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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:

DEC 07 2011

Office: PHOENIX, ARIZONA

FILE:



IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)
of the Immigration and Nationality Act, 8 U.S.C. § 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, 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, Phoenix, Arizona. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 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 admission within ten years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant 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), in order to reside in the United States.

The Field Office Director found the applicant to be subject to section 212(a)(9)(C)(i)(1) of the Act for reentering the United States without inspection after having accrued more than one year of unlawful presence. Accordingly, the Field Office Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Decision of the Field Office Director*, dated April 13, 2009.

On appeal, counsel asserts that the applicant should be allowed to apply for a waiver of inadmissibility for accruing unlawful presence of more than one year. *Form I-290B, Notice of Appeal or Motion*, dated April 27, 2009.

The record includes, but is not limited to, counsel's brief, a letter from the applicant's spouse; documentation relating to the applicant's spouse's trucking business; copies of joint income tax returns; bank statements, and Form 1099s, Miscellaneous Income, relating to the applicant's spouse; and documents relating to the applicant's apprehension and return to Mexico in 2001. The entire record was reviewed and all relevant evidence considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) states 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.

The record reflects that the applicant first entered the United States in 1987 without inspection and remained in the United States until November 13, 2001, when she voluntarily left for Mexico. She

reentered the United States on November 26, 2001, without inspection and has remained in the country since that date.

Based on this history, the AAO finds the applicant to have accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until her November 13, 2001 departure from the United States, which triggered the bar to inadmissibility under section 212(a)(9)(B)(i) of the Act.

As the applicant reentered the United States on November 26, 2001, without inspection, she is also inadmissible pursuant to section 212(a)(9)(C) of the Act, which provides:

(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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien’s reapplying for admission....

On appeal, counsel asserts that the applicant has established eligibility for adjustment of status under section 245(i) because she was physically present in the United States prior to December 21, 2000. He contends that the applicant’s eligibility under section 245(i) would preclude her inadmissibility under section 212(a)(9)(C) of the Act. He asserts that the applicant should, instead, be found inadmissible under section 212(a)(9)(B) of the Act for which a waiver is available.

The AAO acknowledges counsel’s assertion that section 212(a)(9)(C) of the Act does not apply with regards to section 245(i). However, we note that the United States Citizenship and Immigration Service (USCIS) has adopted the position that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board notes that section 245(i) of the Act unambiguously requires an applicant for adjustment of status to prove that he is “admissible to the United States for permanent resident.” The Board further notes that in order to satisfy this admissibility requirement, the applicant must prove either that he or she is “not inadmissible” under any of the various paragraphs of section 212(a) of the Act, or that any applicable ground of inadmissibility has been waived. The Board held that an alien who is inadmissible under section

212(a)(9)(C)(i)(1) of the Act is not eligible for adjustment under section 245(i) of the Act. Furthermore, in *Garfias-Rodriguez v. Holder Jr.*, 649 F.3d 942 (9th Cir. 2011), the Ninth Circuit, in deferring to the BIA's decision in *Matter of Briones*, found that aliens who are inadmissible under section 212(a)(9)(C)(i)(1) of the Act may not seek adjustment of status under section 245(i) of the Act.

The record in this case demonstrates that the applicant reentered the United States without inspection after accruing more than one year of unlawful presence. Therefore, she is barred from admission under section 212(a)(9)(C)(i)(I) of the Act.

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant must remain outside the United States for at least ten years following her last departure. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). The record in the present matter does not establish that the applicant has resided outside the United States for the required ten years. Accordingly, the applicant is statutorily ineligible to seek an exception from her inadmissibility under section 212(a)(9)(C)(i) of the Act.

As the applicant is not eligible to receive an exception from her section 212(a)(9)(C)(i) inadmissibility, the AAO finds no purpose would be served in considering whether she is eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. The appeal will therefore be dismissed.

In proceedings for application for waiver of grounds of inadmissibility, 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 that burden.

ORDER: The appeal is dismissed.