

U.S. Department of Homeland Security
20 Mass, Rm. A3042,
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



Hj

FILE:



Office: CHICAGO

Date:

MAY 26 2006

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 Immigration and Nationality Act (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 and seeking admission within 10 years of his last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated September 16, 2003.

The record reflects that, on April 12, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. The record shows that the applicant appeared at CIS' Chicago District Office on February 28, 2002. The applicant testified that he entered the United States without inspection in 1994 and remained in the United States until he returned to Mexico on August 16, 2000. On August 25, 2000, the applicant attempted to re-enter the United States but was apprehended by immigration officers and returned to Mexico. On August 26, 2000, the applicant re-entered the United States without inspection.

On May 22, 2002, the applicant filed the Form I-601 along with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On September 16, 2003, the district director issued a notice of denial of the application as the applicant was inadmissible because he had been unlawfully present in the United States for more than one year and was seeking readmission within 10 years of his last departure from the United States, and had failed to establish that extreme hardship would be imposed on a qualifying family member.

On appeal, counsel asserts that the district director erred in finding the applicant had failed to establish extreme hardship. *Applicant's Brief*, dated October 13, 2003. In support of his assertions, counsel submitted the above-referenced brief, a copy of mortgage documents, a new psychological evaluation for the applicant's wife and copies of documents previously provided. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

- (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.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9) provides 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

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 Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

- (B) departure from the United States;
- (C) reentry or reentries into the United States; or
- (D) attempted reentry into the United States.

The district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admitted unlawful presence in the United States for more than one year. Counsel does not contest the district director's determination of inadmissibility.

The record in the instant case reflects that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until August 16, 2000, the date of his departure from the United States. On August 25, 2000, the applicant attempted to enter the United States without being legally admitted and was returned to Mexico. On August 26, 2000, the applicant entered the United States without being admitted or inspected. The AAO therefore finds that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, for reentering the United States without being admitted after having been unlawfully present in the United States for an aggregate period of more than one year.

The AAO notes that an exception to this ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

The AAO finds that since the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, he must receive permission to reapply for admission (Form I-212). An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than 10 years have elapsed 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). 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 United States occurred on August 16, 2000, less than ten years ago. He is currently statutorily ineligible to apply for permission to reapply for admission. The applicant is eligible to file the Form I-212 after August 16, 2010, at which time the applicant will no longer need to file an application for waiver of the 212(a)(9)(B)(i)(II) inadmissibility grounds pursuant to section 212(a)(9)(B)(v) of the Act because he will no longer be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act as he will be seeking admission more than ten years after his last departure from the United States.

Inasmuch as the applicant is inadmissible and there is no waiver available for inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, until 10 years after his last departure, no purpose would be served in discussing whether the applicant is eligible for a waiver of the 212(a)(9)(B)(i)(II) inadmissibility grounds pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.