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

(b)(6)

U.S. Citizenship and Immigration Services

Date: JAN 22 2015 Office: VERMONT SERVICE CENTER FILE:

IN RE: PETITIONER:

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter returned for issuance of a new decision.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

The director denied the Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), because the petitioner was inadmissible to the United States and his Form I-192, Application for Advance Permission to Enter as a Nonimmigrant (Form I-192), had been denied. The petitioner timely appealed the denial of the Form I-918 U petition. On appeal, the petitioner submits a brief and additional evidence to demonstrate that the director should favorably exercise discretion and approve his waiver application.

Applicable Law

Section 101(a)(15)(U)(i) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i), provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918U petition, and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

(i) In General
Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

* * *

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

* * *

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(C) Misrepresentation

(i) In General.-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.

(ii) Falsely Claiming Citizenship

(I) In General.

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) Not in possession of a passport valid for a minimum of six months from the date of expiration . . .

* * *

is inadmissible.

(9) Aliens Previously Removed

(A) Certain Aliens 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 who 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 alien convicted of an aggravated felony) is inadmissible.

Facts and Procedural History

The petitioner is a native and citizen of Mexico who claims to have first entered the United States as a minor without admission, inspection or parole. The record indicates that the petitioner was encountered by immigration officials on September 12, 2007, and was granted voluntary return to Mexico under safeguards on September 20, 2007. A few days later, on September 22, 2007, the petitioner sought admission to the United States using his U.S. citizen brother's birth certificate. However, upon questioning, the petitioner admitted to his true identity and the record indicates that he subsequently departed the United States. The record shows that the petitioner claimed to have reentered the United States again without admission, inspection or parole in October 2007. After immigration officials encountered the petitioner again, a Notice to Appear was issued against him on April 28, 2008, placing him into removal proceedings. An immigration judge in California ordered the petitioner removed from the United States on November 8, 2012, and the Board of Immigration Appeals (Board) dismissed the petitioner's appeal on February 7, 2013. On June 5, 2014, the petitioner was deported from the United States. The record shows that the petitioner then sought admission to the United States again on September 27, 2014, and was placed into credible fear proceedings after he claimed fear of returning to Mexico. On November 13, 2014, an immigration judge upheld an adverse credible fear determination against the petitioner and again ordered the petitioner removed from the United States.

The petitioner filed the instant Form I-918 U petition on February 26, 2013, along with a Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), and a Form I-192 waiver application. On June 13, 2013, the director issued a Notice of Intent to Deny (NOID), notifying the petitioner that he appeared inadmissible to the United States and requesting evidence to establish that he warranted a favorable exercise of discretion for his waiver application. The petitioner responded with additional evidence.

The director denied the petitioner's Form I-192, finding that the petitioner was inadmissible under section 212(a)(6)(A)(i) (present without admission or parole), and that the petitioner had not demonstrated that his application for a waiver of inadmissibility warranted a favorable exercise of discretion. As the petitioner was found inadmissible and his Form I-192 had been denied, the director consequently denied the petitioner's Form I-918 U petition. The petitioner filed a timely appeal of the denial of his petition.

Analysis

We conduct appellate review on a *de novo* basis. All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in

order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A review of the record does not support the director's determination of the petitioner's inadmissibility under section 212(a)(6)(A)(i) (present without admission or parole) of the Act. Although the petitioner was in the United States without having been admitted, inspected or paroled at the time the director rendered a decision on the instant petition, the record indicates that the petitioner subsequently departed the United States on June 5, 2014, when he was removed to Mexico. The petitioner then sought admission to the United States on September 27, 2014, and was placed into credible fear proceedings by immigration officials. Therefore, the petitioner is not currently present in the United States without admission and parole, and consequently, the director's determination of inadmissibility under section 212(a)(6)(A)(i) of the Act is withdrawn.

