



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

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

MATTER OF M-A-A-B-

DATE: OCT. 3, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility for unlawful presence. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant also is inadmissible under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C)¹ for entering the United States without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than 1 year, and he is not eligible to request consent to reapply for admission. The Director denied the unlawful presence waiver application as matter of discretion due to the Applicant's inadmissibility under section 212(a)(9)(C) of the Act.

The Applicant previously filed an appeal that we sustained in error. The matter is now before us on a Service motion to reopen. We issued a notice of intent to deny (NOID) and the Applicant did not respond to the NOID. In the appeal, the Applicant submitted additional evidence and asserted that he is not inadmissible under section 212(a)(9)(C) of the Act. He also asserted that he is eligible for a waiver of his unlawful presence due to extreme hardship that his spouse would experience.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking admission as an immigrant and has been found inadmissible for unlawful presence. Section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), provides that a foreign national who has been unlawfully present in the United States for 1 year or more, and who again

¹ The Director cited inadmissibility under section 212(a)(9)(C)(i)(II) of the Act; however, the correct ground of inadmissibility is section 212(a)(9)(C)(i)(I) of the Act.

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seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(iii) of the Act provides that no period of time in which a foreign national is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

Section 212(a)(9)(B)(v) of the Act, provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent.

The Applicant has also been found inadmissible for entering the United States without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than 1 year. Section 212(a)(9)(C) of the Act provides that any foreign national who has been unlawfully present in the United States for an aggregate period of more than 1 year, or has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible.

Foreign nationals found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that inadmissibility shall not apply to a foreign national seeking admission more than 10 years after the date of last departure from the United States if, prior to the 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 foreign national's reapplying for admission.

II. ANALYSIS

The issue on appeal is whether the Applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, and if he is not, whether he has established extreme hardship to a qualifying relative in order to be eligible for a waiver under section 212(a)(9)(B)(v) of the Act. The Applicant asserts that he is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act, because the case law the Director cited does not apply to him. The Applicant does not contest the finding of inadmissibility for unlawful presence, a determination supported by the record.² The claimed hardship to the Applicant's spouse consists of safety, financial, medical, emotional, and psychological hardships.

² The record reflects that the Applicant entered the United States without inspection in April 1997, departed in May 1998, reentered without inspection in March 1999, and departed the United States in July 2011. The Applicant turned 18 on [REDACTED]. Therefore, taking into account the exception described in section 212(a)(9)(B)(iii)(I) of the Act, the Applicant accrued unlawful presence, as it relates to inadmissibility under section 212(a)(9)(B)(i)(II), from [REDACTED] the date he turned 18, until July 2011, when he departed the United States. The Applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of 1 year or more and seeking readmission within 10 years of his July 2011 departure.

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The record reflects that the Applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act and he is not eligible to request consent to reapply for admission at this time. Therefore, we will not address his claim of extreme hardship to his spouse as it relates to his unlawful presence waiver, and we will dismiss the waiver as a matter of discretion.

A. Inadmissibility

The record reflects that the Applicant entered the United States without inspection in April 1997, departed the United States in May 1998, reentered the United States without inspection in March 1999, and departed the United States in July 2011. The Applicant turned 18 on [REDACTED]. The Applicant accrued unlawful presence, as it relates to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, from April 1997, the date he entered the United States without inspection, until May 1998, the date he departed the United States.

The minors exception in 212(a)(9)(B)(iii) applies only to grounds of inadmissibility under section 212(a)(9)(B) of the Act. It does not apply to grounds of inadmissibility under section 212(a)(9)(C) of the Act. USCIS Policy Memorandum, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, Revision to and Re-designation of Adjudicator's Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03)* 28 (May 6, 2009), <http://www.uscis.gov/laws/policy-memoranda>. The Applicant's entry without being admitted in March 1999 was therefore subsequent to a period of 1 year or more of unlawful presence. We therefore find him inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act, for having been unlawfully present in the United States for an aggregate period of more than 1 year and subsequently entering the United States without being admitted.

The Applicant asserts that he may overcome this ground of inadmissibility through establishing extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act. The Act reflects that waivers under section 212(a)(9)(B)(v) of the Act only apply to inadmissibility under sections 212(a)(9)(B)(i)(I) and (II) of the Act.

An individual who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the individual has been outside the United States for more than 10 years since the date of the individual'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 10 years ago, he has remained outside the United States, and USCIS has consented to his reapplying for admission. The Applicant asserts that *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) does not apply to him, as he did not apply for adjustment of status and he did not obtain permission to reapply for admission as the individual did in that case. Although the facts of the Applicant's case differ from those in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the requirements for consent to reapply as mentioned in relevant case law are applicable to him.

The record establishes that the Applicant's last departure from the United States occurred in July 2011. The Applicant has not remained outside of the United States for the required period since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission. The Applicant asserts that *Matter of J-F-D*, 10 I&N Dec. 694 (BIA 1963), a case cited by the Director, does not apply to him, as the individual in that case had a long criminal history. In *Matter of J-F-D*, the Regional Commissioner found that the applicant was mandatorily excludable under former section 212(a)(9) of the Act, which concerned inadmissibility for committing a crime involving moral turpitude prior to entry, and was ineligible to file a waiver; and no purpose therefore would be served in granting permission to reapply for admission. *Matter of J-F-D*, 10 I&N Dec. at 695. Similarly, although the Applicant does not have a criminal history, his waiver application may be denied as a matter of discretion, as its approval would not result in his admissibility to the United States.

The Applicant is currently statutorily ineligible to apply for permission to reapply for admission. Therefore, we will not address his claim of extreme hardship to his spouse as it relates to his unlawful presence waiver, and we will dismiss the waiver as a matter of discretion.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. He is statutorily inadmissible under section 212(a)(C)(i)(I) of the Act, and is ineligible to apply for permission to reapply for admission. As such, we will not address his claim of extreme hardship to his spouse as it relates to his unlawful presence waiver, and we will dismiss the waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of M-A-A-B-*, ID# 117074 (AAO Oct. 3, 2016)