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



PUBLIC COPY



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DATE: **DEC 05 2011** OFFICE: GUATEMALA CITY

FILE:

IN RE: APPLICANT:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

Perry Rhew, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Guatemala who entered the United States without inspection on December 20, 1989. The applicant was placed into deportation proceedings, and was ordered deported *in absentia* on February 2, 1996. Although it is unclear when the applicant left the United States, he indicated he later re-entered the United States without inspection in March of 2003, and departed for Guatemala on January 2, 2009. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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 and seeking readmission within 10 years of his last departure from the United States. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) for seeking admission within 10 years of the date of his departure or removal. As the applicant had failed to appear at his immigration proceedings, he was additionally found to be inadmissible to the United States pursuant to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B). Lastly, the Field Office Director found the applicant was inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 212(a)(9)(C)(i) for having been unlawfully present for more than a year and subsequently entering the United States without inspection. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse and children.

The Field Office Director concluded that the applicant remained inadmissible under section 212(a)(9)(C) of the Act, was consequently ineligible to apply for admission until January 2019, and denied the application accordingly. *See Decision of Field Office Director* dated July 15, 2009.

On appeal, the applicant submits copies of billing statements, birth certificates, a letter from the applicant's spouse, and a psychological evaluation. In the letter, the applicant's spouse describes her financial, emotional, and other difficulties due to the applicant's inadmissibility and her responsibilities towards her children. *Letter from applicant's spouse*, undated.

The record includes, but is not limited to, the documents listed above, evidence of birth, marriage, and naturalization, another letter from the applicant's spouse, and evidence of immigration proceedings. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides:

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

In the present case, the record reflects the applicant entered the United States without inspection on December 20, 1989. *See Form I-589 Application for Asylum and for Withholding of Deportation*, May 24, 1995. The applicant departed the United States on an unknown date, and then indicated he re-entered the United States without inspection in May 2003. *See Form I-601 Application for Waiver of Grounds of Inadmissibility*, January 6, 2009. The applicant remained in the country until January 2, 2009, when he left for Guatemala. The applicant therefore accrued over one year of unlawful presence from May 2003 until January 2, 2009.¹ The applicant's qualifying relative for a waiver of this inadmissibility is his U.S. Citizen spouse.

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

(B) Failure to attend removal proceeding.

(1) In general.-Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

In the present case, the record reflects the applicant entered the United States without inspection on December 20, 1989. *See Form I-589 Application for Asylum and for Withholding of*

¹ It is unclear from the record whether the applicant accrued unlawful presence during his December 20, 1989 stay in the United States, as the date of his departure is unknown. Only periods of stay before April 1, 1997 are subject to the unlawful presence provisions of the Act.

Deportation, May 24, 1995. The applicant filed a Form I-589 Application for Asylum, failed to appear at his asylum interview, and was issued an Order to Show Cause to appear before an immigration judge. *Referral notice*, July 22, 1995, *Order to show cause and Notice of Hearing*, August 12, 1995. The applicant failed to appear at his immigration hearing, and was ordered deported *in absentia* on February 2, 1996. *See Order of Immigration Judge*, February 2, 1996. The Field Office Director consequently found the applicant was subject to section 212(a)(6)(B) of the Act. However, “[s]ection 212(a)(6)(B) of the Act does not apply to an alien placed in deportation or exclusion proceedings before April 1, 1997, even if the alien’s hearing was held after April 1, 1997. The provision applies *only* to individuals who were placed in removal proceedings beginning April 1, 1997.” *See* Memo. from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators* 13 (March 3, 2009). The applicant was placed in deportation proceedings prior to April 1, 1997 as he was ordered deported on February 2, 1996; therefore, the applicant is not inadmissible under section 212(a)(6)(B) of the Act and the finding of the Field Office Director with respect to this portion of the July 15, 2009 decision is reversed.

Although the applicant is not inadmissible under section 212(a)(6)(B) of the Act, he remains inadmissible under section 212(a)(9)(C)(i) of the Act.

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 has consented to the alien's reapplying for admission.

....

“Section 212(a)(9)(C)(i)(II) of the Act applies to those aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997. The alien may have been placed in removal proceedings before or after April 1, 1997, but the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997.” *See memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, dated June 17, 1997.* In the present matter, the applicant was ordered deported *in absentia* on February 2, 1996, and re-entered the United States without inspection in March 2003. *See Order of Immigration Judge, February 2, 1996.* Therefore, the applicant remains subject to this provision of the Act because he was ordered deported and his subsequent unlawful re-entry occurred after April 1, 1997. 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* CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on January 2, 2009, less than ten years ago. He is currently 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 a 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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met the burden of proof for eligibility. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.