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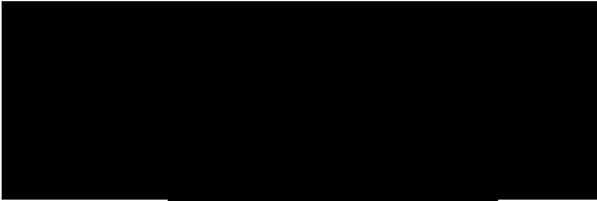
U.S. Department of Homeland Security  
20 Massachusetts Ave. N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE:



Office: NEW DELHI, INDIA Date: DEC 01 2006

IN RE:



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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Officer in Charge (OIC) New Delhi, India, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application declared moot.

The applicant, [REDACTED] is a native and citizen of India 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 being unlawfully present in the United States for more than one year, departing, and then again seeking admission within ten years of the date of his departure. [REDACTED] seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States with his U.S. citizen (USC) wife, [REDACTED] and their two children.

The OIC found that the applicant was inadmissible based on his unlawful presence of more than a year, his departure, and again seeking readmission within ten years of the date of his departure. The OIC further found that the applicant failed to establish extreme hardship to his USC wife and denied the application. *Decision of the OIC, dated March 31, 2005.*

On appeal, the applicant asserts that he was not unlawfully present for more than a year because he had a valid employment authorization document (EAD). *See EAD issued April 26, 1999, valid until April 25, 2000.*

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, or
- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within ten years of the date of such alien's departure or removal from the United States,

is inadmissible.

....

(v) Waiver. - The Attorney General [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 reflects that [REDACTED] entered the United States without inspection in 1992. On October 22, 1992, he filed an application for asylum (Form I-589). Service records indicate that he received EADs based on his pending Form I-589 from February 3, 1993, until June 21, 1995, and then again from February 21, 1997, until February 21, 1998. [REDACTED] married a naturalized USC on November 17, 1997. On May 19, 1998, he filed an application for adjustment of status to lawful permanent resident (Form I-485) based on an approved family visa petition (Form I-130) as the spouse of a USC. On January 18, 2000, [REDACTED] asked that her Form I-130 be withdrawn. On February 25, 2000, the Form I-485 was denied because the visa petition had been withdrawn. On October 17, 2000, the applicant, his wife, and two USC children departed the United States and moved to India and have resided in India until now. On April 24, 2001, [REDACTED] filed another Form I-130 on [REDACTED] behalf. The Service approved this petition on May 23, 2001.

The OIC found that the applicant accrued more than 36 months of unlawful presence after April 1, 1997 due to his employment as a truck driver. *See decision of the OIC, dated March 31, 2005.* The AAO notes that, per section 212(a)(9)(B)(ii) of the Act, 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 unlawful presence, unless the alien has been working without authorization. The applicant's asylum application was administratively closed on August 16, 2002. On February 21, 1997, the Service issued [REDACTED] an EAD based on his pending Form I-589, valid until February 21, 1998. He was, therefore, working with authorization. On May 19, 1998, the applicant filed his Application to Adjust Status to Lawful Permanent Resident (Form I-485). The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General as an authorized period of stay for purposes of determining bars to admission under section 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.*

The AAO finds that [REDACTED] accrued 87 days of unlawful presence between the time his EAD based on his pending Form I-589 expired on February 21, 1998, until May 19, 1998, when he filed his Form I-485. The filing of his Form I-485 stopped the accrual of unlawful presence until the Form I-485 was denied on February 25, 2000. He accrued an additional 235 days of unlawful presence between the time his Form I-485 was denied and October 17, 2000, when he departed the United States. Therefore, he accrued a total of 322 days of unlawful presence, which is more than 180 days, but less than one year.

[REDACTED] was, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days, not under section 212(a)(9)(B)(i)(II), for being unlawfully present for more than one year. Pursuant to section 212(a)(9)(B)(i)(I), [REDACTED] was barred from again seeking admission within three years of the date of his departure.

The applicant's departure occurred in 2000. It has now been more than three years since the departure that made the inadmissibility issue arise in his application. A clear reading of the law reveals that the applicant is

no longer inadmissible. He, therefore, does not require a waiver of inadmissibility, so the appeal will be dismissed, the decision of the OIC will be withdrawn and the waiver application will be declared moot.

**ORDER:** The appeal is dismissed, the prior decision of the OIC is withdrawn and the application for waiver of inadmissibility is declared moot.