



U.S. Citizenship
and Immigration
Services

H2

[Redacted]

FILE:

[Redacted]

Relates)

Office: NEW YORK, NY

Date:

DEC 28 2009

IN RE:

[Redacted]

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

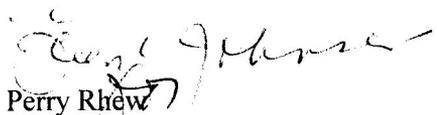
ON BEHALF OF APPLICANT:

[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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of India who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. The applicant's parents are lawful permanent residents. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States.

In her denial of the Form I-601, Application for Waiver of Ground of Excludability, the District Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to either of his lawful permanent resident parents. *Decision of the District Director*, dated January 30, 2009.

On appeal, counsel contends that the District Director erred in denying the applicant's Form I-601. He asserts that, although the District Director considered the hardships alleged by the applicant individually, she failed to do so in the aggregate, as required by *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994). *Form I-290B, Notice of Appeal or Motion*, dated February 25, 2009; *Counsel's Brief*, dated February 25, 2009.

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.

The record contains, but is not limited to, counsel's brief and statements from the applicant's parents regarding the hardship they would experience if the applicant's were to be removed from the United States. The entire record was reviewed and considered in reaching a decision on the appeal.

The AAO notes that the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, is based on a Form I-140, Petition for Alien Worker, benefiting his father, Rajan Moses. The Form I-140 petition was filed on behalf of the applicant's father on November 27, 2006 and approved on April 30, 2007. The applicant, however, may not benefit from the approval of the Form I-140. Although the children of I-140 beneficiaries may adjust their status to that of lawful permanent resident based on the approval of the petitions benefiting their parents, the applicant was over 21 years of age at the time the instant petition was filed and, therefore, no longer a child as defined in section 101(b)(1) of the Act.¹ The AAO observes that the District Director's denial of the applicant's Form I-485 also relied, in part, on this same reasoning.

In a brief submitted in response to the District Director's denial of the applicant's Form I-485, the applicant's counsel contends that the provisions of the Child Status Protection Act apply to the applicant and that the District Director failed to consider the requirements of section 203(h) of the Act in finding that the applicant could not benefit from the Form I-140 approved for his father. Counsel, however, has confused the process by which U.S. Citizenship and Immigration Services determines whether a derivative beneficiary has retained classification as a child under the Act with the initial determination of whether an individual is eligible for classification as a child.

Eligibility for an immigration benefit must be established at the time a petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The applicant in the present case turned 21 years of age on March 15, 2006. As a result, he was no longer a child on November 29, 2006, the date on which the Form I-140 benefiting his father was filed, and, therefore, cannot base his Form I-485 on the approval of that petition.

In that there is no underlying immigrant visa petition upon which to base the applicant's Form I-485, the applicant is not eligible for adjustment of status and the AAO finds no purpose would be served in considering the merits of his appeal. Accordingly, the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot.

¹ The record also indicates that the applicant was a derivative beneficiary on a prior Form I-140 filed on behalf of his father. Although this petition was filed when the applicant was not yet 21 years of age, it was denied by U.S. Citizenship and Immigration Services on October 22, 2004 and, therefore, also fails to provide a basis for the applicant's adjustment.