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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 1 4 2013 OFFICE: GUATEMALA CITY

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 with the field office or service center that originally decided your case by filing a 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,

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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. He is the spouse of a U.S. citizen and seeks a waiver under 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 Field Office Director determined that the applicant had failed to establish that the bar to his admissibility would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. She also concluded that the applicant did not merit a favorable exercise of discretion. *Decision of the Field Office Director,* dated August 12, 2011.

On appeal, prior counsel asserts that United States Citizenship and Immigration Services (USCIS) erred in concluding that the applicant's inadmissibility would not result in extreme hardship for his spouse and in denying the waiver application as a matter of discretion. *Notice of Appeal or Motion*, dated September 10, 2011. He submits additional evidence in support of the waiver application.

The evidence of record includes, but is not limited to: counsel's briefs; statements from the applicant and his spouse; medical documentation relating to the applicant's spouse and mother-in-law; a medical leave approval notice issued to the applicant's spouse; a psychological evaluation of the applicant's spouse; documentation of the applicant's spouse's financial obligations; certificates relating to the applicant's spouse's academic achievements and service to her community; country conditions information on Mexico and Guatemala; a 2009 tax return; earnings statements for the applicant's spouse; and documentation relating to the applicant's arrests and convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > (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.

Section 212(a)(9)(C) of the Act provides:

> (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
>
> . . . .
>
> 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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The record reflects that the applicant entered the United States without inspection in October 1991 and that he did not depart until September 2010. Based on this history, the applicant accrued unlawful presence as of April 1, 1997, the effective date of the unlawful presence provisions under the Act, until his 2010 departure, a period of more than 13 years. On January 6, 2013, the applicant was apprehended by a U.S. Border Patrol Agent near Eagle Pass, Texas after entering the United States without inspection. He pled guilty to Illegal Entry, 8 U.S.C. § 1325, on January 9, 2013.

As the applicant accrued more than one year of unlawful presence in the United States and is seeking admission within ten years of his departure, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.[1] Further, by reentering the United States without admission following the accrual of more than one year of unlawful presence, the applicant triggered the bar in section 212(a)(9)(C)(i) (I) of the Act.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for permission to reapply 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); *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

[1] The record also reflects that on August 14, 1995, the applicant was convicted of Selling Ticket to Improper Person, California Penal Code (CPC) § 383; on November 25, 2003, of Willful Trespass, CPC § 602(j); and on January 9, 2013 of Illegal Entry, 8 U.S.C. § 1325. As we dismiss the appeal on another ground, we have not considered whether any of these offenses would constitute a crime involving moral turpitude and, therefore, bar the applicant's admission to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

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* United States Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. Here the record establishes that the applicant has not remained outside the United States for the required ten years. He is, therefore, ineligible for permission to reapply under section 212(a)(9)(C)(i) of the Act.

As the applicant is not eligible to apply for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act, the applicant would remain inadmissible despite any decision regarding waiver of his other grounds of inadmissibility. We find, therefore, that no purpose would be served by considering the Form I-601 at this time. Accordingly, the appeal will be dismissed as a matter of discretion.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.