(b)(6)

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 1 5 2013 Office: LAS VEGAS 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 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,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Las Vegas, Nevada, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application remains denied.

The record establishes that the applicant is a native and citizen of Mexico who entered the United States without being admitted in 1992. In January 2001, the applicant was voluntarily returned to Mexico. On April 3, 2001, the applicant re-entered the United States without being admitted and has remained in the United States to date. The applicant was found to be inadmissible to the United States 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. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children.

The field office director, in a separate decision denying the applicant's Form I-485, noted that as the applicant had accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until he was removed in January 2001, he was therefore inadmissible under section 212(a)(9)(C) as a result of his subsequent re-entry to the United States in April 2001, and was not eligible to receive consent to reapply for admission for at least 10 years after his last departure. The Form I-485 was denied accordingly. *See Decision of the Field Office Director to Deny the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485),* dated July 27, 2009. As a consequence of the Form I-485 denial, the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied as well. *See Decision of the Field Office Director to Deny the Applicant's Form I-601,* dated July 27, 2009.

On appeal, the AAO noted that the record did not establish that the applicant was in fact removed in January 2001 and thus, the applicant was not inadmissible under section 212(a)(9)(C)(i)(II) of the Act, for having entered the United States without being admitted after having been removed from the United States. Nevertheless, the AAO concurred with the field office director that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I), based on his re-entry to the United States without being admitted after having accrued unlawful presence for a period of more than one year. The AAO concluded that as the applicant is currently residing in the United States and has not remained outside the United States for 10 years after his last departure, he is statutorily ineligible to apply for permission to reapply for admission and as such, no purpose would be served in adjudicating his waiver under section 212(a)(9)(B)(v) of the Act. *See Decision of the AAO,* dated August 27, 2012.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), states in pertinent part:

> (B) 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.

On motion, counsel first states that the AAO incorrectly applied section 212(a)(9)(C)(i)(II) bar to the applicant becaue he was never previously deported, exluded or removed. *See Brief in Support of Motion,* dated September 25, 2012. On appeal, the AAO noted that the applicant was not subject to 212(a)(9)(C)(i)(II) because the record failed to establish that the applicant was removed in January 2001. *Supra* at 3.

Counsel further asserts that the applicant's departure from the United States was brief, casual and innocent and thus, his unlawful re-entry and pre-existing unlawful presence pursuant to INA 212(a)(9)(B)(i)(II) of the act is not triggered. *Id.* at 3. The AAO notes that the court decision cited by counsel in support of this contention holds that being stopped at the U.S. border and returned to Mexico after a brief departure from the United States did not interrupt the accrual of continuous physical presence for the purpose of applying for cancellation of removal under section 240A(b) of the Act, 8 U.SC. § 1229b(b).[1] This decision does not address inadmissibility for unlawful presence under section 212(a)(9)(B)(i) of the Act, which provides that inadmissibility is triggered by an alien's departure from the United States. The record clearly establishes that the applicant departed the United States in January 2001 and months later, re-entered the United States without being admitted. Thus, the applicant's departure in January 2001 clearly triggered inadmissibility for unlawful presence pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant's re-entry in April 2001 without being admitted triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

As previously noted by the AAO, 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 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.

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 his U.S. citizen spouse or whether he merits a waiver as a matter of discretion. 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 motion will be granted and the underlying application remains denied.

ORDER: The motion to reopen will be granted and the underlying application remains denied.

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[1] "We conclude that, for purposes of determining eligibility for cancellation of removal, Tapia's physical presence was not interrupted by the fact that he was initially stopped and turned around at the border when he attempted to reenter the country." *Tapia v. Gonzales,* 430 F.3rd 997 (9th Cir. 2005).