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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: PANAMA CITY, PANAMA

Date:

NOV 21 2006

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Acting Officer-in-Charge (OIC), Panama City, Panama, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the OIC is withdrawn. The appeal will be dismissed, as the waiver application is moot.

The applicant [REDACTED] is a native and citizen of Colombia who applied for a waiver under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v). The applicant was found to be 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), for having been unlawfully present in the United States for one year or more. The applicant is the fiancé of a U.S. citizen and seeks a waiver of inadmissibility in order to enter the United States to marry his fiancée.

The OIC found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen fiancée. The application was denied accordingly. *Decision of the OIC*, dated February 16, 2005.

On appeal, the applicant's fiancée submits a letter listing the hardships she will suffer if the applicant is not granted a waiver of inadmissibility. *Notice of Appeal to the Administrative Appeals Office (AAO)(Form I-290B)*, submitted March 18, 2005.

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, or

(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 [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse¹ 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

¹ In the case of a beneficiary who is a fiancé(e) who is inadmissible on a ground which could be waived under section 212(v) of the Act, the "qualifying relationship" is to the "prospective spouse."

such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Regarding the ground of inadmissibility in this case, based on the evidence in the record, the applicant was refused a visa at the American Embassy in Bogota, Colombia, on July 29, 2004 because he had overstayed his student visa (F1 Visa). The consular decision noted that the applicant's visa was refused under section 212(a)(9)(B)(i)(I) of the Act, and issued the following statement:

Applicant entered the U.S. for the last time on January 8, 2000 with an F1 visa that was issued in 1998 for study at Moorpar (sic) College. The visa was valid for academic purposes until 2003. He terminated his studies at the end of 2000. Legally he could stay one additional year with his F-1 visa, until approximately December 31, 2001. He returned to Colombia on March 5, 2003, having accumulated 247 days of illegal presence.

Note re Applicant from Vice Consul of the United States, American Embassy, Bogota, Colombia, September 23, 2004. The applicant states that he entered the United States on a Student Visa valid for five years, but he did not attend school "the last year." *Statement of Herman* (redacted) undated, submitted September 16, 2004. The OIC determined that the applicant had accrued a year or more of unlawful presence in the United States. The decisions of the consular officer and the OIC are inconsistent, finding different bars to admission based on unlawful presence, and the basis for their respective conclusions is not clear. However, regardless of when the applicant ceased his studies, as the holder of an F1 Visa for Duration of Status, the applicant did not accrue "unlawful presence" under the Act.

In this case, the record indicates that the applicant entered the United States with a student visa in January 2000, valid for duration of status. However, the applicant terminated his studies some time in 2000 or 2001, and was therefore present without status until he left the United States in March 2003. He returned to Colombia at that time to attend his visa interview in Bogota, planning to return to the United States on a fiancé visa. At his consular interview, the applicant was found inadmissible, as noted above, and he requested a waiver of inadmissibility. The OIC found that the applicant's departure triggered the unlawful presence provisions under the Act and that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having accrued unlawful presence in the United States for a period of one year or more.

Chapter 30.1(d) of the CIS Adjudicator's Field Manual (AFM) states, in pertinent part:

(1) Counting of Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the authorized period of stay is unlawfully present and becomes subject to the 3- or 10-year bar to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service 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 USCIS 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. . . .

See Memorandum by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, dated March 3, 2000.

Furthermore, the U.S. Department of State issued a cable addressing the issue of persons who were admitted for duration of status. The cable states that such a person, "...will only begin to accrue unlawful presence if either: an immigration judge (IJ) finds the alien has violated status and is excludable/deportable/removable, or the INS [USCIS], in the course of adjudicating a benefit (e.g. extension of stay or change of status), determines that a status violation has occurred." *State Department Cable (no.97-State-235245)*, dated December 17, 1997.

The AAO finds that in this case a status violation was not determined prior to the applicant's departure from the United States and, therefore, the applicant did not accrue unlawful presence in the United States.

Because the grounds for inadmissibility set forth in the OIC's decision are determined to be in error, the applicant has not been determined to be inadmissible under the Act. The decision of the OIC will be withdrawn. The applicant's appeal will be dismissed as the waiver application is moot and the applicant is not inadmissible under section 212(a)(9)(B) of the Act.

ORDER: The decision of the district director is withdrawn. The appeal is dismissed, as the waiver application is moot.