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

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: DEC 0 8 2012 OFFICE: HOUSTON, TX FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(9)(B)(v) and 1182(h), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)

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.

Thank you,

Michael Shumway

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude and section 212(a)(9)(B)(i)(II) of 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 most recent departure. He is the spouse of a U.S. citizen, and seeks waivers under sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h).

The Field Office Director determined that the applicant had failed to establish that the bars to his admissibility would result in extreme hardship[1] for a qualifying relative or that he merited a favorable exercise of the Attorney General's (now Secretary of Homeland Security's) discretion. *Decision of the Field Office Director,* dated October 4, 2011.

On appeal, counsel contends that the applicant has established the required hardship for a waiver. *Form I-290B, Notice of Appeal or Motion*, dated November 1, 2011.

The evidence of record includes, but is not limited to: counsel's briefs; statements from the applicant and his spouse; medical documentation relating to the applicant's spouse; country conditions information concerning Mexico; documentation of the applicant's and his spouse's financial obligations; tax records, W-2 Wage and Tax Statements and earnings statements; bank statements; statements of support for the applicant; certificates awarded to the applicant and court records relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching 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-
> >
> > > (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 . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

[1] The AAO notes that the Field Office Director's decision incorrectly states that the applicant is required to establish "extreme and unusual hardship," rather than extreme hardship, which is the statutory standard for waiver approval under sections 212(a)(9)(B)(v) and 212(h) of the Act.

> (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.

The record reflects that the applicant entered the United States in 1979 without inspection. On June 20, 2002 and January 28, 2004, the applicant was granted advance parole. Although the record does not indicate that the applicant departed the United States in 2002, it does establish that he did so in 2004 and that he was paroled back into the United States on February 4, 2004 to pursue adjustment of status. As the applicant had departed the United States in 2004, the Field Office Director concluded that he had triggered the unlawful presence provisions under the Act and that his admission was barred pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Subsequent to the Field Office Director's decision, the Board of Immigration Appeals (BIA) held in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled back into the United States. In accordance with the BIA's decision in *Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i) of the Act. Accordingly, he is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The AAO notes that at the time the Form I-601 was filed, counsel indicated that the applicant was seeking a waiver under section 212(a)(9)(B)(v) of the Act as his departure for consular processing outside the United States would trigger the unlawful presence provisions of section 212(a)(9)(B)(i)(II) of the Act. We observe, however, that neither statute nor regulation allow United States Citizenship and Immigration Services to adjudicate a waiver for a prospective unlawful presence inadmissibility. Until such time as the applicant in the present case is found inadmissible under section 212(a)(9)(B)(i) of the Act, he is not eligible for waiver consideration under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(2)(A)(i)(I) of the Act provides:

> (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.

The record reflects that on January 5, 2006, the applicant pled guilty to Driving While Intoxicated, Texas Penal Code § 49.04. He was sentenced to 180 days of confinement, fined $500 and placed on probation for 12 months. On April 22, 2010, the applicant pled guilty to Assault-Bodily Injury, Texas Penal Code § 22.01(a), with adjudication deferred. The applicant was fined $200 and placed on community supervision for one year. On June 13, 2011, the 185th District Court, Harris County, Texas found the applicant to have satisfactorily fulfilled the conditions of supervision imposed on him. Accordingly, the court terminated the applicant's community supervision and discharged him.

The Field Office Director found felony assault under Texas Penal Code § 22.01(a) to be a crime involving moral turpitude and to bar the applicant's admission to the United States under section 212(a)(2)(A)(i)(I) of the Act. The AAO will not, however, consider whether the applicant's conviction is for a crime involving moral turpitude as we find no purpose would be served by doing so.

Section 212(a)(2)(A)(ii) of the Act states:

> (ii) Exception
>
> Clause (i)(I) shall not apply to an alien who committed only one crime if –
>
> (II) the maximum penalty possible for the crime of which the alien was convicted . . . 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 . . . .

The AAO notes that while the applicant was initially charged with felony assault, his case was prosecuted pursuant to Texas Penal Code § 12.44(b) as a Class A misdemeanor, which in Texas carries a maximum sentence of one year of imprisonment. We also observe that the applicant was not sentenced to any time in jail as a result of his conviction. As a result, even if the applicant's offense were to be found a crime involving moral turpitude, it would not bar his admission to the United States as it falls within the petty offense exception of section 212(a)(ii)(II) of the Act. Accordingly, the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

The record does not establish that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) or section 212(a)(9)(B)(i)(II) of the Act. The waiver application is, therefore, unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.