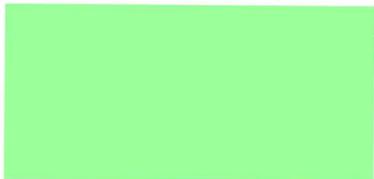


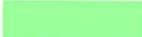
(b)(6)

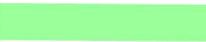
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

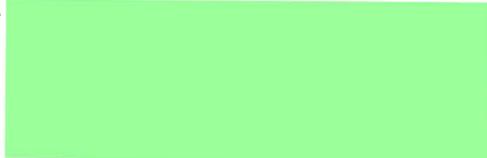


DATE: **APR 12 2013** OFFICE: VERMONT SERVICE CENTER FILE: A 

IN RE: APPLICANT: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)

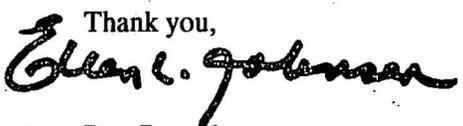
ON BEHALF OF APPLICANT:



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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Center Director, Vermont Service Center. Upon denying the benefit request, the Center Director erroneously failed to notify the applicant of his right to appeal, contrary to 8 C.F.R. §103.3(a)(1)(iii). The applicant ultimately filed an untimely appeal that is now before the Administrative Appeals Office (AAO) for review. An appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(I). However, as a matter of administrative discretion, the AAO will consider the merits of the appeal on certification.¹ The appeal, however, will be dismissed.

The applicant is a native and citizen of Haiti 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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse and children.

The Center Director concluded that the applicant failed to demonstrate the existence of extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Center Director* dated June 15, 2011.

On appeal, counsel contends the applicant does not have legal status in Canada with which to facilitate his spouse's immigration to that country. Counsel additionally claims that the applicant's spouse, a native of the United States, would experience extreme hardship in Haiti due to the adverse country conditions and separation from family in the United States. Counsel moreover asserts that the spouse would experience emotional, financial, and family-related difficulties upon separation from the applicant.

The record includes, but is not limited to, statements from the applicant and his spouse, a letter from a pastor, medical and financial documents, documentation of immigration proceedings in the United States and Canada, articles on country conditions in Haiti, evidence of birth, marriage, residence, and citizenship, other applications and petitions, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) ALIENS UNLAWFULLY PRESENT.-

¹ Like any USCIS office, the AAO may avail itself of the certification process. *See* 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations . . ." *Matter of Jean*, 23 I&N Dec. 373, 380 n 9 (AG 2002). The present case, involving the director's violation of procedural regulations, warrants such review. The AAO is suspending the 30-day briefing period and will instead consider the petitioner's appellate brief. *See* 8 C.F.R. § 103.4(a)(3).

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

....

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

....

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States without inspection on May 5, 2000, and filed a Form I-589, Application for Asylum and Withholding of Removal, on June 13, 2000. The applicant was referred to an immigration judge, who ordered him removed on December 7, 2001. The Board of Immigration Appeals issued a final order of removal on September 26, 2003, and the applicant left the United States in October 2007. The applicant therefore accrued unlawful presence from May 5, 2000 until June 12, 2000, and from September 26, 2003 until his departure in October 2007. The AAO therefore affirms that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

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

....

(C) Aliens unlawfully present after previous immigration violations.-

(b)(6)

(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 record further reflects that, after his final order of removal, and after departing the United States after the accrual of more than one year of unlawful presence, the applicant subsequently reentered the United States without inspection on April 8, 2013 through the Canadian border. The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) and (II) of the Act.

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 10 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 currently present in the United States and therefore, has not remained outside the United States for 10 years since his last departure. 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.

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