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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 12 2007

IN RE: [redacted]

APPLICATION: Application for Adjustment of Status pursuant to § 245 of the Immigration and Nationality Act

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, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the application for adjustment of status (Form I-485) and certified her decision to the Administrative Appeals Office (AAO). The district director's decision will be affirmed. The application will be granted.

The applicant is a native and citizen of India who was first admitted to the United States for duration of status pursuant to a J-1 visa. On October 12, 2004, the applicant submitted a Form I-485 Application to Adjust Status under § 245(i) of the Immigration and Nationality Act (the Act), U.S.C. § 1255(i). On January 3, 2006, the director denied the application, finding that the applicant was inadmissible under § 212(a)(9)(B) of the Act for having been unlawfully present from September 1996 to September 1997 and from September 1997 to April 2002. In addition, the director concluded that the applicant was inadmissible pursuant to § 245(c) of the Act, on account of his periods of unlawful employment, and because he failed to pay the penalty fee specified in § 245(i) of the Act.

The director certified her decision to the AAO, and the matter was remanded to the Service Center for further action. The AAO determined that the record did not establish that counsel was mailed a Notice of Intent to Deny or Notice of Certification and Final Decision, as required by 8 C.F.R. § 103.2(b)(19). The AAO also noted that the applicant could not have accrued unlawful presence prior to the April 1, 1997 effective date of § 212(a)(9)(B) of the Act. On August 7, 2006, the director again issued a denial of the I-485 adjustment application, for essentially the same reasons as she set forth in her original denial. Counsel filed a timely Motion to Reconsider, providing ample explanation and authorities with respect to the erroneous legal conclusions contained in the I-485 denials.

On November 20, 2006, the director issued a decision granting the Motion to Reconsider, and reversing her previous decisions to deny the I-485 application. This most recent decision has been certified to the AAO. The AAO concurs with the director's decision to grant the application to adjust status; however, the AAO must correct the director's misstatements regarding legacy Immigration and Naturalization Service memos that interpret the unlawful presence provisions of § 212(a)(9)(B) of the Act. The director erroneously found that the applicant accrued unlawful presence in the United States from September 1996 to September 1997, and that a lawful readmission (as in the instant case, where the applicant was admitted to the United States in 2004 in H-1B status) voids prior unlawful presence in an adjustment proceeding.

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-
> >
> > > (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 under section 235(b)(1) or section 240, and again seeks admission

> within 3 years of the date of such alien's departure or removal . . . 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 application, the record indicates that the applicant entered the United States with a J-1 exchange student visa on July 9, 1992 with authorization to remain in the country for duration of status. The record reflects that the applicant remained in the United States after his J-1 status expired on June 30, 1996; hence, the director found that the applicant accumulated unlawful presence. As pointed out above, however, unlawful presence in general could not begin to accrue prior to April 1, 1997, because that was the effective date of the applicable section of law, § 212(a)(9)(B) of the Act.[1] Moreover, it must be re-emphasized that for persons who were admitted for duration of status, the tabulation of unlawful presence does not begin when the applicant is presumed to have fallen out of status (or on April 1, 1997), but rather when Citizenship and Immigration Services (CIS) or an immigration judge determines that there has been a status violation. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Field Operations, dated September 19, 1997.* Additionally, the CIS Adjudicator's Field Manual (AFM) states, in pertinent part:

> An alien who remains in the United States beyond the period of stay authorized by the Attorney General [Secretary] is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act.

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[1] **Pub. L. 104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)**
104th Congress Sept. 30, 1996 110 Stat. 3009

IIRIRA Section 301 (b)(3):
TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

IIRIRA Section 309. EFFECTIVE DATES; TRANSITION:
(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

> Under current Service [CIS] policy, unlawful presence is counted in the following manner for nonimmigrants.
>
> . . . .
>
> B. Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service [CIS] finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings...

Furthermore, 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 § 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* On October 12, 2004, the applicant filed an Application to Register Permanent Residence or Adjust Status, Form I-485. The applicant's J-1 status violation was not determined prior to his application to adjust status, at which point he was considered to be in a period of authorized stay; therefore, the applicant did not accrue unlawful presence at any time.

Because the applicant never accrued unlawful presence, he was never inadmissible under § 212 (a)(9)(B) of the Act. The AAO concurs with the director's finding that the applicant is eligible to adjust status under § 245(i) of the Act. The AAO therefore affirms the director's approval of the Application for Adjustment of Status.

ORDER: The director's November 20, 2006 decision is affirmed. The application is granted.