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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

#6

[redacted]

Date: DEC 0 8 2011 Office: TEGUCIGALPA FILE: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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,

Michael Hunnway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras 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 for more than one year and seeking readmission within 10 years of his last departure. He was also found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He was found inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having accrued more than one year of unlawful presence and subsequently entering the United States without being admitted. The record shows that the applicant is also inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a benefit under the Act by willful misrepresentation.[1] The applicant seeks waivers of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), finding that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative upon denial of the application, or that he warrants a favorable exercise of discretion. *Decision of the Field Office Director*, dated June 16, 2009.

On appeal, counsel for the applicant asserts that the field office director abused his discretion in denying the Form I-601 application, as he failed to consider all of the submitted evidence, did not assess the cumulative effect of hardship factors, failed to balance positive and negative factors, considered evidence that was immaterial, and declined to provide sufficient analysis to support his findings. *Statement from Counsel on Form I-290B*, dated July 16, 2009.

The record contains, but is not limited to: briefs from counsel; statements from the applicant, his wife, and others in support of the appeal; documentation in connection with the applicant's wife's mental health; documentation in connection with the applicant's daughter's health care, learning challenges, and associated services; psychological evaluations for the applicant and his wife; documentation relating to the applicant's and his wife's financial circumstances; and evidence relating to the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act provides, in pertinent part:

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[1] The field office director did not indicate that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. However, an application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office 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).

(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.

. . . .

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

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

> 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(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record contains references to multiple dates on which the applicant entered the United States without inspection, including February 20, 2001 (the applicant's statement upon arrest on August 25, 2006), February 2001 (two separate briefs from counsel during the applicant's removal proceedings, dated September 22, 2006), one to two years after Hurricane Mitch, which occurred in late 1998 (statement made by the applicant to a psychological evaluator on September 19, 2006), sometime between 2001 and 2003 (applicant's statement on appeal), 2003 (applicant's statement dated May 10, 2008), February 2003 (counsel's brief on appeal), March 2003 (counsel's brief filed with Form I-601, dated May 1, 2008), 2005 (applicant's statement made while in custody on August 30, 2006), and February 2006 (indication of the applicant's last entry date provided on Form I-130 filed on his behalf, dated September 6, 2006). Based on these representations, the field office director found that the applicant made multiple entries to the United States without inspection, yet the applicant asserts on appeal that he only made one entry to the United States. The applicant was removed to Honduras on October 25, 2006. The field office director concluded that the applicant accrued over one year of unlawful presence during his stay in the United States, and found him inadmissible under section

212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure.

Upon review, the AAO first notes that the record shows that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act based on his assertions or the field office director's findings regarding his presence in the United States. On appeal, the applicant asserts that he entered the United States without inspection a single time between 2001 and 2003. As he was removed on October 25, 2006, his representation supports that he accrued over one year of unlawful presence prior to his last departure.

There are multiple references to the applicant entering the United States without inspection in 2001, including statements made by the applicant to U.S. authorities and a psychological evaluator at different times, as well as briefs from counsel. There are multiple references to the applicant entering the United States without inspection in 2003, including the applicant's statements and counsel's briefs submitted with the Form I-601 application and present appeal. On appeal, the applicant asserts that there was confusion in his waiver interview regarding his entry to the United States, and that he reported that his single entry occurred sometime between 2001 and 2003. However, the applicant's multiple dates of entry are contained in numerous documents that were generated at various times in the applicant's immigration history, and the field office director's reference to separate entries in 2001 and 2003 was not based solely on the applicant's testimony during his waiver interview. Documentation of a separate interview with the applicant on August 30, 2006 reflects that he indicated he entered without inspection in 2005. The applicant's assertion on appeal that he did not report a 2005 entry during his waiver interview does not rebut a finding that he also entered without inspection in 2005. As will be discussed later in this decision, the applicant's assertion that a 2005 entry didn't occur because he didn't report it is not persuasive, because he has previously declined to provide material information to United States Citizenship and Immigration Services (USCIS).[2] The applicant has not asserted or shown that he, his counsel, or his wife have made errors in representing his entry to the United States, thus he has also not rebutted the claimed February 2006 entry without inspection provided on the Form I-130 petition his wife filed on his behalf on September 6, 2006.

If all of the identified entry dates reflect separate entries to the United State without inspection, the applicant has had interruptions in his unlawful presence. The record does not show when the applicant departed prior to each reentry. However, on a Form G-325A signed by the applicant on August 28, 2006, he claimed he held U.S. addresses from February 2003 until the date he executed the form.[3] This representation supports that he has resided continuously in the United States. If his

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[2] The applicant previously made a material misrepresentation that renders him inadmissible under section 212(a)(6)(C)(i) of the Act.

