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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



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Date: **MAR 26 2012**

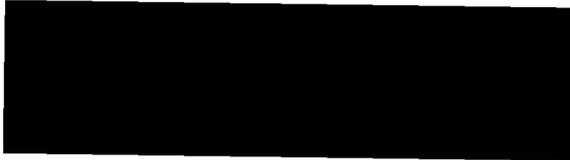
Office: SAN JOSE

FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Jose, California and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant is a native and citizen of Mexico who attempted to procure entry to the United States on April 29, 1996 by presenting a fraudulent Border Crossing Card. The applicant was deported on May 7, 1996. The applicant re-entered the United States without being admitted in May 1997. On or about December 1999, the applicant departed the United States and subsequently re-entered the United States without being admitted on or about January 2000. The field office director determined that the applicant was inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry to the United States by fraud or willful misrepresentation. The AAO notes that the applicant is also inadmissible to the United States 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 more than one year. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen children.

The field office director concluded that as the applicant did not have a United States citizen or lawful permanent resident spouse or parent, he was statutorily ineligible for a waiver of inadmissibility. The field office director further noted that extreme hardship had not been established. The Form I-601, Application for Waiver of Inadmissibility (Form I-601) was denied accordingly. *Decision of the Field Office Director*, dated July 30, 2009.

In support of the appeal, counsel for the applicant submits the following: the Form I-290B, Notice of Appeal (Form I-290B); an attorney statement; and medical documentation pertaining to the applicant's spouse. The entire record was reviewed and considered in rendering this decision.

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.

....

- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of

clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

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

(B) Aliens Unlawfully Present.-

(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.

....

(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 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...

(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.

To begin, on appeal counsel makes numerous references to the applicant's application for a Form I-212 waiver, and the Service's decision denying the Form I-212. The AAO notes that the record fails to establish a Form I-212 filing on behalf of the applicant. The only appeal in the record for the applicant is in relation to the Form I-601 application submitted by the applicant in March 2009. The AAO notes that counsel signed the Form I-601 and thus was aware of such a filing, and moreover, counsel filed the Form I-290B and referenced that the appeal was related to the Form I-601. *See Form I-290B*, dated August 31, 2009.

In addition, on appeal counsel asserts that the applicant never misrepresented himself when he attempted to procure entry to the United States in April 1996 and is thus not inadmissible under section 212(a)(6)(C)(i) of the Act. Counsel contends that a "coyote" presented false documents and the applicant should not be held accountable for the action of others. *See Attorney Statement*. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The record indicates that on April 29, 1996, the applicant applied for admission to the United States at San Ysidro Port of Entry by presenting the Border Crossing Card of another individual. As noted in the record, the applicant "was referred to secondary inspection where he admitted his true identity as well as the fact that he was a Mexican citizen.... [The applicant] likewise admitted that he had purchased

the above mentioned document, for the sum of \$500.00 pesos, and decided to use it in an attempt to gain entrance into the United States....” See *Form I-213, Record of Excludable Alien*, dated April 30, 1996. It has thus been established that the applicant attempted to procure entry to the United by fraud or misrepresentation.

Waivers of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act are dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). Sections 212(i) and 212(a)(9)(B)(v) do not provide for a waiver based on extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant or his wife, an applicant for permanent residence, a permissible consideration under the statute. In the instant appeal, the applicant has not established that a qualifying relative for purposes of a Form I-601 waiver under sections 212(i) and 212(a)(9)(B)(v) of the Act exists, namely, a U.S. citizen or lawful permanent resident spouse or parent. The applicant is thus statutorily ineligible for a waiver.

The AAO notes that even if a qualifying relative did exist for purposes of a Form I-601 waiver, no purpose would be served in adjudicating his waiver at this time. Based on the applicant’s accrual of unlawful presence from May 1997 until his departure from the United States in December 1999 and his subsequent illegal reentry, the field office director correctly determined in a separate decision denying the applicant’s Form I-485, Application for Status as a Lawful Permanent Resident (Form I-485), that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I). See *Decision of the Field Office Director to Deny the Form I-485*, dated July 30, 2009. The AAO finds that the applicant is also inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II). The AAO’s additional finding of inadmissibility in the instant case is based on the applicant’s removal in 1996 and his re-entry to the United States without being admitted on or around May 1997 and again in January 2000.

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 ten 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). 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 USCIS has consented to the applicant’s reapplying for admission into the United States. In the present matter, the applicant is currently residing in the United States and did not remain outside the United States for ten years since his last departure in 1999. He is currently statutorily ineligible to apply for permission to reapply for admission. As such, assuming arguendo that a qualifying relative did exist for purposes of a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act, no purpose would be served in adjudicating his waiver at this time.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

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