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

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FILE: [REDACTED] Office: JACKSONVILLE, FLORIDA

Date: MAY 12 2008

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:

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, Jacksonville, Florida, 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 The appeal will be dismissed, the previous decision of the officer-in-charge will be withdrawn, and the application declared moot.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 of the United States who renounced his U.S. citizenship and is a citizen of Germany. He 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. The applicant is the father of a U.S. Citizen and seeks a waiver of inadmissibility in order to reside in the United States with his daughter.

The officer-in-charge found that the applicant had failed to establish eligibility for a waiver pursuant to section 212(a)(9)(B)(v) of the Act because he does not have the required family relationship. The application was denied accordingly. *Decision of the Officer-in-Charge*, dated March 8, 2006.

On appeal, counsel states that U.S. Citizenship and Immigration Services (CIS) erred in issuing the applicant an advance parole document (Form I-512) without warning him that he would become inadmissible if he departed the United States due to the unlawful presence he had accrued. Counsel requests that CIS approve the applicant's waiver application because "[b]ut for the Service's error, [REDACTED] would not be in this predicament." *Form I-290B*, dated March 21, 2006. The entire record was reviewed and considered in rendering a 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-

(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 [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 case, the record indicates that the applicant entered the United States under the visa waiver program on November 5, 2001, with authorization to remain in the United States until February 16, 2002. On September 20 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On April 1, 2003, 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 the United States. He reentered on August 26, 2003.

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 Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* dated June 12, 2002. The applicant accrued unlawful presence from February 17, 2002 until September 20, 2002, the date of his proper filing of the Form I-485. The applicant was 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 was barred from again seeking admission within three years of the date of his departure.

An application for admission or adjustment of status 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 2003. 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.