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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY



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FILE: [Redacted] Office: SEATTLE, WASHINGTON Date:

JUL 13 2005

IN RE: Applicant: [Redacted]

APPLICATION: Application to Register Permanent Resident or Adjust Status under Section 245 of the Immigration and Nationality Act; 8 U.S.C. §1255.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Seattle, Washington. The matter is now before the AAO on certification. The district director's decision is affirmed.

The applicant initially entered the United States without inspection in September 1990, and he remained in the United States without authorization from September 1990 until approximately December 1999. The applicant married in the U.S. on December 12, 1997. The applicant subsequently left the U.S. and traveled to Mexico for three weeks in December 1999. He reentered the United States without admission or parole in late December 1999. On September 18, 2003, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status (I-485 application), based on a previously approved Form I-130 Petition for Alien Relative (I-130 Petition).¹

The district director determined that the applicant was inadmissible under section 212(a)(9)(C)(i) of the Act based on his reentry into the U.S. without admission or parole, after a previous aggregate period of more than one year of unlawful U.S. presence. The district director determined further that section 245(i) of the Act waiver provisions were not applicable to the applicant's case, and his adjustment of status application was denied accordingly.

On certification, the applicant asserts that the district director erroneously found that he was inadmissible under section 212(a)(9)(C)(i) of the Act, because he was not ordered removed from the U.S. and because he is not a previous immigration violator. The applicant asserts that, at worst, he is inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), which allows for a section 212(a)(9)(B)(v) of the Act, waiver of inadmissibility. The applicant asserts further that his departure from the U.S. in December 1999, was brief, casual and innocent, and that he therefore did not "reenter" the U.S. for section 212(a) of the Act inadmissibility purposes. The applicant additionally asserts that his more than one year of unlawful presence in the U.S. after April 1, 1997, was continuous, and that it therefore does not meet the definition of "aggregate" unlawful presence for section 212(a) of the Act inadmissibility purposes. Lastly, the applicant asserts that section 245(i) of the Act, waiver provisions apply to his case because section 245(i) waives all unlawful entry inadmissibility grounds, including reentry and presence, as long as an alien is not subject to an order of removal or deportation.

The AAO notes that all of the applicant's assertions are based on his own interpretation of relevant statutes. The applicant provides no legal authority or basis for any of the assertions made on appeal.

Section 245 of the Act, states in pertinent part:

¹ The record does not contain evidence relating to the applicant's spouse's U.S. citizenship or immigrant status. The record also does not contain the I-130 petition filed by the applicant's spouse, or evidence containing the date of the I-130 filing or approval date. However, the AAO notes the district director's statement that the applicant's I-130 petition was approved prior to his I-485 application. The AAO notes further that the district director did not question or discuss the timeliness of the applicant's I-130 petition filing for section 245(i) of the Act purposes. In addition, the AAO notes that the present matter is the subject of a Motion to Reconsider, and the applicant's statement on certification and on motion, noted that his wife is a naturalized U.S. citizen, and that she filed an I-130 petition on his behalf on November 23, 1999. Based on the foregoing, the AAO assumes that the applicant meets section 245(i) visa and timely filing requirements.

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) may be adjusted by the Attorney General (now Secretary, Homeland Security, "Secretary"), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

....

(i) (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

- (i) entered the United States without inspection; or
- (ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d) of--

- (i) a petition for classification under section 204 that was filed with the Attorney General [Secretary] on or before April 30, 2001; or
- (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence

....

(2) Upon receipt of such an application and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

Section 212(a)(9)(C)(i) 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.

(Emphasis added). Section 101(a)(13) of the Act; 8 U.S.C. § 1101(a)(13) states in pertinent part that:

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

The AAO finds that the applicant was properly found to be inadmissible under section 212(a)(9)(C)(i) of the Act.

The applicant does not dispute that he entered the United States without inspection in September 1990, and that he remained in the U.S. without authorization until approximately December 1999. The applicant also concedes that he traveled to Mexico for three weeks in December 1999, and that he reentered the United States without admission or parole in late December 1999. The AAO finds that the applicant's entry into the United States without inspection in 1990 followed by his presence without authorization in the U.S. constitute a previous immigration violation which, upon his reentry without admission or parole into the U.S., made the applicant inadmissible under section 212(a)(9)(C)(i).² See also, *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1166 (10th Cir. 2004) (stating that "[i]llegal reentrants to the United States are covered by 8 U.S.C. § 1182(a)(9)(C) [section 212(a)(9)(C) of the Act].

