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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

Date: JUN 29 2011 Office: SANTO DOMINGO FILE: [redacted]

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:

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 $630. 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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santo Domingo, Dominican Republic. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant, a native and citizen of Trinidad, entered the United States with a nonimmigrant visa on September 1, 2001 with permission to remain until November 30, 2001. She did not depart the United States until January 2004. She attempted to re-enter the United States in April 2004 and was expeditiously removed. *See Form I-296, Notice to Alien Ordered Removed/Departure Verification.* In 2006, the applicant re-entered the United States without authorization. The applicant was thus 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse.

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 Form I-601, Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated April 2, 2009.

In support of the appeal, counsel for the applicant submits the Form I-290B, dated April 29, 2009 (Form I-290B), and documentation pertaining to the applicant's and her son's ice cream business in Trinidad. The entire record was reviewed and considered in rendering this decision.

On appeal, counsel notes that the field office director found that in April 2004, during secondary inspection, the applicant was found to be in possession of a New York Driver's License and a vehicle insurance identification card. *See Form I-290B,* dated April 29, 2009. Counsel contends that the documents were found when the "INS executed a search warrant there [at the applicant's previous residence]...." *Id.* at 1. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on a thorough review of the record and contrary to counsel's assertion, the applicant, when attempting to procure entry to the United States in 2004, had in her possession a New York Driver's License issued on December 21, 2001 and a vehicle insurance identification card issued under her name on August 27, 2002. *See Form I-275, Withdrawal of Application for Admission/Consular Notification,* dated April 22, 2004. Copies of the referenced documents are included in the record.

In addition, on appeal, counsel asserts that despite the field office director's assertion to the contrary, the applicant never re-entered the United States illegally via Mexico in 2006. *Supra* at 2. As noted above, the unsupported assertions of counsel do not constitute evidence. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of

evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Consular notes and USCIS electronic records indicate that the applicant re-entered the United States in 2006 without being admitted.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), states 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 Attorney General (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, or
>
> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
>
> 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 has consented to the alien's reapplying for admission.

Regarding the applicant's ground of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), the record establishes that the applicant entered the United States with a nonimmigrant visa in 2001 and did not depart the United States until January 2004. The AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence.

The AAO finds that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I). The AAO's additional finding of inadmissibility in the instant case is based on the applicant's entry without being admitted after having been unlawfully present in the United States for an aggregate period of more than one year. The applicant accrued unlawful presence from 2001 until her departure in January 2004, and she then re-entered the United States without being admitted in 2006.

In addition, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(II). The AAO's additional finding of inadmissibility in the instant case is based on the applicant's removal in 2004 and her subsequent re-entry to the United States without being admitted in 2006.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter, it is unclear from the record when the applicant last departed the United States after entering the United States without authorization in 2006. She is currently statutorily ineligible to apply for permission to reapply for admission because less than ten years have passed since her last departure, which occurred in 2006 or later. As such, no purpose would be served in adjudicating his waiver under section 212(a)(9)(B)(v) of the Act.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to her U.S. citizen spouse or whether she merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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. The waiver application is denied.