

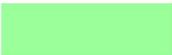


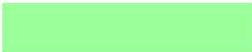
U.S. Citizenship
and Immigration
Services

(b)(6)



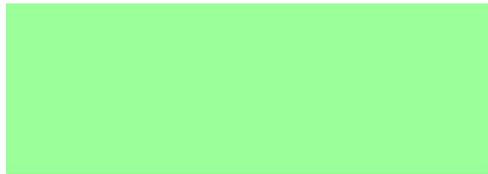
Date: **JUN 02 2014**

Office: TEXAS 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 Director, Texas Service Center, denied the waiver application, and 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 Poland who 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 accruing unlawful presence of one year or more and, as a consequence of this unlawful presence, to be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I), for subsequently re-entering the country without admission or parole. She asserts that she is not inadmissible, but alternatively seeks a waiver of inadmissibility in order to remain in the United States as a derivative beneficiary of the approved Petition for Alien Worker (Form I-140) of her husband, who became a lawful permanent resident on or about July 15, 2010.

The Service Center Director found the applicant to have accrued unlawful presence of one year or more, and concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. He further determined that, as the applicant later re-entered the country without inspection, she was ineligible to seek permission to reapply for admission. Accordingly, the Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of Service Center Director, July 9, 2013*

On appeal, counsel for the applicant contends the applicant is not inadmissible and states that, under the asylee exception of section 212(a)(9)(B)(iii)(II) of the Act, she has not accrued unlawful presence in the United States. Counsel asserts that the applicant accrued no unlawful presence due to having an asylum application pending prior to receiving a grant of voluntary departure. On April 7, 2014, the AAO received the applicant's timely response to a request for evidence (RFE) dated January 29, 2014 on this issue.

Section 212(a)(9)(B) 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 -

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the

United States under clause (i) unless the alien during such period was employed without authorization in the United States.

The record reflects that the applicant was admitted to the country on May 5, 1990 in B-2 status and filed an Application for Asylum and for Withholding of Deportation (Form I-589) on September 13, 1996. An Immigration Judge issued an order on December 8, 1998 granting the applicant voluntary departure until April 7, 1999, and the applicant left the country on April 1, 1999 pursuant to that order. After living in Poland for six months, according to the record, she re-entered the United States without inspection and has remained here since that time.

Counsel asserts that the applicant is not inadmissible under section 212(a)(9)(B)(i) of the Act because she had an asylum application pending. However, if she worked illegally while her asylum application was pending, then unlawful presence is not tolled and she accrued more than one year of unlawful presence between April 1, 1997 and December 8, 1998. The record indicates that the applicant was employed cleaning houses from 1990 to the time she filed her asylum application in October 1996. *See Form G-325, Biographical Information submitted with Form I-589.* The AAO issued an RFE requesting the applicant to supply further information regarding whether she had obtained employment authorization and had worked while her asylum application was pending. The applicant and her counsel answered that she had filed for work authorization and indicated that the application had neither been granted nor denied.¹ This response fails to address whether the applicant worked while awaiting a decision on her application for asylum.

The applicant bears the burden of showing either that she is not inadmissible or, if she is inadmissible, that she is entitled to a waiver. Without providing a substantive response to the RFE regarding her employment, the applicant cannot establish eligibility for the asylee exception under section 212(a)(9)(B)(iii) of the Act. She is thus inadmissible under section 212(a)(9)(B)(i)(II).

Section 212(a)(9)(C) of the Act provides:

(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.

¹ The record reflects that the applicant failed to appear at her asylum interview without good cause. She was thus not eligible for an employment authorization document (EAD). *See* 8 C.F.R. § 274a.12(c)(8). Pursuant to this regulation, an asylum applicant cannot file for a work permit until 150 days after USCIS receives a complete asylum application and, further, applicants failing to appear for a scheduled asylum interview are not eligible for employment authorization, unless able to demonstrate the failure to appear resulted from exceptional circumstances. *See* 8 C.F.R. § 208.7(a)(4).

(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 of Homeland Security has consented to the alien’s reapplying for admission.

Besides being inadmissible under section 212(a)(9)(B)(i)(II), the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), because she entered the country without being admitted after having accrued more than one year of unlawful presence. As she has not resided for ten years outside the country, she is statutorily ineligible to receive permission to reapply for admission.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not seek permission 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). To avoid inadmissibility under this section, 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 residing in the United States, and she must depart and remain outside the United States for ten years before she is eligible for permission to reapply.

Because the applicant is statutorily ineligible for permission to reapply for admission at this time, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.