The director's decision denying the petitioner's Form I-192 waiver application did not identify any other ground of inadmissibility against the petitioner. *See Decision of the Director Denying Petitioner's Form I-192,* dated March 27, 2014. Although we withdraw the director's determination that the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act, the instant petition may not be approved, as our *de novo* review of the record demonstrates the petitioner may be inadmissible under other provisions of the Act, including, but not limited to, sections 212(a)(2)(A)(i)(II) (controlled substance violation); 212(a)(6)(C)(i) (willful misrepresentation or fraud); 212(a)(6)(C)(ii) (false claim to U.S. citizenship); 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport); and 212(a)(9)(A)(ii) (aliens previously removed other than arriving alien) of the Act.

A review of the record before us supports a finding of inadmissibility under 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport) of the Act. The petitioner has not provided, and the record does not contain, a copy of his valid, unexpired passport, which supports a determination of the petitioner's inadmissibility under section 212(a)(7)(B)(i)(I) of the Act.

The record also indicates that the petitioner is inadmissible under section 212(a)(2)(A)(i)(II) (controlled substance violation) of the Act. The record shows that the petitioner was convicted on April for Possession of Marijuana (28.5 grams or less) in violation of section 11357(b) of the California Health and Safety Code, and that on August the petitioner was convicted of Possession of Controlled Substance – Paraphernalia, in violation of section 11364 of the California Health and Safety Code. These convictions relate to controlled substance violations that render the petitioner inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The record also supports a determination of inadmissibility under section 212(a)(9)(A)(ii) of the Act (alien previously removed other than an arriving alien). The record shows that the beneficiary departed the United States pursuant to a final removal order on June 5, 2014, and subsequently sought admission again on

September 27, 2014. As he has been removed from the United States and is now seeking admission within 10 years of his removal, he is inadmissible under section 212(a)(9)(A)(ii) of the Act.

Additionally, the record indicates that the petitioner may be inadmissible under sections 212(a)(6)(C)(i) of the Act for making a willful misrepresentation in order to obtain admission to the United States and under section 212(a)(6)(C)(ii) of the Act for making a false claim to U.S. citizenship. As noted herein, the petitioner sought admission to the United States on September 22, 2007, and presented the U.S. citizen birth certificate of his brother to obtain his admission. However, the record is unclear as to whether the petitioner made a willful misrepresentation or presented the false document himself. Moreover, the petitioner has not been afforded an opportunity to rebut the evidence of his inadmissibility raised here for the first time under our *de novo* review. Accordingly, we do not reach a determination of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(6)(C)(ii) of the Act.

Although the director's determination of the petitioner's inadmissibility under section 212(a)(6)(A)(i) of the Act has been withdrawn, the current record indicates that the petitioner remains, at a minimum, inadmissible under sections 212(a)(2)(A)(i)(II); 212(a)(7)(B)(i)(I); and 212(a)(9)(A)(ii) of the Act and may be inadmissible under other provisions. On appeal, the petitioner did not dispute his inadmissibility, but rather, asserted only that his Form I-192 waiver application should be approved in the favorable exercise of discretion. The director denied the petitioner's application for a waiver of inadmissibility, and as noted, we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3). However, as we have withdrawn the only ground of inadmissibility identified by the director in denying the petition and the record indicates that the petitioner is inadmissible under other grounds, we remand the matter to the director for issuance of a new decision.

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has been met as the sole ground of inadmissibility identified to deny the petition has been overcome on appeal. However, the petition is not approvable because the record contains evidence of the petitioner's inadmissibility to the United States and his waiver application was denied. Because the petitioner was not afforded an opportunity to rebut the evidence of his inadmissibility under these other grounds, the matter will be remanded to the director for further action consistent with this decision and issuance of a new decision.

ORDER: The February 26, 2013, decision of the director is withdrawn. The matter is remanded to the director for further action consistent with this decision and issuance of a new decision on the Form I-918 U petition, which if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.