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



Office: LOS ANGELES

Date:

JUL 28 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application that 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 Mexico, the husband of a U.S. citizen, the father of a U.S. citizen, and the beneficiary of an approved Form I-130 petition. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The applicant seeks a waiver of inadmissibility in order to remain in the United States with his wife and son. The district director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse and denied the application.

On appeal, the applicant provided additional evidence and asserted that the evidence in the record demonstrates that his wife would suffer extreme hardship if the application is not approved.

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

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 . . . 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, . . . is inadmissible.

(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 [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.

Section 212(a)(9)(C) of the Act states:

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.

On his G-325 Biographic Information form, the applicant stated that he lived in San Juan Capistrano, California, from May 1995 to April 21, 2006, when he signed that form. On his Form I-601 waiver application, the applicant stated that his entry into the United States was on May 5, 1995, that it was his last entry into the United States, and that the entry was accomplished without inspection.

Subsequently, on August 11, 2006, the applicant admitted, in a statement sworn before an officer of the USCIS, that his entry during May 1995 was without inspection, and that it was his first entry into the United States. He added that he had left the United States during May 1998 and returned on June 16, 1998, entering without inspection. He further stated that he never left the United States after his June 16, 1998 reentry. The record contains no evidence of any departure from the United States after the applicant's June 16, 1998 reentry.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's illegal presence began on April 1, 1997. The applicant left the United States during May 1998, and entered the United States illegally again on June 16, 1998.

The applicant was unlawfully present from April 1, 1997 until May 1998, a period greater than one year. The applicant subsequently reentered the United States illegally on June 16, 1998. The applicant is therefore inadmissible pursuant to section 212(a)(9)(C)(i) of the Act for entering the United States without being admitted after having previously accrued more than one year of unlawful presence.

No waiver is available for the applicant's inadmissibility pursuant to section 212(a)(9)(C)(i) of the Act. Although exceptions to that inadmissibility exist, the record contains no evidence that any of those exceptions apply to the instant case. The appeal will be dismissed on this basis.

The decision of denial did not find the applicant inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, but pursuant to section 212(a)(9)(B)(i)(II) of the Act for his unlawful presence in excess of one year from April 1, 1997 until May 1998. A waiver is available for inadmissibility pursuant to that section. However, given that the applicant has been found inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, for which no waiver is available, no purpose would be served by

discussing the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act and waiver under section 212(a)(9)(B)(v) of the Act.

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. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.