[3] The August 28, 2006 Form G-325A is referenced as a general indication of the applicant's pattern of residence in the United States, as the specific representations cannot be relied upon. In the form, the applicant claimed he held the same address in Honduras from June 1975 until December 2004, which is inconsistent with his simultaneous claim of residing in United States beginning in February 2003. He also failed to reveal another wife on the form that was material to his eligibility for permanent residence and leads to inadmissibility under section 212(a)(6)(C)(i) of the Act.

representation that has resided in the United States since soon after Hurricane Mitch occurred (in 1998) is relied upon, he has resided in the United States since approximately 2001. Thus, the record supports that he has accrued unlawful presence from approximately 2001 to 2003, from 2003 until 2005, from an unknown date in 2005 until February 2006, and from February 2006 until he was removed on October 25, 2006. The record shows by a preponderance of the evidence that the applicant has accrued at least one period of over one year of unlawful presence prior to his departure on October 25, 2006. Accordingly, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and he requires a waiver under section 212(a)(9)(B)(v) of the Act

As found by the field office director, the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act. An applicant who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless more than 10 years have elapsed since the date of his last departure from the United States. *See Matter of Briones*, 24 I&N Dec. 355, 358-59 (BIA 2007); *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 of the United States during that time, *and* that USCIS has consented to the applicant's reapplying for admission. *Matter of Briones*, 24 I&N Dec. at 358, 371; *Matter of Torres-Garcia,* 23 I&N Dec. at 873, *aff'd.*, *Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007).

In the present matter, the applicant is inadmissible under section 212(a)(9)(C) of the Act due to the fact that he accrued over one year of unlawful presence and he subsequently entered the United States without inspection. While the applicant asserts that he only entered the United States a single time, as discussed above, the record supports that he entered without inspection multiple times. These include on or about February 2003 after approximately two years of unlawful presence from 2001 to 2003, and in 2005 after over one year of unlawful presence from 2003 to 2005. The applicant has not been out of the United States for a total of ten years since his last departure. Accordingly, he is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that the field office director cited section 212(a)(9)(C) of the Act, yet it does not apply to the applicant's case. *Brief from Counsel on Appeal*, at 35, undated. However, counsel does not discuss the facts of the applicant's immigration history or otherwise support this general assertion. Thus, counsel has not rebutted the finding that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

As the applicant is statutorily ineligible to apply for permission to reapply for admission, the present Form I-601 waiver application must be denied, irrespective of whether he has shown that he is eligible for a waiver of inadmissibility under other sections of the Act.

The applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure a benefit under the Act by willful misrepresentation. The applicant was married to another individual prior to his present wife. He and his present wife first married in August 2006, yet the applicant had not effectively divorced his first wife. His present wife filed a Form I-130 petition on his behalf on August 29, 2006, at such time that he was still married to his prior wife. Thus, the applicant's marriage to his current wife was not then valid and he was not eligible as a beneficiary to her petition. The applicant submitted a Form G-325A, Biographic Information, with the August 29, 2006

Form I-130 petition. However, the applicant failed to reveal his prior wife on the form where required. The AAO finds the omission of this information to be a material misrepresentation, as the applicant was in fact not eligible to be a beneficiary of his current wife's Form I-130 petition because he was still married to another woman. The form contains the applicant's original signature, certifying that the information contained in the form is complete and correct. As the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, he also requires a waiver of inadmissibility under section 212(i) of the Act.[4]

Counsel concedes that the applicant is also inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. *Brief from Counsel* at 33. In May 2004 the applicant pled guilty to Menacing under Colorado Revised Statutes § 18-3-206; domestic violence under Colorado Revised Statutes § 18-6-801, and telephone-obstruct service under Colorado Revised Statutes § 18-9-305.5. The record shows that on or about June 23, 2006 the applicant pled guilty to harassment-stalking under Colorado Revised Statutes § 18-9-111(1)(a), and the court designated the offense an incident of domestic violence. On November 20, 2003, the applicant was also convicted of driving while ability impaired (by alcohol or drugs) under Colorado Revised Statutes § 42-4-1301(1)(a), as part of a plea to an original charge of driving under the influence of alcohol or drugs.

As the applicant is not eligible for a waiver of his inadmissibility under section 212(a)(9)(C)(i)(I), no purpose is served in fully assessing his criminal history and inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. However, it is noted that the applicant's acts of domestic violence are likely crimes involving moral turpitude, and may also constitute violent or dangerous crimes as contemplated by the regulation at 8 C.F.R. § 212.7(d). Counsel asserts that the field office director erred in applying an "exceptional and extremely unusual hardship" standard rather than an "extreme hardship" standard. *Brief from Counsel* at 19-21. It is first noted that the field office director did not assess whether the applicant's criminal acts were violent or dangerous, and he limited his discussion of challenges to the applicant's family members to "extreme hardship." Yet, where an applicant has committed a violent or dangerous crime as provided in 8 C.F.R. § 212.7(d), he must show that denial of his waiver application "would result in exceptional and extremely unusual hardship" in order to establish that discretion may be favorably exercised and his application may be approved. 8 C.F.R. § 212.7(d). This standard is more restrictive than the "extreme hardship" standard found in sections 212(a)(2)(A)(i)(I), 212(h), and 212(i) of the Act.

The regulation at 8 C.F.R. § 212.7(d) provides:

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[4] The field office director did not indicate that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. However, an application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office 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).

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Should the applicant's crimes be found to be violent or dangerous, he must meet the higher standard in the regulation at 8 C.F.R. § 212.7(d) in order to establish eligibility for a waiver under section 212(h) of the Act.

Based on the foregoing, the applicant requires waivers of inadmissibility under sections 212(a)(2)(A)(i)(I), 212(h), and 212(i) of the Act. However, as he is statutorily ineligible for a waiver of his inadmissibility under section 212(a)(9)(C) of the Act, no purpose is served in assessing hardship to his family members or balancing discretionary factors in order to determine whether he has met the requirements of sections 212(a)(2)(A)(i)(I), 212(h), and 212(i) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(2)(A)(i)(I), 212(h), and 212(i) 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 that burden due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.