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



H6

[REDACTED]

DATE: JUL 05 2012 Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: [REDACTED]

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:

[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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Austria 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 readmission within ten years of her departure. 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 a decision dated November 24, 2009, the director concluded the applicant failed to establish that her husband would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that the cumulative evidence establishes the applicant's husband will experience extreme emotional and financial hardship if the applicant is denied admission into the United States. In support of these assertions, counsel submits financial documents; medical records; a psychological evaluation of the applicant's husband; family photographs; academic information; and letters from the applicant, her husband and family members.

Counsel also submits a copy of an AAO decision, asserting that it has precedential value and that the director erroneously ignored it. The AAO notes, however, that only AAO decisions that are published and designated as precedents in accordance with the requirements discussed in 8 C.F.R. § 103.3(c) are binding on Service officers. The decision submitted by counsel is unpublished and was not designated as a precedent decision. The findings made in the other AAO decision, therefore, have no binding precedential value for purposes of the applicant's case.

Counsel also requests oral argument before the AAO, stating that the complexity of the issues cannot be adequately addressed in the instant appeal. Under 8 C.F.R. § 103.3(b), counsel must explain in writing why oral argument is necessary. The Service has sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, counsel failed to establish that the issues on appeal cannot be addressed on written appeal. The request will therefore be denied.

The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides in pertinent part:

- (i) 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.

Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure from the United States, remains in force until the alien has been absent from the United States for ten years. In the present matter, the record reflects the applicant was admitted into the United States on December 6, 1997, pursuant to the visa waiver program. Her admission was valid for 90 days. The applicant departed the United States over a year later, in May 1999. She attempted to gain admission into the United States through the visa waiver program on September 30, 1999; she was refused admission, however, based on her previous overstay. A B1/B2 nonimmigrant visa application was denied in Vienna, Austria on October 4, 1999, based on the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The record reflects the applicant subsequently entered the United States on October 24, 1999, and she has remained in the country since that time. Because the applicant was unlawfully present in the United States for more than one year between March 1998 and May 1999, and she has not been absent from the country for ten years from the date of her last departure, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of a section 212(a)(9)(B)(i) ground of inadmissibility where an applicant establishes the refusal of his or her admission would result in extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The AAO notes, however, that although not discussed in the director's decision, a review of the record reflects the applicant is also inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(II).

The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(9) of the Act provides 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 applicant was unlawfully present in the United States for more than one year from March 1998 until May 1999, when she departed the country. The applicant attempted to gain admission into the United States on September 30, 1999, but she was refused admission based on her previous overstay. Her application for a nonimmigrant visa application was refused on October 4, 1999. The applicant subsequently entered the United States on October 24, 1999, and she has remained in the country since that time.

The AAO notes that the burden of proof in these proceedings is on the applicant to establish that she is not inadmissible under the Act. *See* section 291 of the Act, 8 U.S.C. § 1361. In the present matter the applicant submitted no evidence establishing that she was lawfully admitted into the United States on October 24, 2009, and no United States Citizenship and Immigration Services (USCIS) records show she was lawfully admitted on that date. Because the applicant reentered the United States without being admitted after a previous immigration violation, the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. No waiver is available for this ground of inadmissibility. The applicant must instead obtain permission to reapply for admission into the United States pursuant to section 212(a)(9)(C)(ii) of the Act.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for permission to reapply for admission unless the alien has been outside the United States for more than ten years since the date of his or her last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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 currently resides in the United States and therefore has not remained outside the United States for ten years since her last departure. Because the applicant has not remained outside of the United States for ten years

since her last departure, she is currently statutorily ineligible to apply for permission to reapply for admission. Accordingly, no purpose would be served in adjudicating her Form I-601 waiver application. The appeal shall therefore be dismissed.

ORDER: The appeal is dismissed.