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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: Office: MEXICO CITY (CIUDAD JUAREZ) Date: JAN 0 8 2010
CDJ 2004 617 157 (RELATES)

IN RE: [redacted]

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

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.

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the application will be approved.

The applicant, [redacted] is a native and citizen of Mexico. He 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. He was further found inadmissible under section 212(a)(1)(A)(iii)(I) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii)(I), as an alien classified as having a physical/mental disorder with associated behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others. The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(g) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(g).

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, the applicant's spouse asserts that she has physical ailments that limit her physical abilities and the applicant needs to return home to take care of any heavy lifting. She contends that her husband's drinking is not a mental problem.

In support of the application, the record contains, but is not limited to, letters from the applicant's spouse, a letter from the applicant's mother-in-law, medical records and court records. The record also contains a letter from the applicant written entirely in Spanish without a corresponding certified English translation. Because the applicant failed to submit a certified translation of his letter, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the applicant's letter is not probative and will not be accorded any weight in this proceeding. 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:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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 [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.

In the present application, the consular officer's interview notes reflect that the applicant entered the United States with a Border Crossing Card (BCC) on July 10, 2000 and remained in the United States until January 13, 2006. The District Director found that the applicant had accrued unlawful presence in the United States from January 9, 2001 until his departure in January 2006. The District Director determined that the applicant accrued unlawful presence in excess of one year, and was thus inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is present after the expiration of the period of stay authorized by the Secretary of Homeland Security or present without being admitted or paroled.[1] When nonimmigrants are admitted to the United States, the period of stay authorized is generally noted on the Arrival/Departure Record (Form I-94).[2]

Forms I-186 and I-586, Nonresident Alien Border Crossing Card, were the cards issued by the legacy Immigration and Naturalization Service through March 31, 1998, to Mexican nationals residing in Mexico at time of application. On October 1, 2001, the INS began implementing the legal requirements for the new biometric Mexican BCCs. Holders of the old BCCs, Form I-186 or I-586, were required to replace them with the new biometric, machine-readable cards (DSP-150). The new card, issued by the Department of State (DOS), is both a BCC and a B-1/B-2 visitor's visa (B-1/B-2 NIV/BCC). *See* 22 C.F.R. § 41.32.

The AAO has previously determined in another case involving similar facts that since the alien did not appear to be subject to section 222(g) of the Act, he had not accrued unlawful presence during his residence in the United States. The AAO will further explain and clarify its position in this decision.

Section 222(g) of the Act provides, in pertinent part:

> (1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa

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[1] Memo. from [redacted], Dom. Ops. [redacted] Refugee, Asylum and Int. Ops., [redacted] of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 11 (May 6, 2009).

[2] *Id.*

> and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

The Immigration and Naturalization Service, in cooperation with the Department of State, adopted essentially the same interpretation of "remain in the United States beyond the period of stay authorized by the Attorney General" for unlawful presence under section 212(a)(9)(B) of the Act and the automatic voidance of nonimmigrant visas under section 222(g) of the Act.[3]

Section 41.112 Note 7.2-2 of Chapter 9 of the Foreign Affairs Manual (FAM), provides, in pertinent part:

> Classes of Aliens not Subject to INA 222(g)
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> a. Section 222(g) has no relevance in immigrant visa cases, nor does it apply to previous overstays relating to an alien who entered the United States without a visa. Specifically, Section 222(g) does not apply to the following:
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> (1) Aliens who entered the United States without inspection;
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> (2) Aliens who remain in the United States beyond the period of parole authorization;
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> (3) Aliens who were admitted with an Form I-865, Sponsor's Notice of Change of Address or Form I-586, Nonresident Alien Border Crossing Card (Canadian or Mexican Border Crossing Card (BCC)), and remain in the United States beyond the authorized period of admission;
>
> NOTE: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by the Department are subject to INA 222(g) if they remain in the United States beyond the authorized admission . . . .

Similarly, Chapter 15 of the Inspector's Field Manual provides, in pertinent part:

> 15.15 Cancellation of nonimmigrant visas under section 222(g) of the Act.
>
> (c) General Applicability. Section 222(g) of the Act applies to aliens who were "... admitted on the basis of a nonimmigrant visa ....(Emphasis added.) Section 222(g) does not apply to:

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[3] Memo. from [redacted], Office of Field Ops., Immigration and Naturalization Serv., to Reg. Dirs., Dep. Exec. Assoc. Commr., Immigration Serv. Div., Act. Exec., Office of Int. Aff., *Section 222(g) of the Immigration and Nationality Act (Act)* 1 (March 3, 2000).

