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U.S. Citizenship
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FILE:

Office: NEW DELHI, INDIA

Date: JUL 27 2006

IN RE:



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:



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, New Delhi, India. The Administrative Appeals Office (AAO) dismissed the matter on appeal, and the case is now again before the AAO on motion to reconsider. The motion will be granted, and the previous dismissal of the appeal will be withdrawn. The waiver application is declared moot.

The applicant is a native and citizen of India who was found to be inadmissible to the United States 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 10 years of his last departure from the United States. The applicant is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and child.

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.

(II) 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 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.

The record indicates that the applicant entered the United States without inspection on or about March 22, 1992. He applied affirmatively for asylum, but his application was denied, and he was placed in proceedings on February 8, 1993. The Immigration Judge (IJ) denied his request for asylum and ordered the applicant deported on March 17, 1994. The applicant appealed the denial, and the Board of Immigration Appeals (BIA)

dismissed his appeal on October 3, 2000. The applicant filed a Petition for Review and Motion for Stay of Deportation with the Ninth Circuit Court of Appeals. The appellate court denied the Petition for Review on July 23, 2001 and issued its decision on September 14, 2001. On November 6, 2001, the Immigration and Naturalization Service granted the applicant's request for a stay of deportation until May 14, 2002, when the applicant departed the United States. The applicant's spouse's Petition for Alien Relative (Form I-130) filed on behalf of the applicant was approved on May 10, 2002.

The applicant submitted an application for permission to reapply for admission after deportation along with his waiver application. The officer in charge denied the waiver, having found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The ensuing appeal was based on the contention that the applicant did not begin to accrue unlawful presence until the court of appeals issued its decision on September 14, 2001. The AAO found that the applicant had accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 14, 2002, the date of his departure under deportation, and that he was subject to the ten year bar set forth at § 212(a)(9)(B)(i)(II).

The AAO based its determination regarding the applicant's unlawful presence on the September 19, 1997 memorandum by [REDACTED] Acting Executive Associate Commissioner, which states that time spent as an alien in proceedings before an immigration judge or higher appellate authority has not been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under § 212 (a)(9)(B)(i)(I) and (II) of the Act. On motion to reconsider, counsel asserts that the Virtue memorandum does not apply to the instant situation, because the applicant had a pending application for asylum until the date the court of appeals issued its final decision on September 14, 2001. Counsel points out that pursuant to § 212(a)(9)(B)(iii)(II), a bona fide asylum applicant does not accrue unlawful presence unless he works without authorization.

Counsel also refers to the memorandum dated September 15, 1999 by [REDACTED] Acting General Counsel, and [REDACTED] Executive Associate Commissioner, Office of Field Operations, which states that an asylum application is considered pending during any administrative or judicial review of the application. Counsel notes that according to Ninth Circuit Rule 41-2, a Ninth Circuit decision is not considered a final order until the mandate is issued, and a mandate will issue seven calendar days after the time to file a motion for reconsideration or rehearing expires. Thus, the Ninth Circuit decision in the instant case was not final until September 14, 2001, the date the mandate was issued.

Given that counsel has provided evidence that the applicant held work authorization until 2002, it does not appear that he was unlawfully employed. Counsel suggests that the only period during which the applicant accrued unlawful presence would have been between September 14, 2001, the date of the final court decision on his asylum application, and November 16, 2001, the date INS granted him a stay of deportation. This period is just over two months and would not give rise to the grounds of inadmissibility under § 212(a)(9)(B) of the Act.

The AAO finds counsel's assertions persuasive. The applicant was not unlawfully present in the United States for 180 days or more; hence, he is not subject to the bar set forth at § 212(a)(9)(B) of the Act. The AAO therefore finds unnecessary the application for a waiver of inadmissibility.

ORDER: The dismissal of the appeal is withdrawn, and the waiver application is declared moot.