



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-A-B-

DATE: SEPT. 3, 2015

MOTION OF AAO DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Costa Rica, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The Director, Nebraska Service Center, denied the application. The Applicant appealed that decision and his appeal was dismissed. The matter is now before us on motion. The motion will be denied.

The Applicant was found to be inadmissible to the United States pursuant to 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 one year or more and seeking readmission within 10 years of departure from the United States.¹ The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on his behalf by his U.S. citizen spouse. The applicant filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, under section 212(a)(9)(B)(v) of the Act in order to reside in the United States with his spouse.

The Director denied the Form I-601, finding the Applicant also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having entered the United States without being admitted after having previously accrued more than one year of unlawful presence. The Applicant was instructed that he will need to obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act before he can be admitted to the United States. He was also instructed that he cannot apply for consent to reapply for admission by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, until he has remained outside the United States for 10 years since his last departure. The Director denied the Form I-601 as a matter of discretion, as no purpose would be served where the Applicant would remain inadmissible under section 212(a)(9)(C) of the Act. *Decision of the Director*, dated March 26, 2014.

¹ The record indicates that the Applicant may also be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure a visa to the United States through fraud or material misrepresentation. The Applicant initially did not disclose his prior entries to the United States without inspection and his unlawful presence in the United States when seeking his immigrant visa at the U.S. Embassy in Costa Rica.

The Applicant appealed the Director's decision, and we dismissed the appeal on November 18, 2014. We found that the Director correctly determined that the Applicant was inadmissible under section 212(a)(9)(C) of the Act and that, because the Applicant cannot apply for consent to reapply for admission until he has remained outside the United States for 10 years since his last departure, no purpose would be served in granting a waiver under section 212(a)(9)(B)(v) of the Act. *Decision of the Chief, Administrative Appeals Office (AAO)*, dated November 18, 2014.

The Applicant filed a motion to reconsider our decision, stating, through counsel, that he is eligible to file for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. The Applicant quotes an unpublished AAO non-precedent decision and also states that the Applicant reentered the United States without admission not to "violate any human laws" but to obey "his natural instinct" as a father, because at the time his wife was pregnant. The Applicant also asks for a waiver as a matter of discretion. *Applicant's Motion to Reconsider*, dated December 11, 2014.

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 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant was found to be inadmissible under section 212(a)(9)(C)(i)(I).

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

...

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

The record indicates that the Applicant entered the United States without inspection in 1995. He accrued unlawful presence in the United States from April 30, 1997, the effective date of the unlawful presence provisions under the Act, until his first departure from the United States on November 27, 2004. This amounts to more than 1 year of unlawful presence. The record indicates that the Applicant then reentered the United States without inspection on April 3, 2006, and remained in the United States until his last departure on December 21, 2010. Because the Applicant reentered the United States without being admitted after having accrued 1 year or more of unlawful presence, he is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. This is a permanent ground of inadmissibility. The Applicant's reason for reentering the United States without inspection, his natural instinct as a father, does not affect his inadmissibility or our ability to exercise discretion favorably. He remains inadmissible. As the Director noted, the Applicant may seek consent to reapply for admission by filing Form I-212 only after 10 years have passed since the date of the Applicant's last departure from the United States. The record indicates that the Applicant last departed the United States on December 21, 2010; he is therefore not eligible to file Form I-212 until December 21, 2020.

On motion the Applicant, through counsel, cites an unpublished AAO non-precedent decision and appears to argue that because three years have passed since the Applicant's departure from the United States, he is now eligible to apply for a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Unpublished non-precedent AAO decisions, however, are not binding authority. According to 8 C.F.R. § 103.3(c), our precedent decisions are binding on employees in the administration of the Act, while unpublished decisions are not similarly binding. Moreover, the facts of the unpublished case differ from the Applicant's case insofar as the ground of inadmissibility that applies differs. The Applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more and is therefore inadmissible under that provision for a period of 10 years, not three years.

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

(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 Attorney General [now the Secretary of the Department 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 [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.

Although the Applicant may seek a waiver for his grounds of inadmissibility at section 212(a)(9)(B)(i)(II) of the Act and the standard for that waiver is establishing extreme hardship to a qualifying relative, which includes a U.S. citizen spouse, no purpose is served in granting that waiver where the Applicant would remain inadmissible under another provision of the Act. *See Matter of J-F-D*, 10 I&N Dec. 694 (INS 1963). In other words, were the Applicant's Form I-601 to be approved, he would remain inadmissible under section 212(a)(9)(C) of the Act and would not be allowed to obtain an immigrant visa or admission to the United States. Here, the Applicant cannot seek consent to reapply for admission in regard to his section 212(a)(9)(C) inadmissibility until 10 years have passed since his last departure from the United States. There is no discretionary basis on which to approve consent to reapply for admission before 10 years have passed since the Applicant's last departure.

The motion does not establish that our previous decision was based on an incorrect application of law or policy and therefore the motion will be denied. In application proceedings, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion will be denied.

ORDER: The motion is denied.

Cite as Matter of R-A-B-, ID# 12917 (AAO Sept. 3, 2015)