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PROBATION

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H3



FILE:



Office: ATHENS

Date:

SEP 28 2005

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Russia 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 and seeking readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen 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.*

On appeal, the applicant asserts that he is not inadmissible, as he has not accrued unlawful presence in the United States. *Brief in Support of Appeal.* The applicant further asserts that his U.S. citizen spouse will suffer extreme emotional hardship should the applicant be prohibited from entering the United States. *Id.*

The record contains a statement from the applicant in support of the appeal; copies of letters from the applicant's employers; a statement from the sister of the applicant's spouse; a letter from a doctor regarding the applicant's spouse's health status; photographs of the applicant and his spouse; copies of letters from friends of the applicant; copies of the applicant's bank statements and tax documentation, and; documentation associated with the applicant's immigration history in the United States. 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.

....

(iii) Exceptions -

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section

208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

....

(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 was admitted to the United States in B-2 status as a visitor for pleasure on September 17, 1989, valid for a six-month period. He was approved for an extension of his B-2 status, valid until September 16, 1990. In 1990 the applicant applied for asylum in the United States based on a fear of persecution in Russia. Pursuant to his pending application for asylum, the applicant received work authorization. On August 16, 1999, an Immigration Judge denied the applicant's request for asylum. The applicant filed a timely appeal from the decision, and on March 18, 2002 an Immigration Judge affirmed the initial denial and granted the applicant voluntary departure, valid for 30 days. The applicant was subsequently approved for an extension of his voluntary departure period, valid until May 16, 2002. The applicant departed the United States in May 2002 and has not returned since that date.

The applicant was deemed inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. In her decision denying the applicant's Form I-601, Application for Waiver of Ground of Excludability, the officer in charge noted that the applicant has accrued approximately 13 years of unlawful presence. On appeal, the applicant highlights that he has been in a lawful status throughout his stay in the United States, including time in B-2 status, a period with a pending asylum application, and a period in which he was approved for voluntary departure.

Upon review, the evidence does not show that the applicant has accrued unlawful presence in the United States such that he is inadmissible under section 212(a)(9)(B)(i) of the Act. The applicant applied for asylum in 1990, prior to the enactment of the unlawful presence provisions under the Act. His application was pending until his appeal was dismissed by an Immigration Judge on March 18, 2002. This period of stay in the United States falls under the exception to unlawful presence provided in section 212(a)(9)(B)(iii)(II) of the Act, thus it is not deemed unlawful presence. It is noted that the applicant obtained employment authorization while his asylum application was pending, and the record does not show that he engaged in unauthorized employment that would render him ineligible for an exception under section 212(a)(9)(B)(iii)(II) of the Act. The applicant was under an active voluntary departure order from the time that his asylum appeal was denied by an Immigration Judge until he departed the United States, thus this period is not deemed unlawful presence. As the applicant has not accrued unlawful presence in the United States, he is not

inadmissible under section 212(a)(9)(B)(i) of the Act.¹ Therefore, the applicant does not require a waiver of inadmissibility, and the application is deemed moot.

ORDER: The appeal is sustained, the prior decision of the officer in charge is withdrawn, and the application for waiver of inadmissibility declared moot.

¹ The officer in charge indicated that the applicant had accrued approximately 13 years of unlawful presence as of the date of her decision, rendered in approximately May 2004. It is noted that the unlawful presence provisions under the Act were enacted on April 1, 1997. Therefore, time that an alien was present in the United States without a legal status prior to April 1, 1997 is not deemed unlawful presence for the purpose of assessing admissibility under section 212(a)(9)(B)(i) of the Act. Accordingly, the maximum amount of unlawful presence that any alien could have accrued as of the date of the officer in charge's decision would be approximately seven years, from April 1, 1997 to May 2004.