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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEWARK, NEW JERSEY Date: MAR 03 2009

IN RE: Applicant: [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:

[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.

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).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Newark, New Jersey, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the district director for continued processing.

The applicant is a native and citizen of the Czech Republic 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. She sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the district director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the District Director, dated February 4, 2005.*

The AAO will first address the finding of inadmissibility. Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present
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> > (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 . . . 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.
>
> . . . .

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.[1] For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[2] A

[1] Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

[2] *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

properly filed adjustment of status application tolls any unauthorized time and is considered to be a period of stay authorized by the Attorney General.[3] Time in unlawful status that accrued prior to the filing of an adjustment of status application counts toward unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) of the Act. [4] The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

A copy of a page in the applicant's passport indicates that she entered the United States on October 5, 2000, as a visitor for pleasure, with authorization to remain in the country until April 4, 2001. The applicant filed an adjustment of status application with US CIS on December 20, 2001, and departed from the United States pursuant to advance parole in 2003 and 2004. Based upon these facts, the applicant accrued 260 days of unlawful presence, from April 4, 2001, the expiration date of her B-2 visitor classification, until December 20, 2001, the filing date of the adjustment of status application. Thus, she was unlawfully present in the United States for a period of more than 180 days but less than one year.

As previously stated, section 212(a)(9)(B)(i)(I) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for a period of more than 180 days but less than one year, departed the United States and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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* [redacted] *Executive Associate Commissioner, Office of Field Operations* dated June 12, 2002. The applicant accrued unlawful presence from April 4, 2001, the expiration of her B-2 classification, until December 20, 2001, the date of her proper filing of the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The AAO notes that the director denied the applicant's I-485 application on February 4, 2005. The applicant was not afforded the opportunity to pursue the appellate process prior to the

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[3] *See,* Memo, [redacted] Exec. Assoc. Comm. Field Operations (HQADN 70/21.1.24-P, AD 00-07)(March 3, 2000).

[4] *See Id.*

denial of the I-485. The AAO finds that the denial of the I-485 was premature and that, as of today, the applicant is still seeking admission by virtue of adjustment from her parole status. The applicant's last departure occurred in May 2004. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible.

The AAO therefore finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act. The waiver filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The February 4, 2005 decision of the district director is withdrawn. The appeal is dismissed as the underlying application is moot. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.