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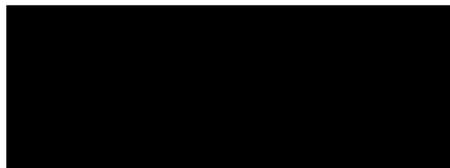
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

tlc



DATE: NOV 22 2011 OFFICE: MEXICO CITY, MEXICO FILE:

IN RE: Applicant:

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, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that 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 his last departure, and under section 212(a)(9)(C)(i)(I) of the Act for having entered the United States, without inspection, after having accrued more than a year of unlawful presence. The record indicates that the applicant is the child of a Lawful Permanent Resident of the United States and is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse, and that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 10, 2009.

On appeal, counsel for the applicant asserts that the Field Office Director incorrectly applied the hardship standard in relation to the applicant's section 212(a)(9)(B)(i)(II) inadmissibility, and asserts that inadmissibility under section 212(a)(9)(C)(i)(I) of the Act does not apply to the applicant and that the appellate process is violative of the applicant's due process rights under the Fifth Amendment. He requests that the waiver application be approved. *Form I-290B*, dated September 8, 2009.

The record of evidence includes, but it is not limited to, statements from the applicant's family members describing the hardships claimed, and letters of support from the applicant's friends. The entire record was reviewed and considered in arriving at a decision on the appeal.

Counsel asserts that the 30-day period allowed to file a written brief is insufficient time in which to obtain the materials from the record necessary to file a meaningful response to the Field Office Director's findings. He claims that this time constraint violates his client's due process rights.

The AAO notes, however, that authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), and, like the Board of Immigration Appeals, we do not have authority over constitutional matters. Accordingly, we will not address counsel's claim that the applicant's due process rights have been violated by the appeals process.

Section 212(a)(9)(B) 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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 entered the United States without inspection in March 2002. The applicant resided in the United States in unlawful status until October 2007, when he departed to Mexico. As the applicant is seeking admission to the United States within ten years of his 2007 departure, he is inadmissible under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for more than one year.

The record also indicates that the applicant is inadmissible under section 212(a)(9)(C)(i)(I), of the Act, which 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 Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
 - (A) removal;
 - (B) departure from the United States;
 - (C) reentry or reentries into the United States; or
 - (D) attempted reentry into the United States.

The record reflects that on [REDACTED] the applicant was arrested for Driving Under the Influence by the Sheriff's Office of [REDACTED] and on [REDACTED] was released into the custody of U.S. Immigration and Customs Enforcement (ICE). While in ICE custody, the applicant indicated that he had last entered the United States without inspection on or about May 3, 2008.

Counsel contends that inadmissibility under section 212(a)(9)(C)(i)(I) of the Act does not apply to the applicant and cites to *Acosta v. Gonzales*, 49 F.3d 550 (9th Cir. 2006). However, in 2011, the 9th Circuit Court overturned its decision in *Acosta* noting the BIA's decision in *Matter of Briones* and finding that section 212(a)(9)(C) of the Act does not apply to section 245(i) adjustments. See *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011).

As the record establishes that the applicant entered the United States without inspection in 2008 after having accrued more than a year of unlawful presence, he is inadmissible 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)(ii) of the Act, an applicant must remain outside the United States for at least ten years following his or her last departure. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The applicant in the present matter has not resided outside the United States for the required ten years. Accordingly, he is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(ii) of the Act.

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

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.