(1) Aliens not admitted on the basis of a nonimmigrant visa.

(A) Aliens who enter the United States without inspection;

(B) Aliens who remain in the United States beyond the period of parole authorization;

(C) Aliens who were admitted with an I-186 or I-586, Canadian or Mexican Border Crossing Card (BCC) and remain in the United States beyond the authorized period of admission. (Note: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are subject to section 222(g) of the Act if they remain in the United States beyond the authorized admission, including those who were not issued a Form I-94. However, the overstay should be documented through a sworn statement or other credible evidence.) . . . .

The AAO notes that while violating section 222(g) of the Act by remaining in the United States beyond the period of stay authorized by the Secretary of the Department of Homeland Security triggers unlawful presence under section 212(a)(9)(B) of the Act, the inverse is not true. That is, an alien's exemption from section 222(g) of the Act does not automatically render him or her immune from accruing unlawful presence. For example, aliens who enter the United States without inspection or who remain in the United States beyond the period of parole authorization are not subject to section 222(g) of the Act as this section relates only to aliens who have been admitted on the basis of a nonimmigrant visa. However, they are subject to section 212(a)(9)(B) of the Act for accruing unlawful presence.[4] Therefore, a finding that an alien is not subject to section 222(g) of the Act is not dispositive of whether an alien has accrued unlawful presence.

As stated, aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are considered to have entered with visitor visas, and are subject to section 222(g) of the Act. They therefore accrue unlawful presence under section 212(a)(9)(B) of the Act if they remain in the United States beyond the period of authorized admission even if they were not issued a Form I-94.[5] A Form I-94 is not required for Mexican nationals admitted as nonimmigrant visitors who have a DSP-150 (B-1/B-2 NIV/BCC) and are admitted for a period not to exceed 30 days to visit within 25 miles of the border or who are admitted at the Mexican border port-of-entries in Arizona at Sasabe, Nogales, Mariposa, Naco or Douglas to visit within 75 miles of the border for a period not to exceed 30 days. 8 C.F.R. § 235.1(h)(1)(v).

However, aliens admitted with the previously issued Mexican BCC (Form I-186 or I-586) are considered "non-controlled nonimmigrants." Such aliens, who were not issued a Form I-94 upon entry, are treated as nonimmigrants admitted for duration of status (D/S) for purposes of determining unlawful presence.[6] For aliens admitted as D/S, the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.[7] If

[4] Memo. from Donald Neufeld at 11.

[5] Memo. from Michael A. Pearson at 3.

[6] Memo. from Donald Neufeld at 25.

[7] *Id.*

U.S. Citizenship and Immigration Services (USCIS) finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will being to accrue on the day after the request is denied.[8] If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order.[9] A consular or immigration officer may revoke a BCC issued on Form I-186 or Form I-586 if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a resident and/or citizen of Mexico. 22 C.F.R. § 41.32(c).

The record reflects that at the time of the applicant's immigrant visa interview, he testified that he had entered the United States with a BCC at various times. He stated that after entering the United States on July 10, 2000, he remained in the United States until January 13, 2006. The consular officer's interview notes do not reflect whether the applicant entered with the previously issued Mexican BCC (Form I-186 or I-586) or with a combination B-1/B-2 NIV/BCC. Nor does the record reflect that while the applicant was residing in the United States a determination was made by an immigration officer or an immigration judge that he violated his nonimmigrant status by ceasing to be a resident and/or citizen of Mexico. In the absence of such evidence, the AAO cannot conclude that the applicant accrued unlawful presence during his residence in the United States. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

However, the record reflects that the applicant is inadmissible under section 212(a)(1)(A)(iii)(I) of the Act as an alien classified as having a physical/mental disorder with associated behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others.

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

> (a) Classes of Aliens Ineligible for Visas or Admission.--Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> (1) Health-related grounds.--
>
> (A) In general.-Any alien-
>
> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—
>
> (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others . . . is inadmissible.

