



U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted] Office: ROME, ITALY Date:

NOV 25 2009

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); and 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C), of the Immigration and Nationality Act

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Rome, Italy, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Portugal who was 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; section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), as an alien unlawfully present after a previous immigration violation; and section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation.

The applicant is the spouse of a naturalized citizen of the United States. He sought a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(a)(6)(C), of the Act so as to immigrate to the United States. The district director determined that the applicant is also inadmissible under section 212(a)(9)(C)(i) for reentering the United States without inspection after having accumulated more than one year of unlawful presence, and stated that no waiver is available for this ground of inadmissibility until ten years have passed since the applicant's last departure from the United States. Finding the applicant to be statutorily ineligible for a waiver, the Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Decision of the District Director, dated May 21, 2007.* The applicant submitted a timely appeal.

On appeal, counsel contends that the director incorrectly found the applicant inadmissible under section 212(a)(9)(C)(i) of the Act. He states that the applicant was refused admission as a visa-waiver applicant under section 217 of the Act in 2001, and that 8 C.F.R. § 217.4(a)(3) indicates that refusal does not constitute removal for purposes of the Act. Counsel states that if section 212(a)(9)(C) of the Act applies here, that section is not waivable. Instead, after a waiting period the Attorney General may consent to an alien's reapplying for admission, upon approval of an I-212 application. Counsel states that the director confuses a waiver with a consent to reapply and the director's statements about eligibility for a waiver of section 212(a)(9)(C) are incorrect and irrelevant.

The AAO will first address the finding of inadmissibility.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less

than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

. . . .

U.S. Citizenship and Immigration Services (USCIS) records reflect that in October 1992 the applicant entered the United States using a Portuguese passport containing a U.S. visa purchased by his father. The applicant remained in the United States until May 17, 2001, at which time he returned to Portugal. On June 21, 2001, he was refused admission under the Visa Waiver Pilot Program. The applicant then flew from Portugal to Canada where he crossed into the United States by car in 2001. On July 27, 2005, the applicant left the United States and returned to Portugal.

The applicant accrued unlawful presence from April 1, 1997 until 2001, and triggered the ten-year-bar when he left the United States, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II). It is noted that the applicant also accrued unlawful presence from 2001 to 2005 prior to leaving the United States in 2005.

The applicant was also found to be inadmissible under section 212(a)(9)(C) of the Act. That section states:

(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. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty;
and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

Counsel states that the applicant is not inadmissible under section 212(a)(9)(C) of the Act for being refused admission as a visa-waiver applicant under section 217 of the Act because it does not constitute removal. However, the AAO finds that because the respondent entered the United States without admission or parole *after* a prior period of unlawful presence in this country of more than one year, he is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act. *See In re Briones*, 24 I& N Dec. 355 (BIA 2007).

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* CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on July 27, 2005. He has remained outside the United States for four years. He is currently statutorily ineligible to apply for permission to reapply for admission.

It is noted that the applicant filed a Form I-601 waiver application for inadmissibility under sections 212(a)(9)(B)(v) and 212(a)(6)(C) of the Act. The director denied the applicant's waiver application. In that the applicant is inadmissible under section 212(a)(9)(C) of the Act, the AAO finds that there is no purpose in adjudicating the applicant's waiver application.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.