



**U.S. Citizenship
and Immigration
Services**

H6

DATE: **DEC 19 2012**

OFFICE: SAN SALVADOR

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)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg,
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under 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 departure from the United States, and 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that while the applicant established that extreme hardship would be imposed on a qualifying relative, the negative factors outweighed the positive and thus a favorable exercise of discretion was not warranted, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated June 3, 2011.

On appeal counsel contends that the discretionary balancing test was improperly applied and that the applicant merits a favorable exercise of discretion and the granting of a waiver. *See Form I-290B, Notice of Appeal or Motion*, received July 6, 2011.

The record contains, but is not limited to: Form I-290B, counsel's briefs in support of a waiver; various immigration applications and petitions; hardship letters; a letter from the applicant and letters of support from friends; medical records; the applicant's criminal record; and documents related to the applicant's 2002 entry without inspection, apprehension and expedited removal, and his 2008/2009 removal proceedings and voluntary departure. The entire record was reviewed and considered in rendering this decision on the appeal.

The record reflects that on November 10, 2002 the applicant entered the United States without inspection and was apprehended, falsely claimed to be a citizen of Mexico, and was expeditiously removed from the United States. The applicant entered the United States without inspection only two days later, on November 12, 2002. The applicant remained unlawfully in the United States for numerous years and was remanded to immigration custody on May 22, 2008 following the completion of a criminal jail sentence. On June 4, 2009 an immigration judge granted voluntary departure to El Salvador in lieu of removal, and the applicant voluntarily departed the United States on September 23, 2009. Counsel does not dispute on appeal these findings which are contained in the field office director's decision and supported by the record.

As the applicant was removed from the United States in November 2002, subsequently entered the United States without inspection two days later, and remained unlawfully until September 2009, the AAO finds that in addition to his other inadmissibility grounds, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who re-enters the United States without being admitted.

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 ten 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). 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* U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the record reflects that the applicant was expeditiously removed from the United States on or about November 10, 2002. The applicant subsequently entered the United States without inspection on or about November 12, 2002 and remained in the United States until departing on September 23, 2009 pursuant to an immigration judge's voluntary departure order. Thus, the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant has not been outside of the United States for a total of 10 years following his expedited removal, he is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in determining whether he qualifies for a waiver under sections 212(a)(9)(B)(v) and 212(h) of the Act.

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. The applicant in the instant case has not met that burden, in that he has not shown that a purpose would be served in adjudicating his waiver application under sections 212(a)(9)(B)(v) and 212(h) of the Act due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.