U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: MAY 20 2009

IN RE: [redacted]

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

Elena C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Pakistan who was found to be inadmissible to the United States pursuant to sections 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and seeking readmission within three years of his departure from the United States; and 212(6)(C)(i), 8 U.S.C. § 1182(6)(C)(i), for seeking admission to the United States through fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that, as the record failed to demonstrate that the applicant had the required qualifying relative, he was ineligible for waiver consideration. She denied the application accordingly. *Decision of the Field Office Director*, dated February 25, 2009.[1]

On appeal, counsel contends that the applicant is not inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act and, alternately, that if unlawful presence is determined, the applicant was already granted an implicit waiver of his inadmissibility when he was issued an H-1B specialty worker visa on June 8, 1999. *Form I-290B, Notice of Appeal or Motion,* dated March 23, 2009.

The record reflects that the applicant was admitted to the United States on September 29, 1984 with a multiple entry B-2 nonimmigrant visa and that he remained in the United States following its expiration. On September 13, 1995, the applicant was awarded an H-1B visa valid until September 1, 1998. He did not depart the United States when his visa expired, but remained until June 3, 1999, when he traveled to Ciudad Juarez, where he was issued a second H-1B visa, valid from June 8, 1999 until April 14, 2002. The applicant reentered the United States in H-1B status and a subsequent petition extended his H-1B status until June 30, 2003. The applicant was, thereafter, approved as an H-1B worker for the period October 28, 2004 until June 13, 2007. The AAO also notes that on October 17, 2000, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, based on an approved Form I-140, Immigrant Petition for Alien Worker, which was denied on February 25, 2009. The applicant last departed the United States in June 2000.

The AAO turns first to consideration of the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act, which states:

> (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.

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[1] The Form I-290B also indicates that the applicant is appealing the denial of his Form I-485, Application to Register Permanent Resident or Adjust Status. However, the AAO does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status. Accordingly, only the appeal of the applicant's Form I-601, Application for Waiver of Ground of Excludability, is before the AAO.

In her decision, the field office director referenced the addendum the applicant provided to his Form I-485, in which he indicated that, in 1993, his temporary resident status under the Special Agricultural Worker (SAW) program, had been terminated for fraud. Noting that the resumé the applicant had provided for the record did not identify any prior agricultural employment, the field office director found the applicant to have committed fraud in applying for temporary residence as a SAW and, as a result, to be inadmissible under section 212(a)(6)(C)(i) of the Act. However, the field office director erred in reaching this decision as U.S. Citizenship and Immigration Services (USCIS) may not find the applicant to be ineligible for adjustment of status based on his SAW record.

Section 210(b)(6) of the Act, 8 U.S.C. § 1160(b)(6) – Special agricultural workers, provides in pertinent part, that:

> 6) Confidentiality of information
>
> (A) In general
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> Except as provided in this paragraph, neither the Attorney General [now Secretary], nor any other official or employee of the Department of Justice [now Department of Homeland Security], or bureau or agency thereof, may -
>
> > (i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application . . . .

In the present case, a review of the record does not demonstrate that the applicant has engaged in fraud or made a willful misrepresentation with respect to any petition or application for immigration benefits outside the SAW program. Therefore, the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. He is, however, inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act for having been unlawfully present in the United States for more than 180 days but less than one year.

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

> The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

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-
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> > (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 . . . and again seeks admission within 3 years of the date of such alien's departure . . . .
> >
> > . . .
> >
> > (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 establishes that the applicant accrued unlawful presence from the expiration of his H-1B visa on September 1, 1998 until he departed the United States on June 3, 1999, a period of more than 180 days but less than one year.[2] Under section 212(a)(9)(B)(i)(I) of the Act, he was barred from seeking admission to the United States for three years from the date of his last departure in June 2000. The applicant, however, reentered the United States that same month. Accordingly, he remains inadmissible under section 212(a)(9)(B)(i)(I) of the Act and must seek a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act.

Counsel contends that the issuance of an H-1B visa to the applicant in 1999 and his admission to the United States as an H-1B worker should be viewed as implicit waiver of his inadmissibility in this proceeding. The AAO notes, however, that the applicant has previously been admitted to the United States as a nonimmigrant, subject only to the waiver requirements of section 212(d)(3) of the Act, 8 U.S.C. § 1182(d)(3), which states:

> (3) Except as provided in the subsection, an alien
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> > (B) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of

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[2] The AAO notes that the field office director found the applicant to have accrued unlawful presence from the date his first H-1B visa expired until April 5, 1999, when a second Form I-129, Petition for Non-Immigrant Worker, was filed on his behalf. However, the filing of the Form I-129 did not establish a period of stay authorized by the Secretary and the applicant, therefore, accrued unlawful presence until his June 3, 1999 departure from the United States.

> Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . ..

In *Matter of Hranka,* 16 I&N Dec. 491, 492 (BIA 1978), the Board of Immigration Appeals held that:

> In deciding whether or not to grant an application under section 212(d)(3)(B), there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.

Accordingly, while the applicant's 212(a)(9)(B) inadmissibility may have been waived under section 212(d)(3) of the Act, allowing him to enter the United States as a nonimmigrant, that waiver does not establish his eligibility for a waiver as an immigrant under section 212(a)(9)(B)(v) of the Act, where he must demonstrate that a qualifying relative would suffer extreme hardship as a result of his inadmissibility.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawful permanent resident spouse and/or parent of the applicant. Hardship that the applicant or his children may experience as a result of his inadmissibility is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it causes hardship to the applicant's spouse and/or parent.

In the present matter, the record does not reflect that the applicant has a U.S. citizen or lawful permanent resident spouse or parent. The applicant's spouse is seeking adjustment of status as a derivative beneficiary of the applicant's approved Form I-140 petition. The applicant's father is deceased and his mother resides in Pakistan. Therefore, the applicant does not have the qualifying relative required by section 212(a)(9)(B)(v) of the Act and is statutorily ineligible for a waiver of his inadmissibility under 212(a)(9)(B)(v). As the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings relating to an 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.