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U.S. Citizenship
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FILE:



Office: MADRID, SPAIN

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JUL 20 2006

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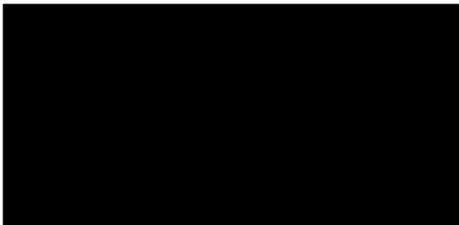
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



PUBLIC COPY

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 Application for a Waiver of Inadmissibility was denied by the Acting Officer in Charge, Madrid, Spain, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed, and the application for the waiver of inadmissibility is declared moot.

The applicant is the beneficiary of an approved Form I-130 petition for an alien spouse, and he seeks a K3 visa in order to return to the United States to live with his wife and child. The acting officer in charge, however, found that the applicant was inadmissible to the U.S. pursuant to § 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 having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant sought a waiver of inadmissibility pursuant to § 212(a)(9)(B)(v) of the Act, but the acting officer in charge denied the waiver, concluding that the applicant had failed to establish that his wife would experience extreme hardship on account of his inadmissibility.

It is noted that the applicant's wife has apparently retained new counsel, who submitted further evidence on appeal on July 7, 2006. The applicant's previous counsel submitted a Notice of Appeal and evidence on December 9, 2004. For the purposes of the following discussion, "counsel" will refer to both the previous and current attorneys, and "appeal" will refer to the entire body of evidence submitted on appeal.

On appeal, counsel asserts that the officer in charge abused his discretion in questioning the validity of the applicant's marriage to a U.S. citizen. Counsel also contends that the officer in charge erred in failing to give due weight to all the hardship factors presented through the evidence. Counsel submits a statement written from the applicant's point of view and evidence of electronic communications between the applicant, his wife, and his wife's family, among other documentation.

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 on October 10, 2000 with authorization to remain in the country for the duration of his status. According to the record, the applicant never attended college; thus, it appears that he was never in valid student status since the day of his arrival. On January 9, 2003, when the applicant registered under the NSEEERS program, the Service determined that he was out of status; therefore, he was issued a Notice to Appear in Immigration Court. On May 23, 2003, the Immigration Judge (IJ) granted the applicant voluntary departure until September 22, 2003. The applicant left the United States on September 21, 2003.

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...

Moreover, the Service (CIS) designated a current grant of voluntary departure as a period of stay authorized by the Attorney General [Secretary]. Unlawful presence that accrued prior to the grant of voluntary departure, however, is not included in the period of authorized stay. *See Memorandum by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations dated March 3, 2000.* The applicant began to accrue unlawful presence on January 9, 2003, the day the Service determined that he was out of status, until May 23, 2003, the day the IJ granted him voluntary departure. As he departed within the period granted by the IJ, he accrued no further unlawful presence. As the applicant accrued only 134 days of unlawful presence, he is not subject to the bar described in § 212(a)(9)(B) of the Act.

The grounds for inadmissibility set forth in the officer in charge's decision are determined to be in error. The applicant is not inadmissible under the provisions of the Act. The applicant's appeal will be sustained and his waiver of inadmissibility application will be declared moot.

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