

HB

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE: [REDACTED] Office: SAN FRANCISCO, CALIFORNIA Date: NOV 04 2004

IN RE: Applicant: [REDACTED]

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:

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. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The waiver application was denied by the Acting District Director, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application declared moot.

The applicant is a native and citizen of Cameroon who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year and seeking readmission within three years of his last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and her children.

The acting district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the Acting District Director*, dated August 12, 2003. On appeal, the applicant asserts that his spouse would suffer financial hardship and difficulties complying with her childcare responsibilities if he is removed from the United States. *Form I-290B attachment*, dated September 15, 2003. In support of these assertions, the applicant submits a statement by his spouse, dated September 10, 2003, copies of birth certificates, payroll records, and an electric bill, and household budget notes. 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-

(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 . . . 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 with a student visa November 28, 1994 with authorization to remain in the country for duration of status. The record contains documentation showing that the applicant attended college through the end of the fall term of 1998, which would have been until approximately January 1999. There is no evidence that the applicant continued his studies after the end of the fall term of 1998; thus, it appears that he was no longer in student status beginning in approximately January 1999. On May 4, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), as the husband of a U.S. citizen. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized 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*. On September 1, 2000, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States. The acting director found that the applicant was inadmissible to the United States under section 212(a)(9)(B)(I) for being unlawfully present in the United states for a period greater than 180 days but less than one year.

The AAO notes that for persons who were admitted for duration of status, the tabulation of unlawful presence does not begin when the applicant is presumed to have fallen out of status, but rather when Citizenship and Immigration Services (CIS) or an immigration judge discovers the status violation. The CIS Adjudicator's Field Manual (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 the applicant's status violation was not determined prior to his application to adjust status and therefore, the applicant did not accrue unlawful presence.

Because the grounds for inadmissibility set forth in the acting director'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 dismissed and his waiver of inadmissibility application will be declared moot.

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

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