U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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NOV 17 2009

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date:
(CDJ 2001 777 064)

IN RE: Applicant: [redacted]

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter 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 under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(9)(B)(i)(II), for having attempted to gain admission to the United States by fraud or willful misrepresentation and for having been unlawfully present in the United States for over one year. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i), in order to reside in the United States with his spouse and children.

The District Director concluded that the applicant failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director,* dated January 9, 2007.

On appeal, the applicant's representative claims that the applicant is not inadmissible for fraud or misrepresentation because he did not misrepresent himself at the border, but was smuggled into the United States in 2000. The applicant's representative further asserts that the applicant's wife has faced extreme financial and psychological difficulties since his departure from the United States and would also suffer extreme hardship if she relocated to Mexico to be with the applicant. *Letter of Accredited Representative*, dated January 5, 2007.

In addition to the letter of the applicant's representative, the record also includes, in pertinent part, copies of the birth certificates of the applicant's two sons, his wife's naturalization certificate, the couple's marriage certificate and the approved Form I-130, Petition for Alien Relative, filed by the applicant's wife on his behalf. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C)(i) of the Act provides that:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien

would result in extreme hardship to the citizen or lawfully resident spouse or *parent of such an alien* . . . .

Section 212(a)(9) 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 [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 . . .

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.

On the waiver application, the applicant stated that "in February 2000[, he] attempted to enter the U.S. by presenting an LPR card of another alien; he was caught by DHS at Calexico, CA POE" and that he "lived illegally in [the] U.S. from Feb. 2000 to March 2004." *Form I-601, Application for*

Waiver of Grounds of Inadmissibility, signed by the applicant on December 15, 2005. On her relative petition, the applicant's wife also stated that in February 2000, the applicant was "intercepted and returned" at Calexico and then entered the United States without inspection on February 6, 2000. *Form I-130, Petition for Alien Relative,* signed by the applicant's wife on December 28, 2000.

On appeal, the applicant's representative asserts that the applicant is not inadmissible for misrepresentation because he "never presented any false documents to enter the United States [but instead] was smuggled across the border." *Letter of Accredited Representative* at page 1. The representative provides no explanation for the contrary statements of the applicant and his wife on the waiver application and relative petition and he submits no statements from the applicant, his wife or any other evidence to support his assertion. The unsupported assertions of counsel or accredited representatives do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). The applicant is therefore inadmissible to the United States under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act.

Beyond the decision of the director, the record shows that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act for being unlawfully present in the United States for more than one year and then re-entering the United States without being admitted.[1] On appeal, the applicant's representative states, "The applicant entered the United States in February 1995. The Service records indicate February 2000, which was his subsequent entry. The applicant had been living in the United States since 1995. In the year 2000 he had a family emergency and was forced to depart and enter without inspection." *Letter of Accredited Representative* at page 1. On appeal, the representative also submits a copy of a Form G-325A, Biographic Information, signed by the applicant on December 28, 2000, on which the applicant stated that he resided in the United States from January 1996 to July 1999 and was present in the United States again, beginning in March 2000. The record contains no evidence that the applicant was inspected and admitted to the United States in 1995 or at anytime thereafter. Accordingly, the applicant accrued unlawful presence from April 1, 1997 to February 2000, when he reentered the United States without inspection.[2] *Form G-325A*, dated December 28, 2000; *Form I-130*; *Form I-601*. The applicant is consequently inadmissible under section 212(a)(9)(C)(i)(I).

An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may not apply for consent to reapply for admission unless the alien has been outside the United States for more than 10 years

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[1] The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

[2] The unlawful presence provisions were enacted in 1996, but did not become effective until April 1, 1997. Accordingly, the applicant did not begin to accrue unlawful presence until April 1, 1997. *See* Sections 301(b), 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

since the date of the alien's last departure from the United States. *Matter of Briones,* 24 I&N Dec. 355, 358-59 (BIA 2007). To avoid inadmissibility under section 212(a)(9)(C) of the Act, the applicant must have departed the United States at least ten years ago, remained outside the United States during that time, and U.S. Citizenship and Immigration Services (USCIS) must consent to the applicant's reapplying for admission. *Id.* at 358, 371; *Matter of Torres-Garcia,* 23 I&N Dec. 866, 873 (BIA 2006), *aff'd., Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007).

In the present matter, the applicant's last departure from the United States occurred in 2004 and he is ineligible to apply for permission to reapply for admission until 2014. Consequently, no purpose would be served in adjudicating his application for waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act.

The applicant bears the burden of proof in these proceedings to establish his eligibility for a waiver. *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.