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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: BOSTON, MA

Date: AUG 17 2007

IN RE:

[Redacted]

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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Boston, Massachusetts. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the decision of the district director withdrawn and the waiver application declared moot.

The applicant is a native and citizen of Ecuador 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 ten years of his last departure from the United States. The applicant has a U.S. citizen son and seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen son. The application was denied accordingly. *Decision of the District Director*, dated November 2, 2005.

On appeal, counsel asserts that the applicant had no notice that he would be deemed inadmissible after having been unlawfully present in the United States and that he had no knowledge that his departure would trigger a ten-year bar to admission. Counsel states that this absence of notice is a violation of the applicant's due process rights. Counsel also states that because the applicant was never removed, he is not subject to the ten-year bar. Finally, counsel states that all the evidence regarding extreme hardship to the applicant's son was not considered by the district director. *Counsel's Brief*, dated December 15, 2005.

Counsel asserts that the applicant's due process rights were violated. The AAO notes that constitutional issues are not within the appellate jurisdiction of the AAO. Therefore, this assertion will not be addressed in the present decision.

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 indicates that the applicant first entered the United States in 1985 without inspection. The applicant filed his first application for permanent residence on February 25, 1997 and then departed the United States sometime after this filing. On November 10, 1999 this application was denied. On February 19, 2000, the applicant re-entered the United States using an Advanced Parole document and the record does not indicate that he has departed since then. On February 20, 2003, the applicant submitted the Form I-485, Application to Register Permanent Resident or Adjust Status.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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.* Therefore, the applicant accrued unlawful presence from November 10, 1999, the date his first permanent residence application was denied until February 2000 when he departed the United States. The applicant did not accrue unlawful presence prior to February 1997 because the unlawful presence provisions under the Act were not enacted until April 1, 1997. The applicant is, therefore, not inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act because his unlawful presence in the United States totals less than 180 days.

Thus, the ground for inadmissibility set forth in the district director's decision is determined to be in error, as the applicant has not been determined to be inadmissible under the Act. The previous decision of the district director will be withdrawn. The applicant's appeal will be dismissed and his waiver application will be declared moot.

ORDER: The appeal is dismissed. The waiver application is declared moot and the previous decision of the district director withdrawn.