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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]

NOV 19 2009

FILE: [redacted] Office: TEGUCIGALPA, HONDURAS Date:

IN RE: Applicant: [redacted]

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:

[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).

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States under section 212(a)(6)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(B), for failing to attend a removal proceeding; section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed; and section 212(a)(9)(B)(i)(II) of 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 readmission within 10 years of his last departure from the United States. The record indicates that the applicant is married to a naturalized United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen wife.

The OIC found that based on the applicant's failure to attend his immigration hearing, the applicant is statutorily inadmissible to the United States within 5 years from the date of his departure in June 2006, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated April 27, 2007.

On appeal, the applicant, through counsel, contends that the OIC "erred as a matter of law and fact in denying [the applicant's] application for a waiver." *Form I-290B*, dated May 25, 2007. Counsel claims that the OIC's assertion that the applicant's failure to attend his immigration hearing was without reasonable cause, "is not supported by any evidence identified in the administrative record." *Id.*

The record of proceedings establishes that on June 1, 1999, the applicant attempted to enter the United States without inspection. On the same day, a Notice to Appear (NTA) was issued against the applicant. On October 12, 2000, an immigration judge ordered the applicant removed *in absentia* from the United States.[1] On May 10, 2001, a Warrant of Removal/Deportation (Form I-205) was issued. On July 25, 2002, the applicant's naturalized United States citizen wife filed a Form I-130. On August 6, 2003, the applicant's Form I-130 was approved. In June 2006, the applicant departed the United States. On June 29, 2006, the applicant filed a Form I-601. On April 27, 2007, the OIC denied the applicant's Form I-601, finding the applicant statutorily inadmissible to the United States under section 212(a)(6)(B) of the Act.

Section 212(a)(6)(B) of the Act provides, in pertinent part:

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[1] The AAO notes that the cover sheet and the first page of the immigration judge's decision are dated October 12, 2000; however, the second page of the immigration judge's decision is dated January 26, 2001. Additionally, the trial attorney notes from the applicant's removal hearing are dated October 12, 2000; therefore, the AAO finds that the applicant was ordered removed from the United States on October 12, 2000.

(B) Failure to attend removal proceedings.—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.

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

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

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 [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.

On appeal, counsel contends that "[t]he instant administrative record is incomplete because the [OIC] failed to identify any facts, or any legal arguments based upon BIA precedent, supporting his conclusion that the Applicant did not have 'reasonable cause' for not appearing before the Immigration Judge on October 12, 2000." *Appeal Brief*, page 3, dated July 19, 2007. The AAO notes that a motion to reopen the immigration judge's decision could have given a reasonable cause for the applicant's absence from his removal hearing; however, there is no evidence in the record that the applicant filed a motion to reopen, or that he has ever indicated the cause of his failure to appear. Counsel has not indicated on appeal why the applicant failed to appear at his removal proceeding. The burden of proof in this proceeding is on the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. To accept counsel's interpretation of section 212(a)(6)(B) of the Act would shift the burden to the government and deprive the statute of any effect. The government is very unlikely to know the cause of an alien's failure to appear unless the alien presents evidence concerning the cause. The applicant's apparent refusal to submit such evidence cannot serve to excuse his inadmissibility under section 212(a)(6)(B) of the Act.

Additionally, the AAO notes that record establishes that the decision of the immigration judge was mailed to the applicant's last known address and there is no evidence in the record that the immigration judge's decision was not received at the applicant's last known address. The AAO finds that the applicant is inadmissible under section 212(a)(6)(B) of the Act, and, is statutorily ineligible for a waiver of inadmissibility.

The AAO finds that because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his United States citizen spouse or whether he merits the waiver as a matter of discretion.

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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.