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

(b)(6)

DATE: DEC 12 2014 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. 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 Ecuador 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 for one year or more and seeking readmission within ten years of his last departure, and pursuant to section 212(a)(1)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been determined to be a drug abuser or addict. The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The Director found that because there is no waiver for inadmissibility under section 212(a)(1)(A)(iv) of the Act, and the applicant would remain inadmissible even if a waiver for his unlawful-presence inadmissibility were granted, denial of the Form I-601, Application for Waiver of Grounds of Inadmissibility, was warranted as a matter of discretion. *Decision of the Director*, dated June 30, 2014.

On appeal, counsel asserts that the Director erred by failing to address the hardship factors in the case; the classification of the applicant as a drug abuser or addict should be re-examined; and the Director should have separately considered the waivers. *Brief in Support of Appeal*, dated July 29, 2014.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, a psychological examination of the applicant's spouse, statements from family members of the applicant's spouse, educational records and country-conditions information about Ecuador. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, 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.
> >
> > . . . .

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security (Secretary)], and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

. . . .

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

The record reflects that applicant entered the United States with a fraudulent visa in 2000;[1] he was granted voluntary departure on March 30, 2011, with an alternate order of removal; his voluntary departure period ended on July 28, 2011; and he did not depart the United States until March 8, 2012. Though his unlawful presence was tolled while his Form I-485, Application to Register Permanent Residence or Adjust Status, was pending between August 17, 2007 and October 14, 2009, the applicant accrued over one year of unlawful presence between May , the date he turned 18 years old, and March 30, 2011, the date he was granted voluntary departure. 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

[1] Whether the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting himself in order to procure admission to the United States in 2000 does not appear to have been addressed by the Director, and the record does not include sufficient evidence for us to make this determination.

years of his March 8, 2012 departure from the United States. The applicant does not contest this ground of inadmissibility on appeal.

Section 212(a)(1) states, in pertinent part:

> (A) In general.-Any alien-
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> . . .
>
> (iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

On August 23, 2013 a panel physician in , Ecuador, examined the applicant and determined that he has a Class A condition, addiction or abuse of cannabis. Therefore, we find that the applicant is inadmissible under section 212(a)(1)(A)(iv) of the Act. Counsel asserts that this ground of inadmissibility should be re-examined, citing 42 C.F.R. § 34.8(a)(2), which provides, in pertinent part:

> (a) The Director shall convene a board of medical officers to reexamine an alien:
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> (1) Upon the request of the INS for a reexamination by such a board; or
>
> (2) Upon an appeal to the INS by an alien who, having received a medical examination in connection with the determination of admissibility to the United States (including examination on arrival and adjustment of status as provided in the immigration laws and regulations) has been certified for a Class A condition.

We do not have jurisdiction to re-examine the applicant or consider an appeal described under 42 C.F.R. § 34.8(a)(2).[2] Furthermore, there is no evidence that the applicant has appealed the finding that he is a drug abuser or addict to the appropriate office and that he subsequently was re-examined and found not to be a drug abuser or addict by a board of medical officers. As such, counsel's contention does not alter the finding of inadmissibility.

The USCIS Policy Manual, Volume 9, Part C, Chapter 5, Part B states:

> Although a waiver is unavailable for medical inadmissibility due to drug abuse or addiction, an applicant may still overcome this inadmissibility if his or her drug abuse

[2] We have jurisdiction over appeals pursuant to 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Although this regulation was subsequently omitted from the Code of Federal Regulations, courts have recognized that the Department of Homeland Security continues to delegate appellate authority to the AAO consistent with that regulation. *See U.S. v. Gonzalez & Gonzalez Bonds and Insurance Agency, Inc.*, 728 F.Supp.2d 1077, 1082- 1083 (N.D. Cal. 2010); *see also Rahman v. Napolitano*, 814 F.Supp.2d 1098, 1103 (W.D. Washington 2011).

> or addiction is found to be in remission. After being found inadmissible due to drug abuse or drug addiction, an applicant may undergo a re-examination at a later date at his or her own cost. If, upon re-examination, the civil surgeon or panel physician certifies, per the applicable [Department of Health and Human Services (HHS)] regulations and [Centers for Disease Control]'s Technical Instructions, that the applicant is in remission, the applicant is no longer inadmissible as a drug abuser or addict.

Only medical examiners, such as panel physicians, civil surgeons, or other physicians designated by the Director of HHS may make determinations of inadmissibility pursuant to section 212(a)(l)(A) of the Act. *See* 42 C.F.R. § 34. Neither the Act nor regulations grant U.S. Citizenship and Immigration Services jurisdiction to overturn a finding of inadmissibility made by an authorized medical examiner under section 212(a)(l)(A) of the Act.[3]

The record does not include evidence that the applicant received a new examination in which it was determined that he was in remission.

Although the Act provides for waivers of inadmissibility under sections 212(a)(l)(A)(i), 212(a)(l)(A)(ii), and 212(a)(l)(A)(iii) of the Act, there is no waiver of inadmissibility for section 212(a)(l)(A)(iv) of the Act.

The applicant is currently inadmissible under section 212(a)(l)(A)(iv) of the Act, for which no waiver is available. If the applicant is found by a panel physician to be in sustained, full remission, he may be found to be admissible, as he would no longer have a Class "A" condition. However, as noted above, we may not make such a determination; it must be made by a panel physician based on clinical judgment. *See* 9 FAM 40.11 N11.1.

As the applicant has been found to be inadmissible under section 212(a)(1)(A)(iv) of the Act and there is no waiver for this ground of inadmissibility, we find that no purpose would be served in adjudicating his waiver of inadmissibility, which includes reviewing relevant hardship factors, under section 212(a)(9)(B)(v) of the Act.

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.

[3] According to 9 FAM 40.11 N.11(d)(2), if the last refusal on a case was more than one year ago, then the applicant must reapply for a visa, complete a new medical examination with a panel physician and pay all applicable fees. A panel physician has the discretion to use his or her clinical judgment to consider sustained, full remission of at least 12 months. *See* 9 FAM 40.11 N. 11.1