U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: FEB 0 2 2015 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[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. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a motion. The motion will be granted and the prior decision is affirmed.

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 more than one year and again seeking admission within ten years of his last departure from the United States. The applicant's U.S. citizen spouse is his qualifying relative, and he 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 her.

The Director found that the applicant was ineligible for a waiver under section 212(a)(9)(C) of the Act, for having been ordered removed from the United States and subsequently re-entering without being admitted. He denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Decision of the Director,* dated September 9, 2013.

On appeal, we determined that the record supported the Director's finding that the applicant was ordered removed from the United States on February 14, 1996, re-entered the United States on May 1, 1999 without inspection, and was removed again in 2011. As he has not remained outside of the United States for 10 years, we found him inadmissible under section 212(a)(9)(C)(i) of the Act and dismissed the appeal. See *Decision of the AAO*, dated July 16, 2014.

On motion, the applicant, through counsel, states that he was present in the United States from April 1996 until his removal in January 2011. Moreover, the applicant asserts that our reliance on the Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as evidence of the applicant's re-entry in May 1999, without more, is improper. The applicant asks us to acknowledge that Form I-871 is a document often completed quickly by Immigration and Customs Enforcement (ICE) officers, and it is likely that ICE erred by including information from a prior detainee on the applicant's form. He adds that that this form should not outweigh the applicant's evidence that he was present in the United States after 1996. With his motion the applicant submits additional evidence to establish that he was in the United States before and after May 1999.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant provides new evidence to support his assertion concerning the date he re-entered the United States, the motion to reopen is granted.

In addition to evidence already considered on appeal, the record includes, but is not limited to, counsel's letters written in support of the applicant's motion; letters from the applicant, his employer, his spouse, his children, and his siblings; documents establishing his sisters' identities;

and financial documentation, including pay stubs. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant was ordered excluded from the United States on February 14, 1996, after seeking to procure admission to the United States by presenting a counterfeit document at the California, Port of Entry.[1] The applicant subsequently re-entered the United States without inspection, and on January 30, 2011, he signed a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) that specifies he illegally re-entered the United States on or about May 1, 1999 at or near Texas. The applicant signed the form's "Acknowledgment and Response" box and indicated with a checkmark that he did not wish to make a statement contesting the determination that his removal order would be reinstated. He was removed from the United States on January 31, 2011, and he has not returned since.

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

> (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 [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
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> . . . .

[1] We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Although the applicant was not charged with this inadmissibility at the time, he also appears to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States by fraud or material misrepresentation.

(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.

Although the applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act based on his unlawful presence, he asserts on motion that he did not re-enter the United States without inspection in May 1999. After his removal on February 14, 1996, the applicant asserts that he re-entered the United States without inspection on or about April 1996. He provides an August 2014 letter from a former employer, who states that he was employed with that company between January 27, 1998 and August 23, 2000; paystubs to demonstrate his presence in the United States; and letters from his sisters, who state that he entered the United States in 1994, returned to Mexico in December 1995, and re-entered the United States in April 1996. His sisters also state that he never left the United States in 1999. In addition, one sister indicates that the applicant lived at her property but that she did not prepare a lease for him, given their relationship.

While the pay stubs the applicant provides on motion still reflect significant unexplained gaps, the applicant provides a letter from his employer indicating that he worked from January 27, 1998 through August 23, 2000 with [redacted] The applicant also asserts that the year-to-date income indicated in a 1999 pay stub supports finding that he was steadily employed in the United States before the Form I-871 re-entry date of May 1,1999, comparing his earnings over a similar period in 2000. Although this evidence establishes the applicant's earnings and employment over a period of several months, it does not establish his whereabouts or activities on the particular date at issue, May 1, 1999. Specifically, his employment evidence does not show that the applicant never departed the United States after his entry in either 1995 or 1996 or that he did not re-enter the United States without admission on May 1, 1999.

The applicant's sisters indicate in their letters that the applicant was in the United States from April 1996 and that he never left the United States in 1999. However, their statements contradict the Form I-871, which was translated for and signed by the applicant in 2011, and other forms related to his 2011 removal. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such

inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the applicant asserts that our reliance on Form I-871 is improper and that we should acknowledge that ICE officers often complete such documents hastily, without providing clear translations; therefore Form I-871 alone should not "outweigh" the reliability of the evidence he provides. The applicant, however, presents no legal authority to support his assertion that our reliance upon the Form I-871 that he signed is improper. He also provides no authority addressing the proper weight we should give that document. Further, though he asks us to acknowledge that the Form I-871 likely was improperly completed, he provides no evidence to support his position that these forms often are completed with errors and that he did not receive a proper explanation or translation when he signed his Form I-871. Moreover, two ICE officers signed the form, attesting that the facts that formed the basis of the determination were communicated to the applicant in Spanish. The applicant did not contest the determination and signed the document.

After consideration of the applicant's evidence, including the new evidence submitted with this motion, we conclude that it does not establish he re-entered the United States in April 1996 instead of May 1999; it also does not show that he never departed the United States in 1999 or that his only departure after his claimed 1996 re-entry was in 2011.

The record reflects that the applicant was ordered removed from the United States on February 14, 1996, and on Form I-871 he acknowledged re-entering the United States without inspection on May 1, 1999. The applicant was removed to Mexico in 2011 and therefore has not remained outside the United States for 10 years since his last departure. As a result of his removal and subsequent re-entry without admission, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i) of the Act.

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. The record reflects, and the applicant does not dispute, that he returned to Mexico in 2011 and therefore he has not remained outside the United States for ten years since his last departure. He is thus 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.

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 motion is granted and the prior decision of the AAO is affirmed.