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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

DATE: DEC 0 3 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center, 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 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 one year or more and seeking readmission within 10 years of his last departure from the United States, and pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for accruing more than one year of unlawful presence and entering the United States without being admitted. The applicant's spouse is a U.S. citizen and his father is a lawful permanent resident. The applicant 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), in order to reside in the United States. The applicant does not contest his inadmissibility on appeal.

The Director found that the applicant would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act even if the Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601), was granted, and therefore he denied the Form I-601 as a matter of discretion. *Decision of Director,* dated May 21, 2013.

On appeal, counsel asserts that the applicant's spouse and father would experience extreme hardship if the applicant is refused admission to the United States. Counsel also states that section 212(a)(9)(C)(ii) of the Act includes a waiver of inadmissibility for section 212(a)(9)(C)(i) of the Act, and 8 C.F.R. § 212.2 supports granting the applicant permission to seek admission before the end of his ten-year inadmissibility period. *Form I-290B, Notice of Appeal or Motion and Brief in Support of Appeal,* dated June 19, 2013.

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

> (B) Aliens Unlawfully Present.-
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> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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 [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…

The record reflects that applicant entered the United States without inspection in August 2002 and he departed the United States in 2006. The applicant subsequently reentered the United States without inspection in 2007 and departed the United States in December 2011. The applicant accrued unlawful presence during these two periods of time in the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his December 2011 departure from the United States.

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

> (C) Aliens unlawfully present after previous immigration violations.-
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> (i) In general.-Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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 reflects that the applicant accrued unlawful presence from the time he became 18 years old, on July 13, 2003, until he departed the United States in 2006, and that he subsequently entered the United States without inspection in 2007. Therefore, the applicant also is inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having been unlawfully present in the United States for an aggregate period of more than one year and reentering the United States without being admitted.

Counsel asserts that 8 C.F.R. § 212.2 permits aliens inadmissible under section 212(a)(9)(C)(i)(I) of the Act to seek admission into the United States before their ten-year period of inadmissibility ends. In *Matter of Torres-Garcia,* 23 I&N Dec. 866, 875 (BIA 2006), however, the Board of Immigration Appeals concluded that this regulation, "which implements statutory provisions that were repealed by the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996], cannot reasonably be construed as implementing the provision for consent to reapply for admission under section 212(a)(9)(C)(ii)" and would require interpreting the regulation "in a manner inconsistent with the plain language 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; *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. The record establishes that the applicant returned to Mexico in December 2011. He is thus 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.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether he has established extreme hardship to a qualifying relative or whether he merits a waiver as a matter of discretion. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.