

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**



(b)(6)

Date: **MAR 12 2014** Office: ORLANDO, FL

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Orlando, Florida, denied the waiver application and 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 Israel who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit, section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and section 212(a)(9)(C)(i)(I) of the Act for re-entering the United States without being admitted after being unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with his wife and children in the United States.

The field office director found that there was no waiver available for the applicant's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act and that the applicant failed to establish extreme hardship to a qualifying relative. The field office director denied the application accordingly.

On appeal, filed on February 21, 2012, and received by the AAO on September 20, 2013, counsel contends that there appears to be an inadvertent error because the applicant did not seek a visa at the Embassy in Jerusalem in 1999. Counsel also contends that the applicant is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act because section 245(i) of the Act allows an alien who enters the United States without inspection and who is the beneficiary of an approved Form I-130 to adjust their status. In addition, counsel contends, among other things, that *res judicata* precludes the government from any findings of inadmissibility because the government specifically stated that there are no apparent bars to adjustment in its non-opposition to terminate the applicant's removal proceedings.

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

In general.—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(i) provides, in pertinent part:

- (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States

of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . . .

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.

. . . .

(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.

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.

The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. See Section 291 of the Act, 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document . . ."). Furthermore, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this case, the record shows that the applicant initially entered the United States on July 25, 1996, using a B1-B2 visitor's visa. The applicant contends he resided in Los Angeles, California, from July 1996 until May 1999. See *Application for Waiver of Grounds of Inadmissibility (Form I-601)*, dated May 13, 2010; *Biographic Information form (Form G-325A)*, dated April 26, 2001. The record contains a copy of the applicant's visa application, dated February 28, 1999, which was received at the American Embassy in Tel Aviv on March 10, 1999. On the visa application, the applicant indicated he had been to the United States for "3 weeks" in 1996 in response to the question "[H]ave you ever been in the U.S.A.?" In addition, for his "present occupation," the applicant indicated on his visa application, [REDACTED] and included a letter from the [REDACTED], which stated the applicant "has worked with the [REDACTED] store' chain as a store manager for the last two years." [REDACTED] dated March 8, 1999. The applicant's visa application was denied with a notation that [REDACTED] is the applicant's uncle. Furthermore, the applicant contends that he entered the United States without inspection in March 1999. See *Application to Register Permanent Residence of Adjust Status (Form I-485)*, dated May 13, 2010 (indicating the applicant's date of last arrival was March 1999, "Entered EWI"); see also *Form I-485*, dated (indicating "EWI" as the status

entered); *Petition for Alien Relative (Form I-130)*, dated April 28, 2001 (indicating he last arrived "EWI").

Therefore, the record shows the applicant overstayed his visa and was unlawfully present in the United States from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until sometime prior to March 1999 when he appeared at the U.S. embassy in Jerusalem. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more. Counsel does not contest this ground of inadmissibility. Furthermore, the record shows the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act as he re-entered the United States without being admitted in March 1999, after he had been unlawfully present in the United States for more than one year.

Regarding inadmissibility under section 212(a)(6)(C)(i) of the Act, counsel's contention that the applicant never sought a visa at the Embassy in Jerusalem in 1999 is without merit. As stated above, the record contains a copy of the applicant's visa application, signed by the applicant and dated February 28, 1999, which was received at the U.S. Embassy in Tel Aviv on March 10, 1999. In addition, the record contains an addendum to the applicant's Form I-485 which specifically states, "In 1999, I presented fraudulent documents seeking a visa at the U.S. embassy in Jerusalem in violation of Section 212(a)(6)(C)(i). The misrepresentation was discovered and the visa was denied." *Form I-485, Addendum*, dated May 13, 2010. Counsel signed this Form I-485 on May 14, 2010, as the person preparing the form. The Form I-601 similarly states, "In 1999, I presented fraudulent documents seeking a visa at the U.S. Embassy in Jerusalem in violation of Section 212(a)(6)(C)(i). The visa was denied." *Form I-601*, dated May 13, 2010. Counsel also signed this Form I-601 on May 14, 2010, as the preparer of the form. Therefore, the applicant himself concedes, through counsel, that he presented fraudulent documentation in support of his visa application and counsel's contention that there appears to be an inadvertent error is without merit. As the record contains the visa application which misrepresents his time in the United States and his employment in Israel, he is clearly inadmissible under section 212(a)(6)(C) of the Act.

Counsel's contention that section 245(i) of the Act allows an alien who enters the United States without inspection and who is the beneficiary of an approved Form I-130 to adjust their status is incorrect as section 245(i)(2)(A) of the Act specifies that the applicant must also be admissible to the United States. In this case, the applicant is inadmissible under three separate grounds. Moreover, counsel's contention that *res judicata* precludes the government from any findings of inadmissibility is also erroneous. The record contains a copy of The Department of Homeland Security's Notice of No Opposition to Respondent's Supplement for Previously Filed Motion to Terminate Proceedings which states that "[t]here are no apparent bars to the respondent adjusting his status to that of a Lawful Permanent Resident." The plain language of the statement does not definitively claim that there are no bars to adjustment of status, but only that there are no clearly visible or obvious bars to adjustment of status. More importantly, though, and contrary to counsel's contention, there was no "legal finding or ruling," about any possible bars to adjustment of status by the immigration judge. The immigration judge merely terminated removal proceedings in order to allow the applicant the opportunity to apply for adjustment of status because there was no opposition from the parties. The

immigration judge terminated proceedings without prejudice, and therefore, the Department of Homeland Security is not precluded from placing the applicant back into removal proceedings. *See Order of the Immigration Judge*, dated October 28, 2010.

Because the applicant re-entered the United States without being admitted after being unlawfully present in the United States for an aggregate period of more than one year, he is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act. There is no evidence in the record that the applicant is a VAWA self-petitioner and, therefore, there is no waiver available for this ground of inadmissibility.

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); *see also Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, the BIA has held that 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 this case, the applicant continues to reside in the United States. Therefore, he remains statutorily ineligible to apply for permission to reapply for admission until he has remained outside the United States for at least ten years. Accordingly, the appeal must be dismissed as no purpose would be served in discussing whether he has established the existence of extreme hardship to a qualifying relative.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant is not eligible to apply for consent to reapply at this time. Accordingly, no purpose would be served in evaluating whether the applicant has established extreme hardship to a qualifying relative and the underlying waiver application must be dismissed.

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.

**ORDER:** The appeal is dismissed.