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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

H6

[REDACTED]

Date: **FEB 16 2012** Office: SEATTLE, WA FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)

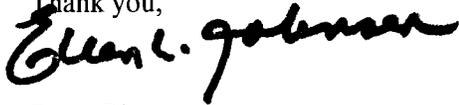
ON BEHALF OF APPLICANT:

[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 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 Field Office Director, Seattle, Washington. The matter 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)(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. The applicant is the daughter of a lawful permanent resident and married to a U.S. citizen, and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her mother, her husband, and their children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse. In addition, the field office director found that the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied pursuant to section 212(a)(9)(C)(ii) of the Act because the applicant reentered the United States illegally and ten years had not elapsed since the date of her departure. As such, the field office director found that the applicant's Form I-601 should be denied as a matter of discretion. The field office director denied the waiver application accordingly. *Decision of the Field Office Director*, dated September 1, 2009.

On appeal, counsel contends the Ninth Circuit Court of Appeals' decision in *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir. 2006), is controlling in this case. According to counsel, even though the Court in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), overruled its holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004), the Court did not disturb its holding in *Acosta*. Counsel asserts that the applicant is eligible to adjust his status notwithstanding section 212(a)(9)(C) of the Act. In addition, counsel contends the field office director failed to consider that the applicant's husband has lived in the United States for over twenty years and that the couple has three young U.S. citizen children.

The AAO notes that counsel purports to appeal the denial of the applicant's Form I-485, Form I-212, and Form I-601. There is no evidence in the record showing the applicant has paid more than one fee for one appeal. As there were three separate decisions rendered, each must have its own Form I-290B with fee. The AAO does not have jurisdiction over an appeal from the denial of a Form I-485. With respect to the Form I-212 and the Form I-601, according to of the Adjudicator's Field Manual, the Form I-601 is to be adjudicated first. *Adjudicator's Field Manual*, Chapter 43.2(d) ("If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first."). Therefore, the AAO will consider the applicant's appeal to be an appeal of the Form I-601.

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

- (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 Attorney General [now the Secretary of Homeland Security (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 Attorney General [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.

....

(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.

(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.

In this case, the record shows, and counsel concedes, that the applicant entered the United States in January 1992 without inspection, departed the country in April 2002, re-entered the country in August 2002 without inspection, and continues to reside in the United States. The applicant accrued more than one year of unlawful presence beginning on April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure in April 2002. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking admission to the United States within ten years of her last departure. In addition, because the applicant re-entered the United States without being admitted after being unlawfully present in the United States for more than one year, she is also inadmissible to the United States under section 212(a)(9)(C) of the Act.

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 CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in April 2002. 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(a)(9)(B)(v) of the Act.

Counsel's contention that the applicant may adjust her status notwithstanding section 212(a)(9)(C) of the Act based on the Ninth Circuit's decision in *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir. 2006), is unpersuasive. The Ninth Circuit has explicitly rejected this argument and modified its prior holding in *Acosta*. *See Garfias-Rodriguez v. Holder*, 649 F.3d 942, 950 (9<sup>th</sup> Cir. 2011) ("we hold that adjustment of status under § 1255(i) [section 245(i) of the Act] is unavailable to aliens inadmissible under § 1182(a)(9)(C)(i)(I). In doing so, we are not creating a new rule of law, but rather we are correcting our prior reading of the statutes in *Acosta* based on the BIA's authoritative ruling in *Briones*."). Therefore, as stated above, the applicant is currently statutorily ineligible to apply for permission to reapply for admission and no purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* 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.