The AAO finds further that the applicant's continuous unlawful presence in the United States from April 1997 to December 1999 constitutes an "aggregate period of more than one year" of unlawful presence, as set forth in section 212(a)(9)(C)(i) of the Act. The term, "aggregate" has been defined as, "[f]ormed by combining into a single whole or total" and, "[t]o collect into a whole". See BLACK'S LAW DICTIONARY, 7th Edition (1999). Moreover, a June 17, 1997 Immigration and Naturalization Service (Service, now U.S. Citizenship

² The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) took effect on April 1, 1997, and amended the Act to define aliens present in the U.S., who entered without inspection, as inadmissible. See section 212(a)(6)(a) of the Act.

and Immigration Services, CIS) Office of Programs, Memorandum entitled, “Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)” (“Memorandum”) clarifies on page three that, under section 212(a)(9)(B) of the Act, an alien’s periods of unlawful presence in the U.S. are not counted in the aggregate. “[T]his is because each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)” of the Act. The Memorandum states that this method of counting unlawful presence is in contrast to the method used for section 212(a)(9)(C)(i) of the Act purposes, under which all periods of unlawful presence are aggregated, and under which aliens “[w]ho were previously unlawfully present in the United States for an aggregate period of more than one year who enter or attempt to re-enter the United States without being admitted” are permanently inadmissible. See Memorandum at 5.

In addition to the above findings, the AAO also finds no merit in the applicant’s assertion that his December 1999, reentry into the U.S. did not qualify as an “entry” for section 212(a)(9)(C)(i) of the Act purposes because his stay in Mexico was brief, casual and innocent. The AAO notes that a 1963, U.S. Supreme Court decision, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), held that a lawful permanent resident returning to the U.S. was not deemed to make a new admission into the country if his trip was innocent, casual and brief, and not meant to be meaningfully interruptive of his status (*Fleuti* doctrine.) The applicant’s attempt to apply *Fleuti* doctrine rationale to his case is not persuasive. First, the “brief, casual and innocent” doctrine was not a general principle of law, but an interpretation of the entry doctrine that applied uniquely to aliens who had already been lawfully admitted for permanent residence. See *INA v. Phinpathya*, 464 U.S. 183 (1984) (stating, “brief, casual and innocent” doctrine did not apply to “continuous physical presence” requirement for suspension of deportation). More significantly, even for resident aliens, the *Fleuti* doctrine did not survive the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See *Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998). Nothing in the text of section 212(a)(9)(C)(i) of the Act supports extending the *Fleuti* doctrine to aliens in the applicant’s situation. Indeed, excusing “brief, casual and innocent” departures would not be consistent with the premising a separate ground of inadmissibility specifically on an alien’s having returned to the United States without admission after a prior removal or prior period of unlawful presence.³

Furthermore, the AAO finds that the applicant’s sweeping assertion that section 245(i) waives all unlawful entry inadmissibility grounds, including reentry and presence, as long as the alien is not subject to an order of removal or deportation, is unsupported by any legal evidence in the record and without basis.

The AAO is aware of the U.S. Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-94 (9th Cir. 2004). In this decision, the U.S. Ninth Circuit Court of Appeals held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may file, in conjunction with an adjustment of status application, a Form I-212 (Application for Permission to Reapply for Admission into the United States after Deportation or Removal) to order to obtain consent to reapply for admission. If, as a matter of discretion, CIS approved the Form I-212, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. The AAO notes that *Perez-Gonzalez* did *not* hold that section 245(i) of the Act, of itself, relieved the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act. Rather, *Perez-*

³ The AAO notes that even if the *Fleuti* doctrine could be said to apply, a three-week absence from the United States is not “brief”, especially in comparison with the few hour absence at issue in *Fleuti*. Moreover, since entering the United States without inspection is a crime (and a felony for a second or subsequent offense), the circumstances of the applicant’s departure cannot be said to be “innocent.” See section 275(a) of the Act, 8 U.S.C. section 1325(a).

Gonzalez concerned “the availability of adjustment of status once a favorable determination of permission to reapply has been made. *See Perez-Gonzalez* at 795.

In the present matter, the applicant has not filed a Form I-212 in conjunction with his adjustment of status, application. The AAO notes that in many cases, this fact would be a sufficient reason to remand the case to the district director so that the applicant could do so. However, 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 is “seeking admission more than ten years after the date of the alien’s last departure.” *See* Section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. section 1182(a)(9)(C)(ii). 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 *and* that CIS has consented to the applicant’s reapplying for admission. In the present matter, the applicant’s last departure from the U.S. occurred in 1999, considerably less than ten years ago. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212.⁴

DECISION: The district director’s decision is affirmed.

⁴ The AAO notes that, in dicta, the *Perez-Gonzalez* decision suggests that this required ten-year wait does not apply to an alien who has already returned to the United States. *See Perez-Gonzalez, supra* at 794, note 10. The main point of the footnote discussion, however, is that an alien is no longer inadmissible if she or he obtains consent to reapply for readmission, “prior to reembarkation more than ten years after their last departure.” This main point is certainly correct. However, this does not mean, as the rest of the note seems to suggest, that an alien can avoid the ten year wait, clearly required by the statute, simply by returning immediately to the United States. This reading would deprive section 212(a)(9)(C)(ii) of any impact at all.