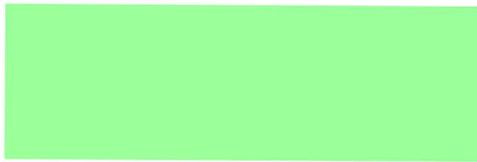




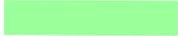
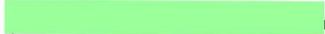
U.S. Citizenship
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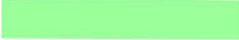
(b)(6)



DATE: **APR 08 2013**

OFFICE: VIENNA, AUSTRIA

FILE: 


IN RE: 

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 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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Field Office Director, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Field Office Director for further action.

The applicant is a native and citizen of the Czech Republic who was found to be inadmissible 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, and seeking readmission within 10 years of his removal. He 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).

The applicant was also found to be inadmissible pursuant to section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having been ordered removed, and seeking admission within 20 years of his second removal. In addition, he was found to be inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(II), for entering the United States without admission after having been ordered removed.

The field office director determined in a decision dated January 13, 2012 that due to his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, the applicant was ineligible for a waiver. The Form I-601 was denied accordingly.¹

On appeal, counsel does not contest the applicant's inadmissibility under sections 212(a)(9)(A)(ii)(II) and 212(a)(9)(B)(i)(II) of the Act. Counsel asserts, however, that the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act, because he was inspected and admitted into the United States on July 25, 2002. The applicant is therefore eligible to apply for a waiver. Counsel asserts further that evidence in the record establishes the applicant's U.S. citizen wife would experience extreme emotional and physical hardship if the applicant's waiver application were denied. In support of the assertions counsel submits affidavits from the applicant's wife, letters from friends and family, medical evidence, financial documentation, and photographs.

The record also includes employment information, a mental health evaluation for the applicant's wife, airline travel itineraries and a list of the applicant's wife's family members in the United States.

In addition to the above assertions, counsel contends that the applicant's July 2002 entry into the United States was not illegal under section 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5), and that the applicant's removal order was improperly reinstated on November 4, 2008. The AAO has no appellate jurisdiction over this issue. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested

¹ The applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Vienna, Austria on January 13, 2012 in the same decision.

in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d. Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(C) 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) [C]lause (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.

Under section 101(a)(13)(A) of the Act, 8 U.S.C. 1101(a)(13)(A), the terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

The Board of Immigration Appeals (Board) has held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may not be granted consent 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). If the alien has not remained outside of the United States for ten years, the alien is statutorily ineligible to apply for consent to reapply for admission, and no purpose would be served in adjudicating the alien's Form I-212 or Form I-601 waiver appeal.

In the present matter the record reflects the applicant was admitted into the United States on February 23, 1998, with a B1/B2 visitor visa valid for six months. The applicant did not depart the United States, and he was ordered removed *in absentia* on January 11, 2000. He remained in

the country until 2002. On July 5, 2002, the applicant reentered the United States. His order of removal was subsequently reinstated on November 4, 2008, and the applicant departed the country on April 20, 2009.

The record contains a copy of the applicant's passport with a U.S. admission stamp dated July 5, 2002. Information contained on a Form I-213, Record of Deportable/Inadmissible Alien dated September 3, 2008 reflects further that the applicant "was inspected by an Immigration Officer on 07/05/2002" and that the applicant "entered the United States at or near Orlando, Florida, on or about July 5, 2002, and was authorized to remain in the United States for a temporary period not to exceed January 4, 2003."

Because the evidence demonstrates that the applicant was admitted into the United States on July 5, 2002, the applicant does not fall within the inadmissibility provisions described in section 212(a)(9)(C)(i) of the Act. Moreover, because the applicant is not inadmissible under section 212(a)(9)(C)(i) of the Act, he may file Form I-212 without first remaining outside of the United States for 20 years.² Similarly, approval of his Form I-601 waiver application is not mandatorily barred under section 212(a)(9)(C)(i) of the Act.

The record reflects however, that the applicant may also be inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B).

Section 212(a)(6)(B) of the Act provides in pertinent part that:

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.

In the present case, the record reflects that the applicant failed to attend his removal hearing, and that he was ordered removed *in absentia* on January 11, 2000. The applicant departed the United States in 2002 while his removal order was outstanding, he was subsequently readmitted into the United States on July 5, 2002, his order of removal was reinstated on November 4, 2008, and the applicant departed the country again on April 20, 2009.

² Under section 212(a)(9)(A)(ii)(II) of the Act, an alien who:

[D]eparted the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal . . .) is inadmissible.

An alien must obtain permission to reapply for admission if seeking admission into the United States before the statutory inadmissibility period ends. See section 212(a)(9)(A)(iii) of the Act.

Because the applicant failed to attend his removal hearing on January 11, 2000 and he seeks admission into the country within five years of his subsequent removal, the applicant may be inadmissible under section 212(a)(6)(B) of the Act.

There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act. However, as noted in the statute, an alien is not inadmissible under section 212(a)(6)(B) of the Act if the alien can establish that there was reasonable cause for failure to attend her removal proceeding. There is no indication in the record that the applicant's inadmissibility under section 212(a)(6)(B), or possible reasonable cause for failure to appear, has been examined.

As there is no waiver of this ground of inadmissibility, the AAO lacks jurisdiction to review the issue of reasonable cause. The matter is, therefore, remanded to the Field Office Director, Vienna, Austria for a determination on the applicant's inadmissibility under section 212(a)(6)(B) of the Act. If the applicant is found to be inadmissible under section 212(a)(6)(B) of the Act, a new decision on the waiver application shall be rendered denying the waiver application, as no purpose would be served in granting a waiver to an applicant who has other grounds of inadmissibility that cannot be waived.³ If the waiver application is denied for this reason no further action will be required of the AAO. If, however, the applicant is not found to be inadmissible under section 212(a)(6)(B) of the Act, the matter shall be returned to the AAO in order to adjudicate the present appeal.

ORDER: The appeal is remanded as discussed above.

³ A similar rationale would apply to the applicant's Form I-212 application.