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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

Date: DEC 12 2011 Office: LOS ANGELES FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and the applicant appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal, and the matter is again before the AAO on motion to reconsider. The motion has been granted and the matter reconsidered. However, the prior decision of the AAO will be affirmed, and 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 for more than one year and seeking readmission within 10 years of his last departure. The applicant is further inadmissible under section 212(a)(9)(C) of the Act for having accrued more than one year of unlawful presence and subsequently entering the United States without being admitted. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated November 16, 2005. In dismissing the subsequent appeal, the AAO found that the applicant's wife would experience extreme hardship should she relocate to Mexico, but that she would not suffer extreme hardship should she remain in the United States. *Decision of the AAO*, dated February 19, 2009.

On motion, counsel for the applicant asserts that the AAO found that the applicant established extreme hardship to his wife should she relocate to Mexico, thus the AAO should have found that the applicant satisfied the extreme hardship requirement of section 212(a)(9)(B)(v) of the Act. *Brief from Counsel*, dated March 19, 2009. Counsel contends that the AAO failed to properly consider hardship to the applicant's wife should she remain in the United States, and failed to follow the reasoning of the Ninth Circuit Court of Appeals, which is controlling in this case. *Id.*

The record contains, but is not limited to: briefs from counsel; statements from the applicant and his wife; documentation in connection with the applicant's wife's and son's medical treatment; and documentation in connection with the applicant's family's taxes, employment, expenses, and general financial circumstances. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act provides, 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.
>
> . . . .
>
> (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.

The record shows that the applicant has entered the United States without inspection on multiple occasions. The record indicates that the applicant first entered the United States without inspection in 1996. On his Form I-601 application for a waiver, he stated that he resided in the United States illegally from June 10, 1997 to December 1998, from January 1999 until January 2000, and from approximately February 2000 until the date he filed the application, on August 31, 2005. The record does not show that the applicant has departed the United States since he entered on or about February 15, 2000. The applicant has not asserted or shown that he has entered the United States lawfully at any time.

Based on the foregoing, the applicant's periods of unlawful presence include, but are not limited to, June 10, 1997 to December 1998 and January 1999 until January 2000, totaling approximately 18

months and 12 months, respectively. He now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States 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. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal, and he requires a waiver under section 212(a)(9)(B)(v) of the Act.

Upon review, the applicant is also inadmissible under section 212(a)(9)(C) of the Act.[1] 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). 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, most recently on or about February 15, 2000. 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.

As the applicant is statutorily ineligible to apply for permission to reapply for admission, no purpose would be served in further assessing his waiver application under section 212(a)(9)(B)(v) of the Act. However, in response to counsel's assertions on motion, the AAO notes that it has long interpreted the waiver provisions of the Act to require a showing of extreme hardship whether a qualifying relative relocates abroad or remains in the United States, as a claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id., also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). The AAO acknowledges that the applicant has submitted significant new information and evidence to support that his wife would experience hardship should she reside in the United States without him. Yet, as noted above, no purpose is served in analyzing this evidence due to the applicant's inadmissibility under section 212(a)(9)(C) of the Act. The AAO also finds that its prior decision

[1] The district director did not indicate that the applicant is inadmissible under section 212(a)(9)(C) of the Act. Nor did the AAO identify section 212(a)(9)(C) of the Act as a basis for inadmissibility in our prior decision. 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).

was in accord with the reasoning of the Ninth Circuit Court of Appeals, in light of the record as constituted at the time of the decision.[2]

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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden, in that he has not shown that a purpose would be served in adjudicating his waiver application under section 212(a)(9)(B)(v) of the Act due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the prior decision of the AAO will be affirmed and the appeal will be dismissed.

ORDER: The prior decision of the AAO is affirmed and the appeal is dismissed.

[2] We acknowledge that this case arises in the Ninth Circuit, and that the Ninth Circuit Court of Appeals rejected the holdings in *Ige* and *Pilch* on the basis that attributing "the hardship posed by family separation to "parental choice" not deportation . . . is not consistent with the . . . responsibility both to determine extreme hardship based on individual experience, and to reach an express and considered judgment." *Perez v. INS*, 96 F.3d 390, 392-93 (9th Cir. 1996) (quoting *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1426 (9th Cir. 1987). The Ninth Circuit has observed that "parents do separate from their children when persuaded that such action is in their children's best interest." *Cerrillo-Perez*, 809 F.2d at 1426. As the aforementioned decisions address the remedy of suspension of deportation and not waiver of inadmissibility, they are not binding in this proceeding. Nevertheless, the Board has dictated that legal concepts articulated in suspension of deportation cases may be applied in the waiver of inadmissibility context. *See Cervantes-Gonzalez,* 22 I&N Dec. at 565 (footnote omitted). The AAO has consistently and uniformly interpreted the waiver provisions to require a direct causal link between extreme hardship and inadmissibility. Furthermore, we note that waiver of inadmissibility cases, unlike the suspension of deportation cases discussed above, often concern hardship to adult qualifying relatives, who are free to choose for themselves whether to relocate abroad or remain in the United States.