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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE:

[REDACTED]

Office: SINGAPORE

Date: **MAR 09 2004**

IN RE:

[REDACTED]

PETITION: 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 PETITIONER:

[REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Singapore, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application declared moot.

The applicant is a native and citizen of Indonesia 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. The applicant is married to a naturalized United States citizen and seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The officer in charge (OIC) found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen husband. The application was denied accordingly. *See* Decision of Officer in Charge, dated January 17, 2003.

On appeal, counsel asserts that the applicant did not accrue unlawful presence as alleged by the Immigration and Naturalization Service [now Citizenship and Immigration Services (CIS)] and even if the applicant is inadmissible owing to unlawful presence, she establishes extreme hardship to her U.S. citizen husband and should, therefore, be granted a waiver.

The record contains a copy of the U.S. passport and a copy of the consular report of birth abroad of one of the applicant's children; copies of the U.S. birth certificates for two of the applicant's children; a copy of State Department Cable (75 IR 53); a copy of a consular information sheet for Indonesia, dated October 25, 2002; a letter verifying the employment of the applicant's spouse, dated November 14, 2002; a letter from the President of the Denver Islamic Society, dated November 15, 2002; an affidavit of the applicant's spouse, undated; a copy of the marriage certificate for the couple and a copy of a report released by the U.S. Department of State addressing human rights practices in Indonesia. The entire record was reviewed and considered in rendering a decision on the 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-

(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 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 with a student visa in March 1995 with authorization to remain in the country for duration of status. However, the applicant did not enroll in classes as planned and therefore, from the beginning of her stay in the United States, was present without status. On December 3, 1996, the applicant married a lawful permanent resident of the United States. On November 30, 2001, the applicant's spouse became a naturalized U.S. citizen. In May 2001, the applicant departed the United States. The decision of the OIC found that the applicant's departure triggered the tabulation of unlawful presence provisions under the Act. Therefore, the OIC determined that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 2001, the date of her departure from the United States. The OIC found that the applicant is 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.

Counsel points to instructions issued by the U.S. Department of State to support an assertion that the applicant did not accrue unlawful presence as found by CIS. *See Applicant's Brief Appealing the Decision of the Immigration and Naturalization Service Regarding Her Application for a Waiver Pursuant to Section 212(a)(9)(B)(v) of the Act, undated.* Counsel asserts:

A State Department cable (no.97-State-235245) addressed the issue of persons who were admitted for 'duration of status.' The cable states that such a person 'will only begin to accrue unlawful presence if either: an immigration judge (IJ) finds the alien has violated status and is excludable/deportable/removable, or the INS, in the course of adjudicating a benefit (e.g. extension of stay or change of status), determines that a status violation has occurred.

Id. at 2-3.

The CIS Adjudicator's Field Manual (AFM) supports counsel's assertion. The AFM states, in pertinent part:

An alien who remains in the United States beyond the period of stay authorized by the Attorney General [Secretary] is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service [CIS] policy, unlawful presence is counted in the following manner for nonimmigrants.

....

B. Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service [CIS] finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings...

See Memorandum by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations dated March 3, 2000. The AAO finds that a status violation was not determined prior to the applicant's departure from the United States and therefore, the applicant did not accrue unlawful presence.

Because the grounds for inadmissibility set forth in the officer in charge's decision are determined to be in error, the applicant has not been determined to be inadmissible under the Act. The applicant's appeal will be sustained and her waiver of inadmissibility application will be declared moot.

ORDER: The appeal is sustained. The waiver application is moot, as the applicant has not been determined to be inadmissible.