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U.S. Citizenship
and Immigration
Services

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FILE:



Office: MEXICO CITY (PANAMA CITY, PANAMA)

Date: SEP 08 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Mexico City, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Ecuador 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. [REDACTED], a lawful permanent resident, is the husband of the applicant. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The district director found the applicant established extreme medical hardship to his U.S. citizen son. However, the district director stated that the applicant's disregard of U.S. immigration laws by continuously attempting to enter illegally after being deported subjected him to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), as an alien previously removed from the United States, and that this section does not provide a waiver until 10 years after the applicant's last departure from the United States. Consequently, the district director denied the applicant's application for waiver of inadmissibility.

The applicant's initial entry into the United States was on August 10, 1999, when he entered the United States without inspection at or near Laredo, Texas. On June 17, 2003 an immigration judge granted voluntary departure to the applicant, in lieu of removal, to occur on or before August 11, 2003. On August 10, 2003, the applicant voluntarily departed from the United States. On December 3, 2003, the applicant was apprehended by an immigration agent in California after having entered the United States without inspection. On December 12, 2003, an immigration judge issued an order of removal and the applicant was advised of being barred from entering the United States for 10 years. On February 20, 2004, he was deported from the United States. On November 9, 2004 the applicant was apprehended in New Mexico, and on December 14, 2004 he was expeditiously removed from the country.

The AAO finds that the applicant is inadmissible under sections 212(a)(9)(A)(ii), 212(a)(9)(B)(i)(II), 212(a)(9)(C)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(B)(i)(II), and 8 U.S.C. § 1182(a)(9)(C)(i)(I) and (II).

The statute under section 212(a)(9) reads as follows:

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal . . .) is inadmissible.

(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.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(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.

. . . .

(v) Waiver

The Attorney General 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 Attorney General 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. No court shall

have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(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 1225(b)(1) of this title, section 1229a of this title, 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 Attorney General has consented to the alien's reapplying for admission. The Attorney General may waive the provisions of subsection (a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 1154(a)(1)(A) of this title . . .

The record establishes that the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien seeking admission within 10 years after being ordered removed from the United States under section 240 of the Act.

With regard to his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), or having been ordered removed and attempting to reenter the United States without being admitted, a waiver of the section 212(a)(9)(C)(i)(II) ground of inadmissibility that is made less than 10 years after the alien's last departure from the United States cannot be granted. *See Matter of Torres-Garcia*, 23 I&N Dec. 866, 873 (BIA 2006).

The record shows the applicant is inadmissible under 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 one year or more. Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.¹

¹ Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii).

For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. *See Matter of Rodarte*, 23 I&N Dec. 905 BIA 2006) (departure triggers bar because purpose of bar is to punish recidivists).

With the case here, the district director was correct in finding the applicant was unlawfully present in the United States for more than one year. He entered the United States from Mexico without inspection on August 10, 1999 and remained in the country until August 10, 2003 when he voluntarily departed from the United States. He therefore accrued four years of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act, which provides the following:

- (v) Waiver. – The Attorney General [now Secretary, 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 Attorney General [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.

The district director erred in finding that the applicant established extreme medical hardship to his U.S. citizen son. A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, who must be the applicant’s U.S. citizen or lawfully resident spouse or parent. Hardship to an applicant’s child is not a consideration under the statute; and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. The hardship to an applicant’s child is considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse.

Although the district director erred in finding extreme hardship to the applicant’s U.S. citizen son, the AAO finds that the record established extreme hardship to the applicant’s wife. The record shows that the applicant’s son has severe cardiac disease and that he has had two major heart surgeries. *Letters by Children’s Hospitals and Clinics of Minnesota dated July 29, 2005 and January 31, 2006; October 18, 2005 letter by The Children’s Heart Clinic; October 18, 2005 letter by Pediatric Surgical Associates, Ltd.* The record conveys the extreme financial and emotional hardship experienced by the applicant’s wife as a result of separation from her husband and having to cope with her son’s serious health problems alone, and it conveys the extreme emotional hardship she would experience if she and her children were to live in Ecuador with the applicant. *Affidavit by the applicant’s wife.*

² DOS Cable, *supra*.; and *IIRIRA Wire #26, HQIRT 50/5.12.*

Although the record indicates that the applicant plead guilty to misdemeanor criminal vehicular operation in Minnesota on July 30, 2002, the AAO need not determine whether the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act for committing a crime of moral turpitude, because the hardship standard for a waiver under section 212(a)(9)(B)(v) of the Act is higher than for a waiver under section 212(h) of the Act for having committed a crime of moral turpitude.

Once extreme hardship is established to the qualifying relative, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996). The favorable factors in this matter are the extreme hardship to the applicant's spouse and U.S. citizen children, and the passage of three years since the applicant's most recent immigration violation. The unfavorable factors in this matter are the applicant's immigration violations, his periods of unlawful presence in the United States, and his criminal conviction in 2001. The AAO cannot emphasize enough the seriousness with which it regards the applicant's immigration violations. It finds that the unfavorable factors outweigh the hardship imposed on the applicant's family as a result of the applicant's inadmissibility. Therefore, a favorable exercise of the Secretary's discretion is not warranted in this matter.

The applicant has established extreme hardship as required by section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). But an exercise of discretion is not warranted. Furthermore, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), which is a ground of inadmissibility for which he will be unable to apply for a waiver until December 2014.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.