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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**



**PUBLIC COPY**

H6

DATE: **MAR 26 2012**

Office: SAN JOSE

FILE: [REDACTED]

IN RE: Applicant: [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:

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 must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*for*  
Perry Rhew  
Chief, Administrative Appeals Office

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

The record indicates that the applicant is a native and citizen of Mexico who procured entry to the United States without being admitted in April 1996. On or about December 1999, the applicant departed the United States and subsequently attempted to re-enter the United States in February 2000 but was apprehended and returned to Mexico. Shortly thereafter, she re-entered the United States without being admitted. The field office director determined that the applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and National 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen children.

The field office director determined that the applicant had failed to establish extreme hardship to her spouse and thus, denied the Form I-601, Application for Waiver of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director, dated July 30, 2009.*

In support of the appeal, counsel for the applicant submits the following: the Form I-290B, Notice of Appeal (Form I-290B); an attorney statement; and medical documentation pertaining to the applicant. The entire record was reviewed and considered in rendering this decision.

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.

....

(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...

(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 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.

To begin, on appeal counsel makes numerous references to the applicant's application for a Form I-212 waiver, and the Service's decision denying the Form I-212. The AAO notes that the record

fails to establish a Form I-212 filing on behalf of the applicant. The only appeal in the record for the applicant is in relation to the Form I-601 application submitted by the applicant in March 2009. The AAO notes that counsel signed the Form I-601 and thus was aware of such a filing, and moreover, counsel filed the Form I-290B and referenced that the appeal was related to the Form I-601. *See Form I-290B*, dated August 31, 2009. In addition, counsel makes numerous references to the applicant having been removed from the United States in 2000. Nothing in the record indicates that the applicant was ever removed from the United States and the field office director in her decision made no such determination.

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. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). Section 212(a)(9)(B)(v) does not provide for a waiver based on extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant or her husband, an applicant for permanent residence, a permissible consideration under the statute. In the instant appeal, the applicant has not established that a qualifying relative for purposes of a Form I-601 waiver under section 212(a)(9)(B)(v) of the Act exists, namely, a U.S. citizen or lawful permanent resident spouse or parent. The applicant is thus statutorily ineligible for a waiver.

The AAO notes that even if a qualifying relative did exist for purposes of a Form I-601 waiver, no purpose would be served in adjudicating the applicant's waiver at this time. Based on the applicant's accrual of unlawful presence for a period of more than one year commencing April 1, 1997, the effective date of the unlawful presence provisions under the Act, and her departure from the United States in December 1999 and subsequent reentry without inspection, the AAO finds that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I).

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). 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 into the United States. In the present matter, the applicant is currently residing in the United States and did not remain outside the United States for ten years since her last departure in 1999. She is currently statutorily ineligible to apply for permission to reapply for admission. As such, assuming *arguendo* that a qualifying relative did exist for purposes of a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act, no purpose would be served in adjudicating her waiver at this time.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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. The waiver application is denied.