**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NATIONAL BENEFITS CENTER Date: AUG 0 4 2010
MSC-09-020-11246

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Inadmissibility pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility within the legalization program was denied by the director of the National Benefits Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under the Immigration and Nationality Act (the Act). Thus the relevant waiver application is moot.

On October 17, 2008, the applicant submitted Form I-690, Application for Waiver of Grounds of Inadmissibility. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(C)(i)(I) or (i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I) or (i)(II), for being either unlawfully present in the United States for one year and entering or attempting to enter without being admitted, and/or for having been ordered removed and having entered or attempted to enter without being admitted.[1] Preliminarily, the director stated that a Form I-690 can only be used in conjunction with a primary benefit application filed under section 245A or 210 of the Act. The director denied the Form I-690, finding that, since the applicant was not an applicant for adjustment of status under section 245A or 210 of the Immigration and Nationality Act (Act), there was no basis for the filing of the waiver application.[2] The applicant submitted a timely appeal, stating that her waiver application was incorrectly denied because she is an applicant for adjustment of status under section 245A of the Immigration and Nationality Act (Act).

Although section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), does not specifically mention "departure" as a prerequisite for inadmissibility to be incurred, according to the wording of the statute, an alien previously ordered removed must have "entered or attempted to enter without being admitted" in order to incur inadmissibility. Thus, the alien cannot violate this provision unless the alien leaves the United States and returns, or attempts to return. *See Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record reflects that the applicant entered the United States on March 15, 1989.[3] On December 26, 2001, removal proceedings were instituted against the applicant. On April 22, 2004, the immigration judge ordered the applicant to be removed should she not voluntarily depart by May 24, 2004, which date was subsequently extended to July 21, 2005 by the Board of Immigration Appeals (BIA). The applicant did not voluntarily depart the United States. The record reflects that the applicant has not departed the United States since the date of her entry on March 15, 1989.

Because the applicant has not departed since her entry into the United States on March 15, 1989, the waiver filed pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), is

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[1] Inadmissibility under section 212(a)(9)(C)(i)(I) (unlawful presence) does not apply to applicants filing for relief under section 245A of the Act. USCIS considers that such applicants are in a period of authorized stay, and do not accrue unlawful presence, as long as the application and any administrative appeal remain pending. The AAO will consider the applicant's admissibility under 212(a)(9)(C)(i)(II) only.

[2] On March 16, 2007, the applicant's Form I-687, application for status as a temporary resident was denied as abandoned. The applicant filed a timely motion to reopen the case, which remained pending as of the date of the Form I-690 filing. The AAO dismissed the appeal of the Form I-687 denial on the same date as the current decision.

[3] The applicant claims that she first came to the United States in 1980. The record reflects that the AAO dismissed the applicant's appeal of the denial of the Form I-687 because the applicant had not demonstrated her continuous residence in the United States in an unlawful status since prior to January 1, 1982. Consequently, the applicant's claim of residence in this country since 1980 is without merit.

therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

**ORDER:** The December 2, 2008 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.