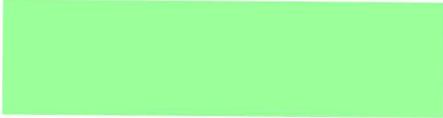


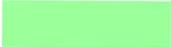
(b)(6)

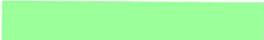


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



Date: **JUL 23 2013** Office: PORTLAND, OR

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Portland, Oregon. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on the applicant's second motion. The motion will be granted, but the underlying application remains denied.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to: section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year; section 212(a)(6)(C)(i) of the Act for fraud or willful misrepresentation of a material fact in order to procure an immigration benefit; and section 212(a)(9)(C) of the Act as an alien unlawfully present in the United States after a previous immigration violation. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act and section 212(i) of the Act in order to reside with her spouse and children in the United States.

The Field Office Director found the applicant to be inadmissible under section 212(a)(9)(C) of the Act for which no waiver is available. *See decision of Field Office Director*, December 16, 2008. The Field Office Director further found the applicant failed to establish extreme hardship to her spouse and denied the waiver application accordingly. *Id.*

The AAO dismissed the applicant's appeal, also finding that the applicant remains inadmissible under section 212(a)(9)(C)(i)(I) of the Act and, therefore, statutorily ineligible for a waiver. *See AAO decision*, May 26, 2011. The AAO affirmed its decision on motion, stating the applicant failed to demonstrate she had entered the United States legally between November 2000 and April 2001, and was consequently inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act. *See AAO decision on motion*, January 16, 2013.

Counsel filed a motion to reconsider and a motion to reopen asserting because the applicant was subsequently admitted to the United States pursuant to a nonimmigrant V-1 visa on August 29, 2002, the applicant had permission from the U.S. government to re-enter the United States. Counsel contends the applicant should therefore be eligible for adjustment of status. Counsel adds that the applicant's spouse needs the applicant present in the United States because he has been diagnosed with trigeminal neuralgia, complicated by diabetes. Medical records from 2012 are submitted in support.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts to be provided in the reopened proceedings and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the applicant's submission meets the requirements of a motion to reopen. Accordingly, the motion is granted.

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 -

(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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

In this case, the AAO previously found that the applicant entered the United States without inspection in August 1993, and remained until at least April 29, 1998, when her daughter [REDACTED] was born in the United States. The applicant accrued unlawful presence for more than one year, from April 1, 1997, until April 29, 1998. The AAO additionally found although the record was unclear on when the applicant returned to Mexico, this trip occurred before she applied for visas in [REDACTED] Mexico in 2000. Moreover, after having been unlawfully present in the United States for more than one year, the applicant reentered the United States illegally sometime between November 2000,

when her second visa application denial was denied in [REDACTED] and April 2001, when she again departed the United States as a result of her father's death. The AAO affirmed its finding that the applicant was consequently inadmissible pursuant to section 212(a)(9)(C) of the Act. The applicant subsequently entered the United States in August 2002 using V-1 visa.

On the applicant's second motion, counsel does not contest those findings. Instead, counsel contends, without citing any law or policy in support, that subsequent issuance of a V-1 visa constituted permission from the U.S. government to re-enter the United States, and that she should now be eligible for adjustment of status since 10 years have elapsed since she last entered in 2002. This contention is incorrect. The applicant became inadmissible pursuant to section 212(a)(9)(C) of the Act when she re-entered the United States without inspection between November 2000 and April 2001. The applicant's inadmissibility under section 212(a)(9)(C) of the Act cannot be overcome by subsequently obtaining a V-1 nonimmigrant visa, or by the fact that ten years elapsed since her last departure. An alien who is inadmissible under section 212(a)(9)(C) of the Act can only obtain permanent residence or an immigrant visa by applying for consent to reapply after the alien has been outside the United States for more than 10 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). Thus, 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. In the present matter, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since her last departure. Because the applicant entered the United States without inspection after one year of unlawful presence, and she has not spent 10 years outside the United States after her last departure, she remains inadmissible to the United States.

As the applicant is currently statutorily ineligible to apply for permission to reapply for admission into the United States, no purpose would be served by adjudicating her waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, although the motion is granted, the underlying application remains denied.

ORDER: The motion is granted, but the underlying application remains denied.