

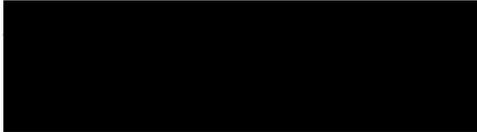
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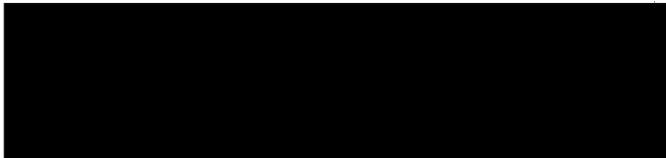


FILE: [REDACTED] Office: ALBANY, NY Date: DEC 31 2007

IN RE: Applicant: [REDACTED]

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

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 Officer in Charge, Albany, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the officer in charge will be withdrawn and the application declared moot.

The applicant is a native and citizen of Poland 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 more than 180 days but less than one year. The applicant is married to a U.S. citizen and she thus seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer in Charge*, undated.¹

In support of this appeal, counsel submits a brief, dated February 23, 2006. In addition, counsel submitted a Motion to Remand and supporting documentation on December 20, 2007. The entire record was reviewed and considered in rendering this decision.

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) 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 commencement of proceedings...and again seeks admission within 3 years of the date of such alien's departure or removal...is inadmissible.

In the present application, the record indicates that the applicant entered the United States on a visitor visa on March 12, 2001. She was authorized to remain in the United States until September 11, 2001. However, according to the sworn testimony provided by the applicant at her Adjustment of Status (Form I-485) interview on July 27, 2004, the applicant overstayed the period of authorized stay and voluntarily departed the United States on June 23, 2002. As such, the applicant accrued unlawful presence from September 12, 2001 until her departure on June 23, 2002. The applicant subsequently obtained a K-3, Nonimmigrant Visa for a

¹ The decision issued by the officer in charge is undated. However, counsel has provided a copy of the envelope containing the decision that counsel received on January 3, 2006; said envelope is postmarked December 30, 2005.

Spouse of a U.S. Citizen, from the U.S. Consulate in Montreal, re-entered the United States on November 12, 2003, and filed her I-485 application on November 26, 2003.

The applicant accrued unlawful presence from September 12, 2001 until her departure on June 23, 2002. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant is barred from again seeking admission within three years of the date of her departure.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (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 [REDACTED] Executive Associate Commissioner, Office of Field Operations dated June 12, 2002. An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment from her K-3 status. The applicant's last departure occurred in 2002. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible.

ORDER: The appeal is dismissed, the prior decision of the officer in charge is withdrawn and the application for a waiver of inadmissibility is declared moot.