[8] *Id.*
[9] *Id.*

> (B) Waiver authorized.--For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

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

> (g) The Attorney General may waive the application of—
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> > (3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

The record reflects that the panel physician who conducted the applicant's medical examination referred the applicant to a psychologist for an evaluation after he reported that he was arrested on two occasions for alcohol related offenses. The applicant was arrested on February 15, 2003 in Alabama for domestic violence while under the influence of alcohol and he was arrested on December 5, 2004 in Alabama for driving under the influence of alcohol. The psychologist classified the applicant as having a Class A medical condition, Alcohol Abuse, with associated Harmful Behavior. The District Director found the applicant inadmissible under section 212(a)(1)(A)(iii) of the Act on this basis.

Regulations at 8 C.F.R. § 212.7(b) govern aliens with certain mental conditions, who are eligible for immigrant visas but require the approval of waivers of grounds of inadmissibility. The regulations require that the applicant submit the waiver application and a statement to the appropriate USCIS office indicating that arrangements have been made to provide the alien's complete medical history, including details of any hospitalization or institutional care or treatment for any physical or mental condition; the alien's current physical and mental condition, including prognosis and life expectancy; and a psychiatric examination. 8 C.F.R. § 212.7(b)(4). "For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery." *Id.* The medical report must then be forwarded to the U.S. Public Health Service for review. *Id.* These regulations further provide:

> (ii) *Submission of statement.* Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or [USCIS] office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:

(A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.

(B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;

(C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished:

(*1*) The report evaluating the alien's mental status within 30 days after the alien's arrival; and

(*2*) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.

(D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(g) of the Act. The record contains a Centers for Disease Control (CDC) form 4,422-1, Statements in Support of Application for Waiver of Inadmissibility. Part I of CDC form 4,422-1 reflects that the Department of Health and Human Services Public Health Service (PHS) received the required medical documentation regarding the applicant's present condition. The PHS reviewing official, [redacted] Division of Global Migration and Quarantine, National Center for Infectious Diseases, classified the applicant as having a Class A medical condition, Alcohol Abuse, which renders him inadmissible under section 212(a)(1)(A)(iii)(I). Part II of CDC form 4,422-1 shows that, pursuant to 8 C.F.R. § 212.7(b)(4)(ii), the applicant obtained the required statement from [redacted] at a PHS-approved facility, Alabama Psychotherapy and Wellness Center, P.C. The applicant's wife completed Part III of Form CDC 4,422-1, attesting that necessary arrangements for further examination of the applicant will be made upon his entry to the United States. On July 7, 2006, [redacted] approved the applicant's Form CDC 4,422-1, thus certifying PHS's opinion that appropriate follow-up care will be provided upon the applicant's entry to the United States, and that PHS has no objection to his entry. Therefore, the AAO finds that the applicant has established eligibility for a waiver of the ground of inadmissibility arising under section 212(g) of the Act pertaining to aliens who have been classified as having a Class A medical condition.

For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to

determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The unfavorable factors in this matter consist of the PHS reviewing official's determination that the applicant has a Class A medical condition, Alcohol Abuse, and the applicant's two arrests for alcohol related offenses. The favorable factors in this matter are that all of the criminal charges against the applicant have been dismissed and the PHS has determined that appropriate follow-up care will be provided upon the applicant's entry to the United States.[10] While the AAO finds that the applicant's alcohol abuse and arrests are serious in nature and cannot be condoned, the applicant does not appear to have been arrested for any other criminal offenses and he has not been charged with any other immigration violations. Therefore, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(g), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained, and the application will be approved.

ORDER: The appeal is sustained.

[10] Court documents in the record reflect that the applicant was arrested on February 15, 2003 and charged with domestic violence-assault. A case action summary from the State of Alabama Unified Judicial System reflects that the charges against the applicant were dismissed on cost [redacted] A court record from the Albertville, Alabama Municipal Court reflects that on an unrecorded date the applicant was charged with driving while intoxicated. On September 13, 2005, the charge against the applicant was dismissed pursuant to his completion of a level 1 CRO (case number illegible). The record contains a Marshall County Court Referral Services, Inc. *Certificate of Completion* awarded to the applicant for successfully completing the "Level 1 Court Referral Education Class."