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



**U.S. Citizenship
and Immigration
Services**

H₂

FILE: [REDACTED] Office: PHILADELPHIA, PA

Date:

AUG 13 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h); and 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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[REDACTED]
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled. The applicant submitted a waiver of inadmissibility. The director found that the applicant's waiver of inadmissibility failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(6)(A)(i) of the Act. Counsel maintains that the applicant is eligible for adjustment of status under section 245(i) of the Act, and that if the applicant is inadmissible his Form I-601 waives that inadmissibility ground as the applicant has demonstrated extreme hardship to his U.S. citizen spouse and child.

The AAO will first address the finding of inadmissibility under section 212(a)(6)(A)(i) of the Act. Section 212(a)(6)(A)(i) of the Act provides the following:

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

. . .

Section 212(a)(6)(A)(i) of the Act states that an alien who is present in the United States without being admitted or paroled or who arrives in the United States at any time or place other than as designated by the Attorney General is inadmissible. The AAO notes that the director was correct in stating that the applicant is inadmissible under section 212(a)(6)(A)(i) of the Act as the record shows that he entered the United States without inspection in January 1993.

The applicant is seeking adjustment of status. Adjustment of status under the special adjustment provision, section 245(i) of the Act, 8 U.S.C. § 1255(i), provides that:

(i) Adjustment of status of certain aliens physically present in the United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –
(A) who -

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of -

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

. . .

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. . . .

Adjustment of status under section 245(i)(1) of the Act allows an alien who entered the United States without inspection and is the beneficiary of a petition for classification under section 204 of the Act which was filed with the Attorney General on or before April 30, 2001 to pay a fee and apply for adjustment of status to that of lawful permanent resident. To be eligible, the alien must be the beneficiary of a petition for classification under section 204 of the Act that was filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001. With the instant case, the director indicated in the adjustment of status denial letter that the applicant was the beneficiary of a petition for classification under section 204 of the Act; however, because the director determined that his petition was filed on July 18, 2001, the applicant was found not to qualify for adjustment of status under section 245(i)(1) of the Act.

On appeal, counsel contends that the submitted receipt notice reflects that the applicant is the beneficiary of a petition for classification under section 204 of the Act that was filed on April 26, 2001 and was "approvable when filed." Counsel maintains that the approval notice for the Form I-130, Petition for Alien Relative (Form I-130), reflects an erroneous priority date of July 18, 2001 because the petition was filed on April 26, 2001. The record before the AAO reflects that the Form I-130 filed on behalf of the applicant was received by the former Immigration and Naturalization Service (INS) on April 26, 2001. However, former counsel for the applicant was sent a rejection notice dated July 6, 2001, stating that the Form I-130 petition could not be accepted because it was not properly signed and that the Form I-130 and the fee were being returned to the applicant. The Form I-130 was then filed a second time with the INS on July 18, 2001. Because the record reflects that the Form I-130 petition was not properly filed on or before April 30, 2001, the director was correct in finding the applicant ineligible to apply for adjustment of status under section 245(i)(1) of the Act.

Furthermore, because the applicant was not admitted or paroled into the United States, the applicant is not eligible to apply for regular adjustment of status under section 245 of the Act, 8 U.S.C. § 1255, which requires, in part, that an alien be inspected and admitted or paroled into the United States. The regulation under 8 C.F.R. § 245.1(b)(3) provides that any alien who is physically present in the United States and who was not admitted or paroled is ineligible to apply for adjustment of status.

In summary, the applicant is not eligible for adjustment of status under sections 245(i)(1) or 245 of the Act, and no waiver is available for inadmissibility under section 212(a)(6)(A)(i) of the Act.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.