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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: **MAY 07 2013**

Office: TEGUCIGALPA, HONDURAS

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tegucigalpa, Honduras, and appealed to the Administrative Appeals Office (AAO). The appeal was sustained and the waiver application was approved. The AAO will sua sponte reopen the matter. The previous decision of the AAO is withdrawn. The appeal will be dismissed. The waiver application is denied.

The record reflects that the applicant is a native and citizen of Honduras who entered the United States without inspection in January 1993, was granted temporary protected status on June 29, 2000 and returned to Honduras on October 26, 2007. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until June 29, 2000, the date he was granted temporary protected status. The applicant was thus 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. The applicant sought a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated April 29, 2008.

On appeal, the AAO concurred with the field office director that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence, but found that extreme hardship to a qualifying relative existed and moreover, concluded that although the immigration violations committed by the applicant were serious in nature and could not be condoned, the applicant had established that the favorable factors in his application outweighed the unfavorable factors and therefore, a favorable exercise of the Secretary's discretion was warranted. The appeal was sustained and the waiver application was approved. *Decision of the AAO*, dated November 29, 2010.

It has now come to the attention of the AAO that between the time the appeal was submitted by counsel in May 2008 and when the AAO issued its decision to sustain the appeal and approve the waiver application in November 2010, the applicant procured entry to the United States without being admitted. *Record of Deportable/Inadmissible Alien*, dated July 19, 2010.

As noted by the applicant in the Record of Sworn Statement in Proceedings, in pertinent part:

- Q: When, where and at what time did you last enter the United States?
A: On [REDACTED] at 7:00 p.m. up river near Laredo, Texas.
Q: How did you last enter the United States?
A: On a boat across the Rio Grande River illegally.
Q: Were you inspected by an immigration officer at a port of entry?
A: No.

- Q: When was the last time you entered the United States before this.
A: I think it was back in 1993.
Q: What happened that time?
A: I came across and made it to Houston, Texas were (sic) I stayed until I returned to Honduras on my own.

Record of Sworn Statement in Proceedings, dated July 19, 2010. The record indicates that the applicant is currently in removal proceedings. The applicant's next hearing date is scheduled for January 2015.

Based on the applicant's re-entry without being admitted in July 2010, the AAO finds that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I). The AAO's additional finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act in the instant case is based on the applicant's entry into the United States without being admitted in July 2010 after having accrued unlawful presence under section 212(a)(9)(B)(i)(II) of the Act by residing in the United States without authorization for more than one year, as discussed above.

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

Aliens Unlawfully Present.-

(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.

....

(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 Attorney General (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....

(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). 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 record fails to establish that the applicant has departed the United States since his re-entry in July 2010. As the applicant is currently residing in the United States and did not remain outside the United States for 10 years after 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 application for waiver of grounds of inadmissibility, 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. The waiver application is denied.