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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:

Office: NEW YORK, NEW YORK

Date: JAN 22 2008

IN RE:

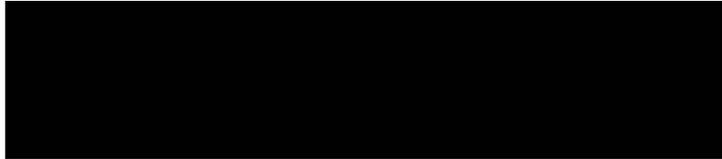
Applicant:



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 District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under 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), thus the relevant waiver application is moot.

The applicant, _____ is a native and citizen of India 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 unlawful presence in the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, which the district director denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the District Director, dated May 17, 2005.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

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. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

Properly filed adjustment of status applications toll any unauthorized time and are considered to be a period of authorized stay by the Attorney General. Memo, Pearson, Exec. Assoc. Comm. Field Operations (HQADN 70/ 21.1.24-P, AD 00-07) (Mar. 3, 2000). An exception arises only if the adjustment application is filed after a Notice to Appear is served on the applicant. Memo, Virtue, Acting Exec. Assoc. Comm., HQ IRT 5015.12, 96 Act. 043 (June 17, 1997). Time in unlawful presence that accrued prior to the filing of an adjustment of status application also counts toward the 180-day/ one-year periods. With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment

¹ 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).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

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 documentation in the record reveals that the applicant was authorized to stay in the United States to May 16, 1991 pursuant to a visitor visa; however, he remained in the United States beyond the authorized expiration date. On July 7, 1993, the applicant filed the adjustment of status application, Form I-485, concurrently with the petition for an alien relative, Form I-130, filed on his behalf by [REDACTED] the applicant's spouse. The petition for alien relative was denied on November 3, 1994. On July 1997, the applicant filed a new Form I-485 application concurrently with the Form I-130 petition filed on his behalf by his second wife, [REDACTED]. The Form I-130 petition was considered abandoned and was denied on September 23, 2000. On March 27, 2001, the applicant submitted a new Form I-485 application concurrently with the Form I-130 petition filed by his third wife, [REDACTED].

Time in unlawful presence that accrued prior to the filing of an adjustment of status application counts toward unlawful presence. The record conveys that the applicant accrued unlawful presence from September 23, 2000 to March 27, 2001, a period of 185 days. The three-year-bar for unlawful presence was triggered by the applicant's departure on advance parole sometime prior to July 27, 2004. Although the exact date of the applicant's departure is unknown, it has been more than three years since his departure.

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 his parole status. The applicant's last departure occurred in 2004. 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.

Based on the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The waiver filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The May 17, 2005 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.