

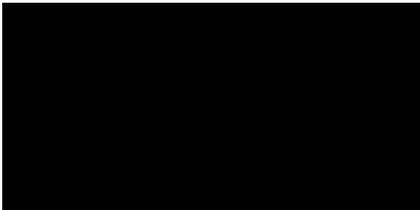


U.S. Citizenship
and Immigration
Services

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FILE:

Office: TEGUCIGALPA, HONDURAS

Date:

NOV 17 2009

IN RE:



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)

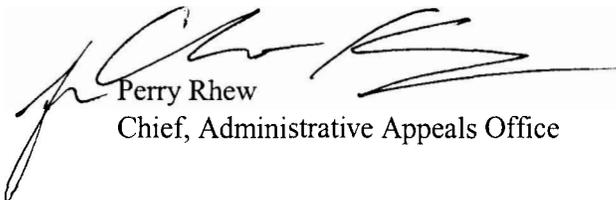
ON BEHALF OF APPLICANT:



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 Officer in Charge, Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a 33-year-old native and citizen of Honduras who was found to be inadmissible to the United States pursuant to: (1) section 212(a)(6)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(B), for failure to attend removal proceedings; (2) 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 (3) section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission within ten years of the date of her removal from the United States. The applicant is married to a citizen of the United States, and she seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her husband in the United States.

The Officer in Charge determined that under section 212(a)(6)(B) of the Act, the applicant's failure to attend removal proceedings without good cause rendered her inadmissible to the United States for five years from the date of her removal from the United States on April 27, 2005. *See Decision of the Officer in Charge.* Finding no available waiver for this ground of inadmissibility, the Officer in Charge denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601), as well as her Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). *Id.*

On appeal, the applicant contends through counsel that USCIS erred in denying her applications. *See Brief in Support of Appeal.* Specifically, the applicant asserts that the Officer in Charge failed to provide her with an opportunity to establish reasonable cause for her failure to attend her removal proceedings. *Id.* Additionally, the applicant contends that the Officer in Charge erred in summarily denying her I-601 waiver application without considering the merits of her claims of extreme hardship to her U.S. citizen husband. *Id.* The applicant submitted supplemental hardship evidence in support of the appeal on October 5, 2009. *See Supplemental Documentation.* The applicant seeks a remand to cure these alleged errors. *See Brief in Support of Appeal*

Section 212(a)(6)(B) of the Act provides:

Failure to attend removal proceeding

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.

Where an immigration judge has entered an in absentia order of removal under section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5), that order is generally sufficient to establish that the alien had sufficient notice of the proceeding and that the alien can be found to have failed to attend the proceeding. Although there are no available waivers for this ground of inadmissibility, there is an

exception for individuals who establish “reasonable cause” for failing to attend a removal hearing. Section 212(a)(6)(B) of the Act.

The record reflects that the applicant was apprehended after crossing into the United States on July 3, 2000. *See Form I-213, Record of Deportable/Inadmissible Alien*. The applicant was served with a Notice to Appear for removal proceedings, and released on her own recognizance. *See Notice to Appear; Order of Release on Recognizance*. The Notice to Appear indicated that the applicant’s removal hearing would be calendared before an immigration judge in Harlingen, Texas, but did not include the time and date of the hearing. *See Notice to Appear*. Although the Notice to Appear did not include the applicant’s address, it did inform the applicant of the obligation to provide a full mailing address and telephone number, and of the consequences of failing to provide a current address. *Id.* Further, the Notice to Appear was served on the applicant in person and indicates that she was given oral notice in Spanish of the place of her hearing and the consequences of a failure to appear. *Id.* On February 6, 2001, the applicant’s removal hearing was called on the Harlingen immigration court’s docket for a hearing. *See Memorandum and Order*. The applicant was not present at the hearing. *Id.* The immigration judge found:

Respondent failed to provide the Service with an address at the time that the Notice to Appear was issued. Additionally, he/she failed to provide the Court within five days written notice of his/her correct address as required by Section 239(a)(1)(f) of the Immigration and Nationality Act (“Act”) and 8 C.F.R. 3.15(d), and as specified in the Notice to Appear. As a result, the Court was not required to provide Respondent with written notice of his/her hearing. *See* Section 240(b)(5)(B) of the Act; 8 C.F.R. 3.18(b).

Id. The immigration judge found by clear, unequivocal and convincing evidence that the applicant was subject to removal, and issued an in absentia order of removal under section 240(b)(5) of the Act. *Id.* A warrant of removal was issued, and the applicant was removed from the United States on April 27, 2005. *See Form I-205, Warrant of Removal/Deportation*.

The applicant contends that the Officer in Charge failed to provide her with an opportunity to establish reasonable cause for her failure to attend her removal hearing, and that “if given such an opportunity, it is highly likely that [she] would have been able to establish such reasonable cause” because she did not have notice of the time and place for the hearing. *Brief on Appeal*. This contention lacks merit. Here, the adjudicating officer reviewed the evidence in the record and determined that the applicant did not meet her burden of proving reasonable cause for failure to attend the removal hearing. *See Decision of the Officer in Charge* (reviewing the record and concluding that the applicant failed to attend her immigration hearing “without good cause”). Accordingly, the applicant was not deprived of an opportunity to establish reasonable cause for her failure to appear.

