

Administrative Appeals Office
U.S. Citizenship and Immigration Services
Washington, DC 20529-2090
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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: JUN 15 2012 Office: GUATEMALA CITY, GUATEMALA

[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 (the Act), 8 U.S.C. section 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 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 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 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. He was found to be inadmissible to the United States pursuant to 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 one year or more and seeking admission within ten years of his last departure; pursuant to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend his removal proceeding; and pursuant to section 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having entered the United States without inspection after having been ordered removed. It was also noted that the applicant was inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien who having departed the United States while an order of removal was outstanding is applying for admission within ten years of his last departure. The applicant is married to a Lawful Permanent Resident (LPR) and seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director concluded that, although the applicant had established eligibility for a waiver of his unlawful presence under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), his admission to the United States remained barred under sections 212(a)(6)(B) and 212(a)(9)(C)(i)(II) of the Act. The Field Office Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated December 1, 2009.

On appeal, the applicant's spouse states that without the applicant's U.S. income and employment benefits, she cannot obtain care for her medical conditions and asks that United States Citizenship and Immigration Services (USCIS) grant the applicant's waiver. *Form I-290B*, dated December 20, 2009.

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

(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.

....

The record indicates that the applicant last entered the United States without inspection in March 1999, and remained until he departed voluntarily on December 17, 2007. Therefore, the applicant

accrued unlawful presence from the date he entered the United States without inspection in March 1999 until his December 17, 2007 departure. As the applicant accrued unlawful presence in excess of one year and is now seeking admission within ten years of his 2007 departure, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.¹ The applicant does not contest this finding on appeal.

Section 212(a)(6)(B) of the Act states:

Failure to attend removal proceeding. Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

The record indicates that the applicant was ordered removed in absentia on April 23, 1996. While the Field Office Director found that the applicant's failure to appear for his removal hearing barred his admission under section 212(a)(6)(B) of the Act, the AAO notes that the provisions of section 212(a)(6)(B) of the Act do not apply to aliens placed in deportation or exclusion proceedings prior to April 1, 1997. *See* Chapter 40.6.1(b)(2)(i) of the Adjudicator's Field Manual. As proceedings against the applicant were initiated prior to April 1, 1997, his failure to appear at his 1996 removal hearing does not bar his admission to the United States under section 212(a)(6)(B) of the Act.

Section 212(a)(9)(C) 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.

¹ An immigration judge ordered the applicant removed from the United States on April 23, 1996. In December 1996, the applicant departed the United States. In March 1999, he returned to the United States and did not depart until December 17, 2007. Based on this history, the applicant appears to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(II) of the Act as an alien who departed the United States while an order of removal was outstanding and who has not remained outside the United States for a period of ten years prior to seeking admission. To obtain an exception from his inadmissibility under section 212(a)(9)(A)(iii) of the Act, the applicant must file an Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212).

(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 Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The record reflects that the applicant was ordered removed from the United States on April 23, 1996 and that after voluntarily departing in December 1996, he returned to the United States in March 1999, entering without inspection. As the applicant entered the United States without being admitted after having been ordered removed, he is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

The AAO notes that an alien who is inadmissible under section 212(a)(9)(C) of the Act is not eligible to apply for consent to reapply 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). 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's last departure from the United States occurred in December 2007. As the applicant has not resided outside the United States for ten years, he is currently statutorily ineligible to apply for permission to reapply for admission. Accordingly, the AAO finds

no purpose would be served in considering his waiver application under section 212(a)(9)(B)(v) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests 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.