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 NOV 23 2012 Office: MEXICO CITY 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:

[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 District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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. The applicant, therefore, 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) to reside in the United States with his U.S. citizen spouse. The applicant was also found inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having been ordered removed under section 235(b)(1) of the Act and having re-entered the United States without being admitted.

The Director concluded that the applicant did not qualify for the exception under section 212(a)(9)(C)(ii) of the Act, because the applicant's last departure from the United States was less than ten years ago and therefore he could not apply for a waiver under section 212(a)(9)(C)(iii). The Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated May 28, 2010.

On appeal, counsel contends that the applicant's identity was confused with another person based on mismatched fingerprints. Counsel also asserts that the waiver should be considered under section 212(a)(9)(B) of the Act, because the waiver concerns his unlawful presence and not the applicant's removal under section 212(a)(9)(C)(i)(II) of the Act, even if the applicant is barred under section 212(a)(9)(C)(i)(II) of the Act. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), received June 28, 2010.

The record reflects that the applicant attempted to enter the United States on February 18, 2000 through [redacted] by hiding in the trunk of a vehicle. The applicant was expeditiously removed on February 18, 2000 and barred from re-entering the United States for five years. The applicant re-entered the United States on an unknown date in February 2000 without being inspected and remained until May 2009. The record thus supports the inadmissibility findings under sections 212(a)(9)(B)(i)(II) and (C)(i)(II) of the Act. Although counsel contests the inadmissibilities based on mismatched fingerprints, he provides no evidence and nothing in the record supports this assertion. The AAO concurs that the applicant is inadmissible under sections 212(a)(9)(B)(i)(II) and (C)(i)(II) of the Act.

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); *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 is inadmissible under section 212(a)(9)(C) of the Act due to the fact that he was removed from the United States on February 18, 2000, for a period of 5 years and he re-entered the United States without inspection a few days later. The applicant departed the United States in May 2009. As the applicant has not been outside of the United States for a total of ten years, he is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(a)(9)(B)(v) 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.