Settlement Agreement and Amendment of the Class Definition at 2-3, *Duran Gonzales v. DHS*, No. C06-1411 (W.D. Wash, 2014).

In this case, the record establishes that the applicant is not eligible for relief under the settlement agreement as the record establishes that he is otherwise inadmissible. The applicant is also inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act, for illegally reentering the United States after having accrued more than one year of unlawful presence. The settlement agreement only pertains to applicants who are inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Based on his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, the applicant is still subject to the ten year bar in applying for permission to reapply for admission.

Counsel for the applicant asserts that the enactment of the LIFE Act in 2000 allows the applicant to adjust his status despite his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, as the LIFE Act was enacted subsequent to the provisions of section 212(a)(9)(C)(i). Counsel contends that the applicant’s mere physical presence in the United States on the date of enactment of the LIFE Act is sufficient to disregard any ground of inadmissibility. The provisions of section 245(i) of the Act, which allow for the adjustment of status of certain eligible individuals under the LIFE Act, specifies that the status of such an alien may be adjusted if, amongst other requirements, the alien is admissible to the United States. *See INA § 245(i)(2)(A)*. As noted, the applicant has been found to be inadmissible under sections 212(a)(6)(C) and 212(a)(9)(C)(i)(II) of the Act. Further, the Board of Immigration Appeals determined that inadmissibility under section 212(a)(9)(C)(i) of the Act can only be waived by section 212(a)(9)(C)(ii) when an applicant is seeking admissibility

more than ten years after his last departure from the United States, with no discretion to create less restrictive waivers. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).¹

The applicant's last departure from the United States took place on November 8, 1999. The applicant entered the United States without admission or parole the following day and has remained in the United States since that date. Accordingly, the applicant has remained outside the United States for less than ten years since his last departure. Based upon this ground of inadmissibility, the applicant is currently statutorily ineligible to apply for permission to reapply for admission. As such, the applicant's Form I-601 remains denied as a matter of discretion.

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. Accordingly, the prior AAO decision is affirmed.

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

¹ Counsel for the applicant asserts that the section 212(a)(9)(C)(ii) exception to inadmissibility states that its ten year bar applies only to clause (i). As such, counsel contends that the ten year bar applies to section 212(a)(9)(C)(i)(I) and not to section 212(a)(9)(C)(i)(II). It is noted that the clause (i) indicated in section 212(a)(9)(C)(ii) references section 212(a)(9)(C)(i). As such, the ten year bar is applicable whether an applicant enters or attempts to enter the United States without admission after either unlawful presence of over one year, section 212(a)(9)(C)(i)(I), or an order of removal, section 212(a)(9)(C)(i)(II).