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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: AUG 0 8 2012 Office: PHILADELPHIA, PA FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the then Acting District Director, Philadelphia, Pennsylvania and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO as motion to reopen/ motion to reconsider. The motion will be granted. The AAO's prior decision will be withdrawn, and the matter will be returned to the Field Office Director for action consistent with this decision.

The record reflects that the applicant is a native and citizen of India 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. The applicant is the spouse and father of U.S. citizens. He seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States.

The Acting District Director found that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Acting District Director's Decision,* dated March 9, 2010.

On motion, counsel asserts that the United States Citizenship and Immigration Services (USCIS) erred in finding the applicant to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act as he is eligible to adjust status under section 245(i) of the Act. Counsel also submits additional medical documentation to support the hardship claim. *Form I-290B, Notice of Appeal or Motion,* dated April 6, 2010.

The record of proceeding includes, but is not limited to, the following evidence: counsel's brief; statements from the applicant's spouse; medical documentation relating to the applicant's spouse; a letter of support from a friend of the applicant; country conditions information on India; and a court record relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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 record reflects that the applicant entered the United States with a B-2 nonimmigrant visa, valid until January 23, 1998, which was subsequently extended until July 22, 1998. The applicant did not depart the United States when her authorized period of stay expired. On September 9, 1999, the applicant's U.S. citizen spouse filed a Form I-130, Petition for Alien Relative, on behalf of the applicant and on this same date, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On January 16, 2001, the legacy U.S. Immigration and Naturalization Service (now USCIS) granted the applicant advance parole and he departed the United States, returning on March 7, 2001.

In our March 9, 2010 decision, the AAO found the applicant's 2001 departure from the United States under advance parole to have triggered the unlawful presence provisions under the Act and that prior to his departure, he had accrued unlawful presence in excess of one year (from July 23, 1998, the day after his nonimmigrant visa expired, until September 9, 1999, the date he filed the Form I-485).[1] Based on this history, the AAO determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Since our March 9, 2010 decision, the Board of Immigration Appeals (BIA) has held in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i) of the Act. Here, as in *Arrabally*, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled back into the United States to pursue his adjustment of status application. The applicant's 2001 departure is, therefore, not a departure for the purposes of section 212(a)(9)(B)(i) of the Act and he is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

However, the AAO notes the presence of evidence that was not part of the record on appeal. This evidence, a Court Summary from the York County (Pennsylvania) Court of Common Pleas and a Pennsylvania Court Report, raises the issue of possible inadmissibility pursuant to section 212(a)(2)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(i)(I), which states:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Court Summary from the York County (Pennsylvania) Court of Common Pleas and the Pennsylvania Court Report reflect that the applicant was arrested in 2004 for Indecent Assault, 18

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[1] 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 Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009.

Pennsylvania Consolidated Statues (Pa. C.S.) § 3126(a)(1), and Disorderly Conduct, 18 Pa. C.S. § 5503. These same documents indicate that, on June 23, 2005, the applicant pled guilty to two counts of Disorderly Conduct and to an unspecified lesser offense in connection with the Indecent Assault charge.

Accordingly, the AAO will return this matter to the Field Officer Director to obtain and review the applicant's complete criminal record for a determination of whether the applicant's admission to the United States is barred pursuant to section 212(a)(2)(A)(i)(I) of the Act. If so, the applicant must file a new Form I-601 application to seek a waiver of such inadmissibility. *See* 8 C.F.R. § 212.7(a)(4).

ORDER: The prior decision of the AAO is withdrawn as the applicant is not admissible to the United States pursuant to section 212(a)(9)(B)(i) of the Act. The matter is returned to the Field Office Director for action consistent with this decision.