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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date:

FEB 01 2008

IN RE:

Applicant:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guyana who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(III) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(III), for having been unlawfully present in the United States for more than one year. The applicant 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). The Acting Center Director denied the waiver application, finding the applicant is ineligible for approval of the waiver. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (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 a period of more than 180 days but less than 1 year, voluntarily departed the United States . . .
  - (III) 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, 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.

. . .

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).<sup>1</sup> For purposes of section

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<sup>1</sup> Memo, Virtue, Acting Assoc. Comm. INS, *Grounds of Inadmissibility, Unlawful Presence, June 17, 1997* INS Memo on *Grounds of Inadmissibility, Unlawful Presence* (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup> The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra*. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that the applicant lived unlawfully in the United States from September 1, 1997 until 2003 after entering the country on a visitor's visa. She therefore accrued more than one year of unlawful presence in the United States at the time she departed from the country. Based on the record, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(III) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(III), for having been unlawfully present in the United States for more than one year.

The AAO will now address the finding that a waiver of inadmissibility is not warranted here.

The director denied the waiver application, stating that the applicant is ineligible for a waiver as she is not the spouse, son, or daughter of a United States citizen or an alien lawfully admitted for permanent residence; but is the parent of a U.S. citizen.

On appeal, counsel states that the U.S. consulate admitted that the beneficiary is eligible for a waiver and under the principle of estoppel Citizenship and Immigration Services (CIS) is stopped from denying the waiver application. Counsel asserts that the regulation is misapplied against parents of a U.S. citizen and that congressional intent is not to exclude parents of U.S. citizens for obtaining waivers. Counsel states that CIS should follow the required guideline as shown in Exhibit A.

Counsel's assertions are not persuasive. The AAO finds that counsel failed to explain the relevance of Exhibit A to the finding of inadmissibility. With regard to congressional intent, the Act is clear in stating that extreme hardship must be shown to the spouse, son, or daughter of a United States citizen or an alien lawfully admitted for permanent residence. A parent is not a qualifying relative. The AAO therefore agrees with the director's denial of the waiver application. It is noted that the applicant submitted no evidence to establish that she has any qualifying relative under the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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

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<sup>2</sup> DOS Cable, *supra*.; and IIRIRA Wire #26, HQIRT 50/5.12.

**ORDER:** The appeal is dismissed.