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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 10 2014 OFFICE: NEBRASKA SERVICE CENTER File [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects the applicant is a native and citizen of Mexico 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 in the United States for one year or more and seeking admission within 10 years of her last departure from the United States. The record reflects the applicant also was found to be inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having been ordered removed and subsequently entering the United States without being admitted. The record further reflects the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C.§ 1182(a)(6)(C)(i), for willfully misrepresenting material facts to attempt to procure admission into the United States.[1] The applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant does not contest the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. She seeks, through counsel, a waiver of inadmissibility to reside in the United States with her U.S. citizen spouse.

The Director denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) as a matter of discretion, as the approval of Form I-601 would not make her admissible. *See Decision of the Director*, dated October 14, 2013.

On appeal, counsel asserts 8 C.F.R. § 212.2(a) provides U.S. Citizenship and Immigration Services (USCIS) the authority to admit the applicant to the United States prior to the expiration of her term of inadmissibility; and the applicant was not properly advised of her *Miranda* rights, right to counsel, and right to proceedings before an immigration judge. Counsel also asserts evidentiary documentation demonstrates hardship to the applicant's spouse because of the applicant's inadmissibility. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), dated November 13, 2013; *see also Brief*, dated December 10, 2012.

The record includes, but is not limited to: a brief, correspondence, and identity documents. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6) of the Act provides, in relevant part:

> (C) Misrepresentation.-
>
> > (i) In general.- Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
> >
> > ...

[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

(iii) Waiver authorized.- For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides, in relevant part:

(1) The Attorney General [now Secretary of Homeland Security (Secretary)] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(9) of the Act provides, in relevant 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 [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.

(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.

The record reflects that upon apprehension by U.S. immigration officials at the Otay Mesa Port of Entry on July 17, 2006, the applicant provided a name and date of birth that did not belong to her, and she was ordered expeditiously removed as an intending immigrant without proper documentation pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225. The record also reflects the applicant subsequently entered the United States without inspection by immigration officials at a later date in July 2006 and remained until around September 2007, when she voluntarily returned to Mexico. The applicant accrued unlawful presence from July 2006 until September 2007, a period in excess of one year.

The record further reflects that after seeking entry into the United States at the Port of Entry in Nogales, Arizona by presenting a border crossing card that did not belong to her, the applicant was ordered expeditiously removed a second time pursuant to section 235(b)(1) of the Act on March 18, 2009, and she has remained outside the United States to date. The record reflects that the applicant was properly notified of her rights in the Spanish language in accordance with the expedited-removal provisions of the Act.

Accordingly, the applicant is inadmissible pursuant to sections 212(a)(6)(C)(i), 212(a)(9)(B)(i)(II), and 212(a)(9)(C)(i) of the Act and is statutorily ineligible to apply for permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act.

Counsel asserts that 8 CFR § 212.2(a) "contemplates an alien's return to the United States prior to the expiration of the period of inadmissibility." However, in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (2006), the Board of Immigration Appeals found that the regulation at 8 CFR § 212.2 could not be applied to inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, noting that the regulation's language, structure and history made clear that it was not promulgated to implement section 212(a)(9)(C)(ii) of the Act and, further, that "permission requested after unlawful reentry, contradicts the clear language of section 212(a)(9)(C), which in its own right makes unlawful reentry after removal a ground of inadmissibility that can only be waived after the passage of at least 10 years." *Torres-Garcia* at 875.

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 10 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); *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

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's last departure from the United States occurred on March 18, 2009, less than ten years ago. Although she currently resides in Mexico, she has not remained outside the United States for more than 10 years since her last departure. She is currently statutorily ineligible to apply for permission to reapply for admission. The appeal of the denial of the waiver application is dismissed as a matter of discretion, as its approval would not result in the applicant's admissibility to the United States.

Moreover, having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to her U.S. citizen spouse or whether she merits a waiver as a matter of discretion.

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.