

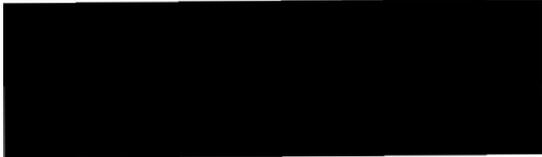


U.S. Citizenship
and Immigration
Services

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FILE:



Office: MIAMI, FL

Date: JUN 15 2006

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:



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. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. 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 Guatemala who was determined 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. The applicant is the child of a naturalized citizen of the United States and 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 his mother.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and failed to demonstrate that he is entitled to a favorable exercise of discretion. The district director denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated February 8, 2005.

On appeal, counsel contends that Citizenship and Immigration Services erred by basing its decision on the premise that the applicant was issued a warning in writing regarding the possibility of inadmissibility if he departed from the United States pursuant to an approved advance parole document. *Appeal from Decision of Citizenship & Immigration Services*, undated. The entire record was reviewed and considered in rendering a decision on the applicant's appeal.

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-
 - (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
 - (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 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.

In the present application, the record indicates that the applicant entered the United States on December 22, 1991 pursuant to a valid visitor visa. The applicant remained in the United States beyond his period of authorized stay and, on November 19, 1998, filed an Application to Register Permanent Residence or Adjust Status (Form I-485). Also in November 1998, the applicant obtained advance parole authorization and subsequently departed from the country and re-entered on January 10, 1999.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (Secretary)] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant therefore accrued unlawful presence from April 1, 1997, the date of implementation of unlawful presence provisions under the Act, until November 19, 1998, the date of his proper filing of the Form I-485 application. By departing from the United States, the applicant triggered unlawful presence provisions under the Act. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(II), the applicant was barred from again seeking admission within ten years of the date of his departure.

The record reflects that the applicant was subsequently granted advance parole authorization and exercised the authorization from departing from and returning to the United States as detailed in the decision of the district director.

On appeal, counsel contends that the applicant was not issued a warning in writing regarding the possibility of inadmissibility if he departed from the United States pursuant to an approved advance parole document, as contended in the decision of the district director. *Appeal from Decision of Citizenship & Immigration Services.* Counsel argues that the decision of the district director “cannot be made to hold upon a defective premise, especially, [sic] when such a premise is literally cited as the basis for the adverse action.” *Id.* (emphasis omitted).

The record contains three identical documents entitled Notice to Applicant which read, in pertinent part:

Presentation of this authorization will permit you to resume your application for adjustment of status upon return to the United States...If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the processing of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved.

The AAO notes that one of the three above referenced documents is dated December 17, 2002 and is signed by the applicant; one is dated December 17, 2001 and is signed by the applicant's attorney of record at that time and the final document is dated November 25, 1998 and is signed by the applicant's attorney of record at that time. The two earlier dated documents include notations made by then Immigration and Naturalization Service officers who also signed the documents indicating that the respective signatories insisted on filing for advance parole authorization despite warning from the officers.

On appeal, counsel makes no assertions regarding hardship imposed on the applicant's qualifying relative(s) as a result of the applicant's inadmissibility to the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.