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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: MEXICO CITY, MEXICO
[REDACTED] (CIUDAD JAUREZ)

Date: **OCT 28 2010**

IN RE: [REDACTED]

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

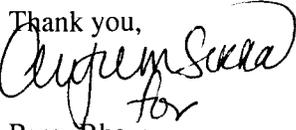
ON BEHALF OF APPLICANT:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion 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 District Director, Mexico City, Mexico. 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 Mexico. He was found to be inadmissible to the United States pursuant to 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 and seeking admission within ten years of his last departure. He is married to a United States citizen. He 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 concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 3, 2007.

On appeal, counsel for the applicant asserts, in part, that the applicant's spouse is experiencing extreme hardship due to the living conditions in Mexico, and that she has been diagnosed with depression and is in danger of losing a property and vehicle in the United States.

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.

The record indicates that the applicant entered the United States without inspection in September 2002 and remained until he departed voluntarily in February 2007. The applicant attempted to re-enter the United States on March 28, 2007, but was detained, convicted of illegal entry into the United States, and granted voluntary departure. *Form I-213, Record of Deportable/Inadmissible Alien*, dated March 29, 2007. The District Director concluded that the applicant resided unlawfully in the United States for over a year between September 2002 and February 2007, and that he was inadmissible under 212(a)(9)(B). The District Director then adjudicated the applicant's waiver to determine if it met the extreme hardship standard.

The District Director's decision was incorrect as a matter of law and will be withdrawn. As the applicant accrued a previous period of unlawful presence, from 2002 to February 2007, and then

attempted to re-enter the United States on March 28, 2007, he is inadmissible under section 212(a)(9)(C)(i)(I) of the Act.¹

Section 212(a)(9)(C)(i)(I) of the Act provides in pertinent part:

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. . . . 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.

A violation under section 212(a)(9)(C)(i)(I) of the Act constitutes a permanent bar to admission to the United States. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must have entered or attempted to enter the United States without being admitted.²

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

² USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.

In this case, the applicant departed the United States in February 2007, after having accrued more than one year of unlawful presence, and he attempted to reenter without inspection on or about March 28, 2007, and is therefore inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The record contains no evidence to establish that the applicant filed a self-petition under VAWA, or that the waiver requirements set forth in section 212(a)(9)(C)(iii) of the Act have been met. The applicant has additionally failed to establish that he qualifies for an exception to his ground of inadmissibility under section 212(a)(9)(C)(ii) of the Act.

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 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 U.S. Citizenship and Immigration Services has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in 2007, less than ten years ago. He is currently inadmissible, and is statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his 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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden because he has not established that he is otherwise admissible to the United States even if a waiver under section 212(a)(9)(B)(v) were granted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.