identifying [illegible] deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEW YORK, NEW YORK Date: DEC 23 2004

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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 Interim District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The applicant is a native of Afghanistan and citizen of Canada who was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or willful misrepresentation. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to § 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. On appeal, counsel contends that the applicant does not fall within the purview of § 212(a)(6)(C)(i) of the Act, since he did not willfully misrepresent a material fact in order to gain a benefit under the Act. Counsel asserts that even if the applicant were inadmissible, he has established extreme hardship to his wife, and thus, the waiver should be granted. The record contains a sworn statement dated February 5, 2002 in which the applicant wrote that he last entered the United States on or about August 1992.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO agrees that it does not appear that the applicant made the statement regarding his 1992 entry date in an effort to procure a benefit under the act. There is no evidence that such a claim would garner the applicant any advantage or benefit, nor did the applicant actually procure any benefit under the Act. Thus, it does not appear that the applicant is subject to the grounds of inadmissibility described in § 212(a)(6)(C)(i) of the Act.

Nevertheless, it appears that the applicant is subject to § 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 more than one year and seeking readmission within 10 years of his last departure from the United States. As a Canadian citizen, the applicant was allowed to remain in the United States as a visitor for six months. Counsel states that the applicant entered the United States in 1992 and remained in this country until his May 1999 departure and return. The applicant also stated that he entered the United States in August 1992 and failed to depart within the allowed period. The record contains no evidence that the applicant applied for any immigration status prior to his application for adjustment of status.

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-

. . . .

(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.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized 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.* Therefore, it appears that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until the date of his proper filing of the Form I-485. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his May 1999 departure from the United States.

The record does not reflect inadmissibility under § 212(a)(6)(C)(i) of the Act, but rather under § 212(a)(9)(B)(i)(II) of the Act. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of his unlawful presence, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.