Further, the applicant’s claim of reasonable cause is unavailing. Here, the immigration judge issued an in absentia order of removal. Although the applicant contends that she did not receive actual notice of the time and place of the removal hearing, the evidence shows that the applicant had

constructive notice of the hearing. Specifically, the applicant was given actual notice of the obligation to provide an address and telephone number as required by section 239(a)(1)(F) of the Act, 8 U.S.C. § 1229(a)(1)(F), when she was served in person with the Notice to Appear. *See Notice to Appear*. Despite this notice, the applicant failed to provide written notice of an address and telephone number at which she could be contacted, as required by statute and regulation. *See* section 239(a)(1)(F) of the Act; *see also* 8 C.F.R. § 1003.15(d) (formerly codified at 8 C.F.R. § 3.15(d)) (stating that if the Notice to Appear does not include the alien's address, the alien must provide written notice of her address to the immigration court within five days of service of the document). The applicant's Order of Release on Own Recognizance (Form I-220A) also required her to report quarterly to a deportation officer, and reiterated her obligation to report for her removal hearing. *See Form I-220A, Order of Release on Own Recognizance*, dated July 3, 2000. Because the applicant failed to provide the immigration court with her current address, the immigration judge was not required to provide the applicant with written notice of her hearing. *See* Section 239(a)(2)(B) of the Act, 8 U.S.C. § 1229(a)(2)(B) (stating that written notice of a change in time or place of proceeding shall not be required if the alien fails to provide an address); Section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5) (providing for removal in absentia after written notice; but stating that written notice is not required if the alien has failed to provide the statutorily required address); 8 C.F.R. § 1003.26(d) (same); *see also Matter of G-Y-R*, 23 I&N Dec. 181, 189 (BIA 2001) (en banc) ("In those instances where actual notice is not accomplished, the statute will permit constructive notice when the alien is aware of the particular address obligations of removal proceedings and then fails to provide an address for receiving notices of hearing."); *Wijeratene v. INS*, 961 F.2d 1344, 1347 (7th Cir. 1992) (stating that where the applicant "had moved to another location in New York, and she had not informed the IJ or her representative of her new address . . . [the applicant's failure] to receive notice of the second hearing . . . was entirely her own fault").

Although the applicant contends that her Notice to Appear was defective because it did not include the date and time of her removal hearing as required by section 239(a)(1)(G) of the Act, 8 U.S.C. § 1229(a)(1)(G), the applicant has cited no authority holding that the absence of this information renders her in absentia removal order improper, or her failure to appear reasonable. Rather, the applicable regulation provides that if the information is not included in the Notice to Appear, the immigration court shall provide notice to the alien of the time, place, and date of the hearing. *See* 8 C.F.R. § 1003.18(b) (formerly codified at 8 C.F.R. § 3.18(b)). However, "[n]o such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act." *Id.*

In sum, the Officer in Charge correctly determined that the applicant is inadmissible under section 212(a)(6)(B) of the Act as an alien who without reasonable cause failed to attend her removal proceeding, and who is seeking admission within five years of her removal. Accordingly, the applicant is inadmissible for a five-year period beginning on April 27, 2005.

Because the applicant is inadmissible under section 212(a)(6)(B) of the Act for which a waiver is not currently available, the Officer in Charge correctly determined that no purpose would be served in determining the applicant's eligibility for a waiver for her unlawful presence in the United States under section 212(a)(9)(B)(v) of the Act. *See* 8 C.F.R. § 212.7(a)(1) ("An applicant for an

immigrant visa . . . who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.”).

Beyond the decision of the director, the applicant is also inadmissible under section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), as an alien who “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.”¹ The record indicates that the applicant was unlawfully present in the United States from 1997 until 2000, an aggregate period of more than one year. *See Form I-821, Application for Temporary Protected Status*, dated June 26, 2002 (indicating the applicant’s entry without inspection on April 14, 1997); *see also Form I-765, Application for Employment Authorization*, dated June 26, 2002 (same); *Letter from Greenriver Construction Company*, dated Jan. 21, 2003 (indicating the applicant’s employment from 1997 to 2000). Additionally, the applicant attempted to reenter the United States without being admitted on July 3, 2000. *See Form I-213, Record of Deportable/Inadmissible Alien*.

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 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 was removed from the United States on April 27, 2005, less than ten years ago. Because she has not remained outside the United States for ten years since her last departure, the applicant is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her application under section 212(a)(9)(C)(ii) of the Act.

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 also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n.9 (2^d Cir. 1989). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d.* 345 F.3d 683 (9th Cir. 2003); *see also Dor*, 891 F.2d at 1002 n. 9.

The applicant is inadmissible under grounds for which no waiver or exceptions currently apply. Accordingly, no purpose would be served in adjudicating the waiver application.²

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis for denial of her Form I-601 waiver of inadmissibility. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² The AAO notes that the Officer in Charge denied the Form I-212 and the Form I-601 in one decision. *See Decision of the Officer in Charge.* Because these are two separate applications, two decisions should have been issued. However, given the applicant's inadmissibility under sections 212(a)(6)(B) and 212(a)(9)(C)(i) of the Act, the AAO does not reach the merits of either application.