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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: DEC 19 2014 OFFICE: LAS VEGAS FILE:

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 (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 Field Office Director, Las Vegas, Nevada denied the waiver application and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO affirmed its decision upon the applicant's filing of a motion to reconsider. The matter is now before the AAO on a second motion to reconsider. The motion will be granted and the previous decision of the AAO is affirmed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible under 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 and seeking readmission within 10 years of his last departure from the United States.. 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 with his U.S. citizen spouse and children.

The Field Office Director determined that the applicant is also inadmissible to the United States under section 212(a)(9)(C)(i)(II) and not currently eligible to reapply for admission to the United States, and denied the application accordingly. *See Decision of Field Office Director,* dated July 27, 2009. On appeal, the AAO determined that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, rather than section 212(a)(9)(C)(i)(II), and dismissed the applicant's appeal on this basis. *See Decision of the AAO*, dated August 27, 2012. On motion, the AAO affirmed its previous decision, finding the applicant statutorily ineligible to reapply for admission to the United States. *See Decision of the AAO*, dated May 15, 2013.

On motion, counsel for the applicant asserts that the finding that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is incorrect, as the applicant failed to accrue the requisite amount of unlawful presence in the United States prior to his illegal reentry.

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

> (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.
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> . . . .
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> (v) Waiver.-The Attorney General 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 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 Attorney General regarding a waiver under this clause.

The record indicates that the applicant resided in the United States without authorization from 1992 until his voluntary return to Mexico in January 2001. The applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in January 2001. The applicant accrued over one year of unlawful presence in the United States, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

....

(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) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii)Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place

> outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

As noted, the record reflects that the applicant accrued over one year of unlawful presence prior to his departure from the United States in January 2001. The applicant subsequently entered the United States without admission or parole in April 2001. The applicant is, therefore, also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i) 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); *see also 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)(i) of the Act, the BIA has held that 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.

Aliens who reside within the jurisdiction of the Ninth Circuit Court of Appeals, however, may be eligible for consent to reapply for admission even if they are presently inadmissible under section 212(a)(9)(C)(i)(II) of the Act, if they meet specific requirements under the terms of *Duran-Gonzales v. DHS,* No. C06-1411(W.D. Wash., 2014) (settlement agreement).

The settlement agreement defines a class member as any person who:

1. Is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:

    a. the beneficiary was physically present in the United States on December 21, 2000, or
    b. If a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.

2. Is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act ("INA"), because he or she entered or attempted to reenter the United States without being admitted after April 1, 1997, and without permission after having previously been removed;

3. Properly filed a Form I-485 (Application to Adjust Status) and Form I-485 Supplement A (Adjustment of Status Under Section 245(i)) while residing within the jurisdiction of the Ninth Circuit on or after August 13, 2004, and on or before November 30, 2007;

4. Filed a Form I-212 (Application for Permission to Reapply for Admission Into the United States After Deportation or Removal) on or after August 13, 2004, and on or before November 30, 2007;

5. Form I-485, Form I-485 Supplement A, and Form I-212 were denied by U.S. Citizenship and Immigration Services ("USCIS") and/or the Executive Office for Immigration Review ("EOIR") on or after August 13, 2004, or have not yet been adjudicated;

6. Is not currently subject to pending removal proceedings under INA § 240, or before the United States Court of Appeals for the Ninth Circuit on a petition for review of a removal order resulting from proceedings under INA § 240; and

7. Did not enter or attempt to reenter the United States without being admitted after November 30, 2007.

Settlement Agreement and Amendment of the Class Definition at 2-3, *Duran Gonzales v. DHS,* No. C06-1411 (W.D. Wash, 2014).

In this case, the record establishes that the applicant is not eligible for relief under the settlement agreement as there is no indication that he was subject to a removal or that he is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act. Rather, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act, for illegally reentering the United States after having accrued more than one year of unlawful presence. The settlement agreement only pertains to applicants who are inadmissible under section 212(a)(9)(C)(i)(II) of the Act.[1]

Based on his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, the applicant is subject to the ten year bar in applying for permission to reapply for admission. As the record does not establish that the applicant has been outside of the United States for a total of ten years since his most recent voluntary return in January 2001, he is currently statutorily ineligible to apply for permission to reapply for admission into the United States after deportation or removal pursuant to section 212(a)(9)(C)(iii) of the Act. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Based upon this ground of inadmissibility, the applicant is currently statutorily ineligible to apply for permission to reapply for admission. As such, the applicant's Form I-601 remains denied as a matter of discretion.

[1] As the applicant is ineligible for relief under the settlement agreement based upon his inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rather than 212(a)(9)(C)(i)(II), the other requisite elements for relief under the settlement will not be discussed.

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. Accordingly, the prior AAO decision is affirmed.

ORDER: The motion is granted and the prior AAO decision dismissing the appeal is affirmed.