U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: DENVER, CO Date: DEC 08 2008

IN RE: [redacted]

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of the United Kingdom and a citizen of Canada who was found to be inadmissible to the United States pursuant to section 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 admission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse and the application was denied accordingly. *Decision of the District Director*, at 2, dated August 4, 2006.

On appeal, the applicant asserts that he never stayed in the United States longer than four months at a time, he never stayed past six months as a visitor and he traveled to Canada about ten times and Scotland twice in the three year period. *Form I-290B*, received August 15, 2006.

The record contains, but is not limited to, the applicant's Form I-290B, the applicant's prior immigration petitions and applications, the applicant's spouse's statement and a statement from the applicant's spouse's doctor. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States on January 1, 1997 as a nonimmigrant visitor and departed the United States on December 10, 1999. The district director found that the applicant had accrued unlawful presence from July 1, 1997, six months after he was admitted as a visitor from Canada, until December 10, 1999, the date he departed the United States.[1]

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[1] The record does not reflect whether the applicant was issued an I-94, Arrival/Departure Card, at the time he was admitted to the United States. The AAO notes that Canadians inspected at the border, but not given an I-94, are treated as recipients of duration of status (D/S). 76 Interpreter Releases 1552 (Oct. 25, 1999). 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:
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> > 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

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.
> >
> > . . . .
> >
> > (v) Waiver. – The Attorney General [now 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 AAO will not consider the appeal in the present case as it finds that there is no underlying Form I-130, Petition for Alien Relative, upon which to base the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status. The record reflects that the Form I-130 benefiting the applicant was denied on August 4, 2006. As such, there is no longer a basis for the applicant's Form I-601 (and appeal) as the applicant does not have a basis on which to adjust his status.

The applicant's appeal will be dismissed.

ORDER: The appeal is dismissed.

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immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings....

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