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

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[REDACTED]

FILE:

Office: GUATEMALA CITY, GUATEMALA
(RELATES)

Date: DEC 16 2008

IN RE:

[REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[REDACTED]

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guatemala City, Guatemala and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to sections 212(a)(6)(B) and 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 failed to attend his removal hearing and having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is the husband of a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The field office director found that, as the applicant was inadmissible under section 212(a)(6)(B) of the Act and no waiver was available, no purpose would be served by considering whether he had met the requirements for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. He denied the Form I-601 application accordingly. Using this same reasoning, the field office director also denied the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, filed by the applicant.¹ *Decision of the Field Office Director*, dated April 21, 2008.

On appeal, counsel contends that the applicant is no longer inadmissible to the United States under section 212(a)(6)(B) of the Act as the immigration judge, on August 4, 2008, reopened the applicant's removal proceeding, vacated the applicant's removal order and, on September 16, 2008, terminated the proceeding. He further claims that the applicant has accrued no unlawful presence in the United States and is, therefore, not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. *Counsel's Brief*, dated September 30, 2008.

The record indicates that the applicant entered the United States without inspection on June 17, 1984 and subsequently applied for asylum. His application was denied on April 6, 1990. The applicant reapplied for asylum on December 13, 1991 pursuant to the settlement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). On June 11, 1997, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, which was denied on March 8, 2001. On May 30, 2003, a Notice to Appear was issued, which, on June 9, 2003, was served on the applicant. On October 28, 2003, the immigration judge ordered the applicant removed *in absentia*. On December 16, 2005, the applicant's second asylum application was denied. On January 12, 2006, the applicant was removed from the United States. On August 4, 2008, the immigration judge reopened the applicant's removal proceeding, terminating the proceeding on September 19, 2008.

The record also indicates that the applicant was arrested on September 30, 1990 for assault with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury

¹ The AAO notes that the applicant has appealed only the field office director's denial of the Form I-601, submitting one fee. Therefore, the Form I-212 is not before the AAO and only the denial of the Form I-601 is addressed in this proceeding

under section 245(a)(1) of the California Penal Code (CPC). He was sentenced to 45 days in jail and 24 months probation.

The AAO turns first to the issue of whether the applicant is inadmissible to the United States under section 212(a)(6)(B) of the Act, which states:

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

The AAO notes that, at the time the field office director considered the applicant's Form I-601 waiver application, the applicant had been removed from the United States *in absentia* and was, therefore, inadmissible to the United States for five years under section 212(a)(6)(B) of the Act. However, subsequent to the field office director's decision, on August 4, 2008, the immigration judge reopened the applicant's removal proceeding.

Several courts of appeals have held that a grant of a motion to reopen vacates a final order of removal, including the Ninth Circuit Court of Appeals. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008) As the applicant in the present case was ordered removed by an immigration judge in Las Vegas, within the jurisdiction of the Ninth Circuit, the AAO finds that the immigration judge's reopening of the applicant's removal proceeding vacates his previous order of removal. Accordingly, the applicant has not been removed from the United States *in absentia* and is no longer inadmissible to the United States under section 212(a)(6)(B) of the Act.

At his consular interview in Guatemala on November 6, 2007, the applicant was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking admission within ten years of his January 2006 removal. The AAO does not, however, find the record to support such a conclusion.

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.

Section 212(a)(9)(B)(ii) defines the term “unlawfully present” for purposes of section 212(a)(9)(B)(i) of the Act as an alien who is present after the expiration of the period of stay authorized by the Attorney General (now Secretary of Homeland Security) or present in the United States without being admitted or paroled. Section 212(a)(9)(B)(iii)(II) includes the following statutory exception with regard to unlawful presence:

Asylees. – No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

The record reflects that the applicant in the present case filed two asylum claims. The second of these applications, filed on December 13, 1991 pursuant to the settlement reached in *American Baptist Churches v. Thornburgh*, 796 (N.D. Cal. 1991), was pending on April 1, 1997, the effective date of the unlawful presence provisions of the Act, and remained pending until December 16, 2005, when it was denied. The record further reflects that the applicant’s previous employment in the United States was authorized. The applicant did not, therefore, begin accruing unlawful presence in the United States until December 16, 2005, when his second Form I-589 was denied, and had only 27 days of unlawful presence in the United States at the time of his January 12, 2006 removal. Accordingly, the applicant accrued too little unlawful presence to trigger the bar in section 212(a)(9)(B)(i) of the Act and does not require a waiver of inadmissibility for unlawful presence.

The AAO also finds that the applicant’s conviction for assault under section 245(a)(1) of the CPC does not render him inadmissible to the United States as he has not been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) has generally found that assault with a deadly weapon is a crime involving moral turpitude. *See, e.g., Matter of G-R-*, 2 I. & N. Dec. 733 (BIA 1946); *see also Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988). However, the Ninth Circuit Court of Appeals has specifically addressed the statute at issue, and has held that a violation of section 245(a)(2) (Assault With a Firearm) of the CPC is not a crime involving moral turpitude. *See Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) (citing *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994)). Although the court in the *Carr* and *Komarenko* cases did not provide a detailed rationale for this finding, it is noted that a violation of section 245(a)(1) of the CPC differs from a violation of section 245(a)(2) only in the means employed to commit the assault rather than in the motive or intent of the offender. On the basis of the finding in the

Carr and *Komarenko* cases, the AAO determines that the applicant's conviction under section 245(a)(1) of the CPC is not a crime involving moral turpitude, and that no waiver of inadmissibility is necessary for this conviction.

In proceedings for an 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. In the present case, the applicant has met his burden. The record establishes that he is not inadmissible to the United States under section 212(a)(b)(B) of the Act for which no waiver is available. Further, he is not subject to the bars in sections 212(a)(2)(A)(i)(I) or 212(a)(9)(B)(i) of the Act and is, therefore, not required to file the Form I-601. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is moot..