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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**

[REDACTED]

H6

DATE: **SEP 21 2011**

OFFICE: LOS ANGELES

FILE: [REDACTED]

IN RE: [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,

Michael Shumway

for Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and the subsequent appeal was dismissed by the Administrative Appeals Office (AAO). It is now again before the Administrative Appeals Office (AAO) on a motion to reconsider. The motion will be denied.

The record indicates the applicant is a native and citizen of Mexico who entered the United States without inspection in May 1995, and voluntarily departed in November 1998. The applicant again re-entered the United States without inspection in May 1999, and returned to Mexico in December 2001. The applicant re-entered the United States a third time without inspection in June 2002, and has remained in the United States. Consequently, he 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 pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for having been unlawfully present in the United States for more than one year and subsequently re-entering the United States without being admitted. The applicant seeks a waiver of inadmissibility in order to reside in the United States with U.S. Citizen spouse and children.

The applicant filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, which was denied by the District Director, Santa Ana, California. The applicant appealed the decision to the AAO which dismissed the appeal on March 13, 2009. In the dismissal, the AAO concluded the applicant was inadmissible under section 212(a)(9)(C) of the Act, for which there is currently no waiver, and that the record does not support a finding of extreme hardship to the applicant's spouse, as required for a waiver of inadmissibility under section 212(a)(9)(B)(i)(II). *See Decision of AAO*, dated March 13, 2009.

On appeal, counsel for the applicant submits a brief in support of his motion, copies of Department of Health and Human Services annual poverty guidelines, and copies of two articles. In the brief dated March 25, 2009, counsel asserts that "the AAO inappropriately applied the law to his case and failed to give proper weight to the hardship his spouse would experience." Counsel acknowledges the AAO considered the applicant's spouse's financial hardship; however, counsel reiterates the applicant's spouse "would suffer from the loss of the majority of the household income... she would just barely be above the federal poverty guidelines for a family of three... [she] would not be able to pay the mortgage with her income and could lose her home... [f]urther, [the applicant's spouse] would also be in real danger of losing the family vehicle." Counsel contends although the AAO "noted the family's expenses in its decision... [it] failed to consider the aggregate effect on [redacted] wife, of losing over half of the family income, the home, and the car." Counsel additionally claims the applicant's spouse "could also face debilitating emotional and psychological hardship if she is relegated to single mother status... she worries about the negative effects her children will suffer if their father returns to Mexico... [c]onstantly worrying about the outcome of her husband's case, or being faced with his departure, may cause [redacted] wife to experience stress related illnesses."

In the brief, counsel's main argument appears to be that the "AAO inappropriately applied the law to his case and failed to give proper weight to the hardship his spouse would experience." However, by focusing on the alleged failure to properly weigh evidence on extreme hardship to the applicant's spouse for a waiver of inadmissibility under section 212(a)(9)(B)(i) of the Act, counsel fails to acknowledge the applicant is also inadmissible under section 212(a)(9)(C) of the Act, a permanent ground of inadmissibility for which there is no waiver, only an exception that is available once the applicant has been outside the United States for a period of ten years.

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.

....

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). In *Torres-Garcia*, the Board of Immigration Appeals emphasized a "request for a waiver of the section 212(a)(9)(C)(i)(II) ground of inadmissibility that is made less than 10 years after the alien's last departure from the United States simply cannot be granted." *Id.* at 873. 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* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and therefore, has not remained

outside the United States for 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission.¹

In its previous decision, the AAO correctly affirmed the District Director's decision regarding the applicant's inadmissibility pursuant to section 212(a)(9)(C) of the Act. However, the AAO then improperly adjudicated the waiver application to waive inadmissibility under section 212(a)(9)(B) of the Act. As the object of a waiver application is to waive inadmissibility in order to establish eligibility for adjustment of status to that of permanent resident, no purpose is served in adjudicating waiver of section 212(a)(9)(B)(i) inadmissibility where an applicant is ineligible due to a separate, non-waivable ground of inadmissibility. Although counsel has asserted that the AAO committed legal errors in evaluating extreme hardship, counsel has not disputed or demonstrated that the determination of inadmissibility under section 212(a)(9)(C) of the Act was based on an incorrect application of law or USCIS policy. 8 C.F.R. 103.5(a)(3). Because of the applicant's inadmissibility under that section, the AAO could not have sustained the applicant's appeal even had the applicant established that denial of the waiver would result in extreme hardship to a qualifying relative. Therefore, as the applicant has not met his burden of demonstrating that the AAO's decision dismissing his appeal was based ultimately on an incorrect application of law or policy, the motion must be denied.

ORDER: The motion to reconsider is denied.

¹ It is noted that should the applicant comply with the requirements of the exception to inadmissibility in section 212(a)(9)(C) of the Act by departing and remaining outside of the United States for ten years, he would also no longer be inadmissible under the ten-year bar imposed by section 212(a)(9)(B)(i) of the Act.