

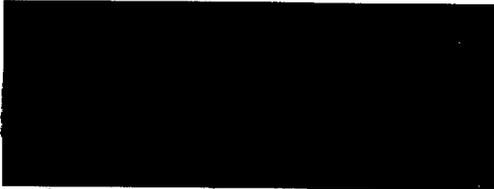
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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [Redacted]

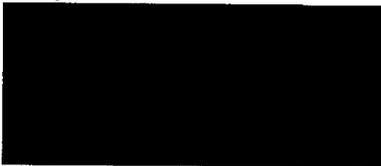
Office: ATHENS, GREECE

Date: AUG 31 2005

IN RE: [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:



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 waiver application was denied by the Officer in Charge, Athens, Greece, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Egypt 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 married to a naturalized United States citizen and seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The officer in charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the Officer in Charge*, dated April 22, 2004.

On appeal, counsel asserts that the officer in charge made several factual errors in the decision and that the applicant's spouse will suffer extreme hardship based on separation from the applicant. *Brief in Support of Appeal*, dated May 14, 2004.

The record contains, but is not limited to, a copy of the applicant's passport, I-94, marriage certificate and the applicant's spouse's medical records and affidavit. The entire record was reviewed and considered in rendering a decision on the appeal.

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 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 student visa in January 1997 with a duration of status notation on his I-94 Departure Record. *Applicant's Form I-94*. The applicant's course of study was to last two years, but he remained in the United States until February 2003 without obtaining an extension of stay. *Decision of the Officer in Charge*, at 1. In his decision, the officer in charge determined that the applicant was in "unauthorized status" from January 1999 until February 26, 2001, the date the officer in charge states that the applicant filed an adjustment of status application with the INS (now known as United States Citizenship and Immigration Services or USCIS). *Id.* The officer in charge's decision was written on April 22, 2004, after the applicant had left the United States. The record does not include any evidence that USCIS or an immigration judge found a status violation for the applicant while he was actually in the United States. Counsel asserts that the applicant never filed an adjustment of status application with USCIS. *Brief in Support of Appeal*, at 4. The AAO notes that there is no record of an adjustment of status filing with USCIS.

Chapter 30.1(d) of the CIS Adjudicator's Field Manual (AFM) states, in pertinent part:

(1) Counting of Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the authorized period of stay is unlawfully present and becomes subject to the 3- or 10-year bar to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service 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 USCIS 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....

See Memorandum by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, dated March 3, 2000.

Furthermore, the U.S. Department of State issued a cable addressing the issue of persons who were admitted for duration of status. The cable states that such a person, "...will only begin to accrue unlawful presence if either: an immigration judge (IJ) finds the alien has violated status and is excludable/deportable/removable, or the INS [USCIS], in the course of adjudicating a benefit (e.g. extension of stay or change of status), determines that a status violation has occurred." *State Department Cable (no.97-State-235245)*, dated December 17, 1997.

The AAO finds that a status violation was not determined prior to the applicant's departure from the United States and therefore, the applicant did not accrue unlawful presence.

Because the grounds for inadmissibility set forth in the officer in charge's decision are determined to be in error, the applicant has not been determined to be inadmissible under the Act. The applicant's appeal will be


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dismissed as the waiver application is moot due to the applicant not being inadmissible under section 212(a)(9)(B) of the Act.

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