

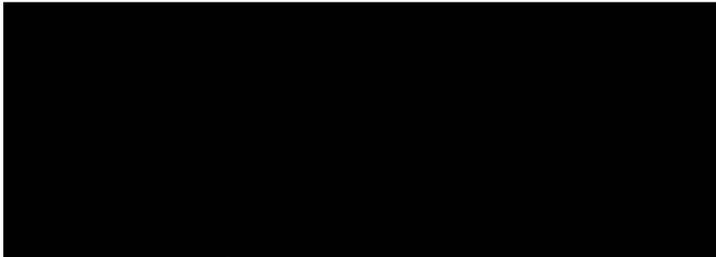
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:

Office: GUATEMALA CITY

Date: FEB 25 2010

IN RE:



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:

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 Field Office Director, Guatemala City, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Guatemala. In a decision dated July 17, 2007 the field office director found that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i), and section 212(a)(6)(B) of the Act, 9 U.S.C. § 1182(a)(6)(B). The applicant seeks a waiver of her inadmissibility. The field office director also concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on the applicant's spouse and denied the waiver application accordingly. On appeal, the applicant provided an unsigned statement and additional evidence.

The record contains, among other documents, documents showing that the applicant was in Guatemala at various times between November 28, 1995 and February 10, 2001.

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-

(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 . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, 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.

....

(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.

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.

No waiver exists for inadmissibility under section 212(a)(6)(B) of the Act. The AAO will first address the possibility of the applicant being inadmissible under that section.

The record shows that the applicant failed to appear for a hearing in removal proceedings to determine inadmissibility on August 28, 1998. The evidence submitted on appeal suggests that she was not then in the United States, but had been in Guatemala since leaving the United States during 1995. The field office director did not address this in the decision. Because the applicant's absence from the United States would likely be deemed sufficient to excuse her failure to appear, the AAO declines to find the applicant inadmissible pursuant to section 212(a)(6)(b) of the Act.

The applicant admits, however, to having entered the United States during 2001 and to living in Richmond from then until 2006. The record contains no indication that she had any legal status during that time. The applicant has been found inadmissible for her unlawful presence of more than one year. On appeal, the applicant did not appear to dispute that inadmissibility or provide any evidence that tends to negate it. The AAO therefore affirms the field office director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for her unlawful presence from 2001 to 2006.

Waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is available pursuant to section 212(a)(9)(B)(v) of the Act, and is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Typically, a case involving inadmissibility for unlawful presence would hinge on the availability of that waiver to the applicant. The record in the instant case, however, suggests an additional basis for inadmissibility that was not discussed in the decision of denial.

As was noted above, the applicant failed to appear for her August 28, 1998 inadmissibility hearing. The result was that the applicant was ordered removed *in absentia*, notwithstanding that the evidence in the record, as interpreted by this office, suggests that she had already departed the United States. The applicant also stated, on her waiver application, that she lived in the United States from 2001 to 2006. The record contains no indication that she was admitted to the United States during 2001.

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

* * * *

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

* * * *

(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.

The record before the Administrative Appeals Office appears to indicate the following chronology. On July 18, 1995 a Notice of Asylum Interview requesting that the applicant attend an interview on August 8, 1995 was sent to the applicant at [REDACTED] in Los Angeles, notwithstanding that the applicant's address of record was then [REDACTED]. That notice was returned marked, "Attempted, Not Known." The applicant failed to appear at her scheduled interview and her case was administratively closed on August 9, 1995.

The applicant departed the United States sometime before November 28, 1995. Whether she had departed prior to the notice being sent or prior to the scheduled interview is unclear, but does not appear to be relevant to any material issue, as, in any event, the delivery to an incorrect address does not constitute notice.

On July 24, 1996 the applicant's asylum case was administratively reopened and a Notice of Asylum Interview was sent to her address of record on July 25, 1996. The evidence in the record suggests that the applicant had, by that time, departed the United States. The applicant did not appear at that asylum interview, and on September 9, 1996, her asylum case was again administratively closed.

On April 11, 1998 a Notice to Appear in Removal Hearing was sent to the applicant. That notice was sent to [REDACTED] the applicant's address of record, notwithstanding that her evidence indicates that she had left the United States during 1995. The applicant failed to appear at that scheduled hearing, and, on August 28, 1998, was ordered, *in absentia*, removed to Guatemala.

The applicant appears to have failed to inform USCIS that she was departing the United States. Such notification may have prevented her order of removal.

Notwithstanding that she was no longer in the United States, the applicant was ordered removed on April 11, 1998. The applicant admitted that she reentered the United States during 2001, and the record does not support that she was inspected and admitted, nor does the applicant assert that she was. Based on the applicant's previous order of removal and subsequent reentry without being admitted, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. No waiver is available for inadmissibility under section 212(a)(9)(C)(i)(II) of the Act.

Though it may seem unjust that the applicant suffer the consequences of a removal order issued against her long after she departed the United States voluntarily, the AAO does not have the authority to withdraw the order of removal issued by the immigration judge. Any attempt to overcome the August 28, 1998 removal order must be pursued in the appropriate venue. A plain reading of section 212(a)(9)(C)(i) of the Act renders the applicant inadmissible, and no waiver is available for inadmissibility under that section.

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 rests with the applicant. See section 291 of the Act, 8

U.S.C. § 1361. Here, because the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, no purpose would be served in addressing whether the applicant is eligible for a waiver under section 212(a)(9)(B)(v) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.