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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED] Office: CLEVELAND

Date: **JAN 22 2010**

IN RE: [REDACTED]

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

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 Field Office Director, Cleveland, Ohio. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, \_\_\_\_\_ is a native and citizen of Mexico, and the spouse of a naturalized U.S. citizen. He 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 and seeking admission within 10 years of his last departure from the United States. He was further found inadmissible under section 212(a)(6)(C)(i) the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresenting a material fact to obtain an immigration benefit. The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i).

The Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the director erred in denying the applicant's waiver application by failing to analyze the hardship factors in their aggregate. Counsel states that the cumulative impact of the applicant's bar from the United States is more than adequate to allow for the approval of the application.

In support of the application, the record contains, but is not limited to, copies of the applicant's birth certificate, the applicant's nonimmigrant visa applications (Forms DS-156), the applicant's marriage license, the applicant's daughter's birth certificate, financial documentation, medical documentation, sociological reports on single-parent families, wedding photographs, and supporting letters from friends and family members. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) 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.

\* \* \*

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-

(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.

\* \* \*

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

(i) In general.--Any alien who-

(I) 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 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 ... the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The denial notice provides the following detailed account of the applicant's inadmissibility:

You appeared for [an] interview regarding your Form I-485, Application to Register Permanent Residence or Adjust States, on January 3, 2008 and provided testimony under oath. . . . You indicated that you last entered the United States on March 15, 2007 as an H2R, nonimmigrant temporary worker. You provided Form I-94, Entry/Departure record, in support of this claim. You were asked if this was the first time you had been in the United States and you indicated that it was not. You stated that you entered the United States in 1998 without inspection and stayed for approximately five and a half months. Later, you entered without inspection in 1999 and remained until 2001. You then entered without inspection in 2001 . . . USCIS records confirm that you were stopped by Wyoming Highway Patrol on April 28, 2001 and turned over to legacy Border Patrol (USBP) officers. USCIS records indicate that you voluntarily departed the United States on May 3, 2001. You testified that you were transported by legacy INS to the United States-Mexico border in Texas and allowed to travel by foot to Mexico. You testified that you immediately reentered the United States without inspection. You stated that you went to Painesville, OH and remained until 2005. You have since reentered on or about June 2006, departing on or about December 2006, and reentered on or about March 2007, both with nonimmigrant H2 visas. Because you accrued more than one year of

unlawful presence and then voluntarily left the United States, you are inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

You testified at the interview that you first applied for an H2 nonimmigrant visa in 2004. You stated that you failed to disclose, when asked on the application, your previous presence and voluntary departure from the United States and that the application was denied on these grounds. Your failure to answer this question truthfully constitutes the willful misrepresentation of a material fact in an attempt to obtain an immigration benefit and renders you inadmissible pursuant to section 212(a)(6)(C)(i).

On appeal, counsel states that the applicant arrived in the United States in April 2001 without admission with approximately 10 other friends from Mexico. Counsel states that the applicant was apprehended and permitted to voluntarily return to Mexico. Counsel notes that the applicant again entered and resided in the United States for approximately two years, until December 2003. Although counsel's account of the applicant's period of residence in the United States after his 2001 entry-without-inspection differs from the testimony the applicant gave during his adjustment of status interview, it results in the same conclusion that the applicant continuously resided in the United States for a period of more than one year. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for a period of more than one year and seeking admission to the United States within ten years of his last departure.

Counsel further states that when the applicant applied for a visa at the U.S. Consulate in 2004, he was asked if he had entered the United States illegally, and the applicant responded that he had not. Counsel states that the consular officer had knowledge of the applicant's past entries and justifiably denied the applicant's H-2B visa application. An applicant for an H-2 visas must establish that he or she has a residence in a foreign country which he or she has no intention of abandoning. Section 101(a)(15)(H)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(H)(ii). The applicant's previous residence in the United States is a material fact as it relates to whether he intends to temporarily or permanently reside in the United States. Therefore, the applicant is inadmissible under section 212(a)(6)(C) for willfully misrepresenting a material fact to procure a visa for admission into the United States.

Beyond the decision of the director, the AAO finds under its de novo review that the applicant is also inadmissible under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for having been unlawfully present in the United States for an aggregate period of more than one year, and entering the United States without being admitted.<sup>1</sup> The director determined that the applicant entered the United States in 1999 and remained in the United States until 2001. The adjudication officer's

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<sup>1</sup> 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 (2d Cir. 1989).

notations on the applicant's Form I-485 adjustment application reflect that the applicant testified he resided in the United States for this period of time. Counsel has failed to dispute this factual determination on appeal. The applicant's reentry into the United States without inspection in 2001 renders him inadmissible under section 212(a)(9)(C) of the Act.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C) of the Act, an applicant must file an Application for Permission to Reapply for Admission into the United States (Form I-212). However, only those individuals who have remained outside the United States for at least ten years since their last departure are eligible for consideration. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The record does not reflect that the applicant in the present matter has resided outside of the United States for the requisite ten years. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C) of the Act. The AAO finds that no purpose would be served in considering the merits of his Form I-601 waiver application under sections 212(a)(9)(B)(v) and 212(i) of the Act.

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 meet his burden of proof in the present matter. The appeal will therefore be dismissed and the application will be denied.

**ORDER:** The appeal is dismissed and the application is denied.