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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 09 2008

IN RE: [redacted]

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and underlying waiver application is moot.

The applicant is a native and citizen of Peru 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 readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to remain in the United States.

The director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the Director,* dated May 23, 2006.

On appeal, counsel for the applicant asserts that the applicant's mother will suffer emotional and economic hardship should the applicant be prohibited from remaining in the United States. *Brief from Counsel*, dated July 17, 2006.

The record contains a brief from counsel; statements from the applicant's mother, the applicant's daughter, the applicant's son, and the applicant's deacon; copies of records associated with the applicant's mother's medical treatment; copies of tax records for the applicant and his daughter; copies of birth records for the applicant and the applicant's children; copies of naturalization certificates and a permanent resident card for the applicant's three children, and; copies of employment and salary records for the applicant's daughter. The entire record was reviewed and considered in rendering a decision on the appeal.

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 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 matter, the record indicates that the applicant first entered the United States on June 11, 1985 pursuant to a visitor's visa. In a Form I-485 application to adjust his status to permanent resident filed on May 29, 1997, he provided that he entered the United on February 1, 1987.

The applicant departed the United States on or about November 1999, and was paroled in on July 16, 2000 to resume his prior application for permanent residence. The prior Form I-485 application for permanent residence was denied on April 25, 2002 for the applicant's failure to appear for an interview.

The applicant remained in the United States after his prior Form I-485 application was denied. He filed a new Form I-485 application on September 23, 2004. The record does not reflect that he departed the United States after his parole on July 16, 2000.

Upon review, the record does not support that the applicant is inadmissible under section 212(a)(9)(B)(i) of the Act. Specifically, the applicant has not accrued more than 180 days of unlawful presence in the United States and then sought admission to the country. Section 212(a)(9)(B)(i) of the Act.

The unlawful presence provisions were enacted on April 1, 1997. Accordingly, the applicant did not accrue unlawful presence prior to that date. The applicant had no legal status as of April 1, 1997, so he began accruing unlawful presence on that date. However, he filed a bona fide Form I-485 application to adjust his status to permanent resident on May 29, 1997 which effectively ended this period of unlawful presence. Accordingly, the applicant accrued approximately one month of unlawful presence during this time. The applicant departed the United States on or about November 1999 and was paroled in on July 16, 2000. This departure potentially rendered the applicant inadmissible under section 212(a)(9)(B)(i) of the Act. However, the applicant had not accrued more than 180 days of unlawful presence at the time of his departure and parole back into the United States, thus he was not inadmissible for unlawful presence. Section 212(a)(9)(B)(i) of the Act.

The applicant's prior Form I-485 application for permanent residence was denied on April 25, 2002, thus he began accruing unlawful presence again. The applicant filed a new bona fide Form I-485 application to adjust his status to permanent resident on September 23, 2004 which effectively ended this period of unlawful presence. During this period, he accrued over two years of unlawful presence. However, the record does not reflect that the applicant departed the United States and sought admission after he accrued this unlawful presence. Accordingly, section 212(a)(9)(B)(i) of the Act was not triggered as a result of the applicant's unlawful presence after his last parole into the United States on July 16, 2000.

Based on the foregoing, the record does not support that the applicant is inadmissible under section 212(a)(9)(B)(i) of the Act. Nor does the record show that the applicant is inadmissible under any other provision of the Act. Therefore, the present Form I-601 application will be declared moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

ORDER: The appeal is dsimissed and the Form I-601 application is declared moot.