



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 04 2015**

Office: MANCHESTER, NH

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:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Manchester, New Hampshire. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a motion. The motion will be granted and the prior decision is affirmed.

The applicant is a native and citizen of Brazil 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 seeking to procure admission to the United States by fraud or willful misrepresentation of a material fact. The applicant's spouse is a lawful permanent resident. 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 her spouse.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated October 3, 2013. In his decision denying the applicant's motion to reopen and reconsider dated April 1, 2014, the Field Office Director also found that the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for having been ordered removed and subsequently entering the United States without being admitted.

On appeal, we determined that the record supported the finding that the applicant was ordered removed from the United States on April 8, 2004, that she re-entered the United States on July 1, 2004 without inspection, and that she currently resides in the United States. As she has not remained outside of the United States for 10 years, we found her inadmissible under section 212(a)(9)(C) of the Act and dismissed her appeal as a matter of discretion. *Decision of the AAO*, dated October 22, 2014.

On motion, the applicant, through counsel, states that we incorrectly applied current law and policy by failing to note that she is eligible to adjust status under section 245(i) of the Act despite her inadmissibility under section 212(a)(9)(C) of the Act. The applicant also asserts that we failed to demonstrate that the First Circuit has found that the Board of Immigration Appeal's (BIA) decision in *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010), holding that an alien is ineligible to adjust under section 245(i) of the Act with a section 212(a)(9)(C) inadmissibility, is reasonable and to establish that BIA case law applies in her case. Similarly, the applicant states that BIA case law applies only in the circuits it already has addressed in its decisions, and because it has not addressed cases facing this issue in the First Circuit, the law is not "homogenous" and BIA case law cannot apply to First Circuit cases like hers. The applicant also indicates that the inadmissibility under section 212(a)(6)(C)(i) of the Act for misrepresentation should not apply to her, because she seeks adjustment status under section 245(i) of the Act. Moreover, the applicant claims that her due process rights were violated by the lack of analysis or explanation in her denial decision. Similarly, the applicant asserts we failed to explain what evidence we considered and failed to determine whether the District Director correctly found that her qualifying relative would not suffer extreme hardship.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant provides new evidence to support the assertions concerning her eligibility to adjust status under section 245(i) of the Act, the motion to reopen is granted.

In addition to evidence already considered on appeal, the applicant provides a supplemental discussion brief with her Form I-290B, Notice of Appeal or Motion.

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 Secretary of the Department 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 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 record reflects that the applicant presented a photo-substituted Brazilian passport and U.S. visitor's visa in the name of [REDACTED] to U.S. immigration authorities while seeking admission to the United States on April 8, 2004. She is therefore inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for seeking to procure admission to the United States through willful misrepresentation of a material fact. The applicant does not contest the finding of inadmissibility.

However, on motion, the applicant asserts that her inadmissibility under section 212(a)(6)(C)(i) of the Act for misrepresentation should not apply to an alien eligible to adjust status under section 245(i) of the Act. She provides no legal authority to support her assertion. The Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." See sections 235(b)(3) and 240(c)(2)(A) (addressing the requirement in the context of removal proceedings). The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008). See *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008). See *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). The applicant has not shown that section 212(a)(6)(C) of the Act does not apply to her.

Section 212(a)(9)(C) of the Act states in pertinent part:

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 record also reflects that the applicant received an expedited removal order on April 8, 2004, after she attempted to procure admission to the United States. She was removed a day later. The applicant subsequently entered the United States without inspection on July 1, 2004. Therefore, she is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed and subsequently entering the United States without being admitted.

The applicant asserts that we incorrectly applied current law or policy by citing to *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). The applicant asserts that we failed to demonstrate that the First Circuit determined that the BIA's decision in *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010), holding that an alien is ineligible to adjust under section 245(i) of the Act with a section 212(a)(9)(C) inadmissibility, is reasonable and is binding. The applicant claims that although other circuit courts have agreed that an alien with a section 212(a)(9)(C) inadmissibility is ineligible to adjust under section 245(i), the BIA may not make the same finding in the First Circuit. The applicant provides no legal authority to support her assertions. While counsel notes that this issue has not been addressed in the First Circuit, regulations at 8 C.F.R. § 1003.1(g) provide that BIA precedent decisions "shall be binding on all officers and employees of the Department of Homeland Security" and "selected decisions designated by the Board . . . shall serve as precedents in all proceedings involving the same issue or issues." As officers and employees of the Department of Homeland Security, we therefore are bound by the BIA decision in *Matter of Diaz and Lopez*.

Moreover, the applicant's eligibility to apply for adjustment of status would not cure her inadmissibility under section 212(a)(9)(C) of the Act. See *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) (holding that section 212(a)(9)(C)(i)(I) of the Act bars aliens from adjustment of status under section 245(i)); *Cheruku v. Attorney General of U.S.*, 662 F.3d 198, 204 (3rd Cir. 2011) (holding that 245(i) eligibility does not waive inadmissibility under section 212(a)(9)(B) of the Act).

The applicant also asserts that we violated her due process rights by failing to explain the grounds for the denial of the appeal. Constitutional issues are not within our appellate jurisdiction; therefore we will not address the applicant's right to due process in the present decision.

The record establishes that the applicant's last departure from the United States occurred on April 9, 2004 and that she entered the United States without inspection on July 1, 2004. She currently resides in the United States and has not remained outside of the United States for the required period since her last departure. As we stated in our previous decision, to avoid inadmissibility under section 212(a)(9)(C) of the Act, the applicant's last departure must have been at least ten years ago, the applicant must have remained outside the United States, and USCIS must have consented to the applicant's reapplying for admission.

The applicant states that we failed to explain what evidence we considered and did not determine whether the District Director correctly found that her qualifying relative would not suffer extreme hardship. We acknowledge the evidence the applicant submits regarding hardship to her lawful permanent resident spouse, but no purpose would be served in adjudicating her application for a waiver of inadmissibility under section 212(i) of the Act, given her inadmissibility under section 212(a)(9)(C) of the Act. Our previous dismissal as a matter of discretion therefore is affirmed.

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 is granted and the prior decision of the AAO is affirmed.