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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ATHENS Date: JUL 13 2010

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Athens, Greece, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

The record reflects that the applicant is a native and citizen of Yemen, the husband of a U.S. citizen, the father of two U.S. citizen children, and the beneficiary of an approved Form I-130 petition. The Field Office Director found the applicant inadmissible under 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. The director also found the applicant inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien who has been ordered removed from the United States within the past ten years.

On September 19, 2005, the applicant filed an Application for Waiver of Ground of Excludability (Form I-601) in order to reside in the United States with his wife and children. The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of the Field Office Director*, dated June 13, 2007.

On appeal, the AAO reviewed the determinations of inadmissibility and found that the applicant does not appear to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act because he was never ordered removed from the United States. *Decision of the Chief, Administrative Appeals Office*, dated January 8, 2010. On March 25, 2010, the AAO, pursuant to 8 C.F.R. § 103.5(a)(5)(ii), *sua sponte* reconsidered and withdrew this part of its prior decision, and provided the applicant 30 days to submit a rebuttal brief. *Decision of the Chief, Administrative Appeals Office*, dated March 25, 2010. As of the date of this decision, the applicant has not responded to the AAO's determination. Therefore, the AAO's March 25, 2010 decision will become the final decision on the applicant's appeal.

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

> (A) Certain aliens previously removed.-
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> (ii) Other aliens. - Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now

Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

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.
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> . . . .
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> (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.

The record reflects that the applicant entered the United States without inspection on or about October 1, 1999. The applicant was apprehended by Immigration and Customs Enforcement on October 1, 2003, and served with a Notice to Appear in Removal Proceedings under Section 240 of the Act (Form I-862). On October 23, 2003, the Immigration Judge found the applicant subject to removal under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. 1182(a)(6)(A)(i). The Immigration Judge ordered that the applicant would be granted permission to voluntarily depart the United States in lieu of removal on or before November 8, 2003. *See* Section 240B of the Act, 8 U.S.C. § 1229c. The Immigration Judge further ordered that if the applicant failed to comply with the conditions related to the voluntary departure order, the order would be withdrawn without further notice or proceedings and the applicant would be ordered removed to Yemen.

The record shows that the applicant's voluntary departure period was subsequently extended until December 15, 2003. However, the applicant did not depart the United States on or prior to this date. The applicant's failure to depart on or before December 15, 2003 withdrew the privilege of voluntary departure, and immediately placed the applicant under an order of removal. Department of Homeland Security records show that the applicant departed the United States on January 17, 2004, thereby executing the removal order. Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act for having departed the United States while an order of removal was outstanding, and seeking admission within ten years of the date of his departure. The applicant is further inadmissible 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 to the United States within ten years of the date of his last departure

An exception to inadmissibility under 212(a)(9)(A)(ii)(II) of the Act is under section 212(a)(9)(A)(iii) of the Act for aliens who receive consent from the Secretary, Department of Homeland Security, to reapply for admission. The record shows that the applicant filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, and a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The applicant filed only one appeal and indicated that the appeal was filed in connection with the denial of both applications. In situations where an applicant must file a Form I-212 and a Form I-601, the adjudicator's field manual clearly states that the Form I-601 is to be adjudicated first. Chapter 43.2(d) of the Adjudicator's Field Manual states, "If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose." Thus, based on this rule, in a situation like the applicant's, where there is one appeal that has been filed and either the Form I-212 or the Form I-601 could be considered on appeal, the AAO will first review the Form I-601.

In its prior decision, the AAO determined that the applicant failed to establish extreme hardship to his U.S. citizen spouse, as required for a waiver of this ground of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and dismissed the appeal. *See Decision of the Chief, Administrative Appeals Office*, dated January 8, 2010. The AAO affirms its prior determination that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Since the AAO denied the applicant's Form I-601 waiver application, no purpose would be served in now adjudicating the applicant's Form I-212 application.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 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.