

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

[REDACTED]

H6

Date: **DEC 31 2012** Office: GUATEMALA CITY, GUATEMALA 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 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 in accordance with the instructions on 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, Guatemala City, Guatemala. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was found inadmissible 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 again seeking admission within ten years of her last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse.

The Field Office Director found that the applicant failed to establish that her qualifying relative would experience extreme hardship as a consequence of her inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director*, dated June 21, 2012.

On appeal, the applicant's attorney indicates that the qualifying spouse has Stage IV cancer with a limited life expectancy, and he would experience extreme hardship upon continued separation from the applicant.

The record includes, but is not limited to, an Application for Waiver of Grounds of Inadmissibility (Form I-601); a Notice of Appeal or Motion (Form I-290B); briefs written on behalf of the applicant; medical documentation regarding the qualifying spouse; a letter and affidavit from the qualifying spouse; relationship and identification documents for the applicant and qualifying spouse; a death certificate for the qualifying spouse's first wife; a substance abuse evaluation regarding the qualifying spouse and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering a decision on the appeal.

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's husband was the only qualifying relative in this case. However, publicly available records indicate that the applicant's husband passed away on Wednesday, October 24, 2012.

The record indicates that the applicant entered the United States without inspection on or about October 2008 and remained in the United States until October 21, 2011. The applicant accrued unlawful presence between October 2008 and October 21, 2011. In applying for an immigrant visa, the applicant is seeking admission within ten years of her departure from the United States. Therefore, as a result of the applicant's unlawful presence, she is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant has not disputed her inadmissibility.

As noted above, the applicant's U.S. citizen husband died on October 24, 2012. The applicant has not asserted or shown that she presently has a U.S. citizen or lawful permanent resident spouse or parent.

Section 204(l) of the Act, which became effective on October 28, 2009, provides relief to some applicants who lose their family members. It states as follows:

1) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);

- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 101(a)(15)(U)(ii); or
- (F) an asylee (as described in section 208(b)(3)).

However, the applicant does not qualify for relief under section 204(l) of the Act, as the record indicates that she was not residing in the United States when her spouse died and she is not currently residing in the United States. Consequently, the applicant is not eligible to obtain a waiver based on extreme hardship to her qualifying spouse, the petitioner of the Form I-130 filed on behalf of the applicant, who is now deceased.

In *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), the Board of Immigration Appeals found that, to be eligible for a waiver of removal under section 237(a)(1)(H)(i) of the Act, an applicant must establish a qualifying relationship to a "living relative." Section 237(a)(1)(H)(i)(I) of the Act uses language to describe a required relationship to a U.S. citizen or lawful permanent resident that is nearly identical to the language used to describe a qualifying relationship in section 212(a)(9)(B)(v) of the Act. Thus, the reasoning in *Matter of Federiso* supports that the applicant must show that she has a qualifying relationship to a living relative. As the applicant's husband is deceased and she presently has no other spouse or parent who is a U.S. citizen or permanent resident, she has not shown that she is eligible for consideration for a waiver under section 212(a)(9)(B)(v) of the Act.

Based on the foregoing, the applicant has not shown that she has a qualifying relative, or that the present waiver application should be adjudicated on a *nunc pro tunc* basis. In proceedings for a 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.