

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H3

FILE: [REDACTED]

Office: NEWARK, NJ

Date: JUN 21 2007

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant has been determined not to be inadmissible and the waiver application is therefore moot.

The applicant is a native and citizen of Columbia who was found to be inadmissible to the United States pursuant to sections 212(a)(9)(B)(i)(II); 212(a)(9)(C)(i)(I) and (II); 212(a)(9)(A)(i); and 212(a)(9)(A)(ii)(I) and (II) of the Immigration and Nationality Act (the Act). The applicant's father is a naturalized citizen of the United States. The applicant 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). The District Director denied the application finding the record did not support a waiver of inadmissibility. Counsel submits additional documentation on appeal.

The AAO will first address the director's finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II).

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (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, 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.

...

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The three- and ten-

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² DOS Cable, supra.; and IIRIRA Wire #26, HQIRT 50/5.12.

year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra*. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects the following. The applicant first entered the United States without inspection on January 20, 1986 at or near San Ysidro, California, and was apprehended by the U.S. Border Patrol at San Diego, California. On April 22, 1986, deportation proceedings were held in absentia against the applicant when he failed to appear before the immigration judge, and the immigration judge ordered the applicant deported from the United States to Columbia. The applicant claims to have self-deported prior to September 1989 and to have entered without inspection after September 1989. On April 19, 1990, a warrant of deportation was issued, and on May 14, 1990, the applicant failed to appear before the Deportation Branch as requested. The applicant filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212), which was approved on July 1, 1991. The record does not indicate that the applicant has left the United States since his return in September 1989.

The AAO finds that the applicant was unlawfully present in the United States for more than one year. He entered the United States without inspection in 1986. For purposes of section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence on April 1, 1997. Nevertheless, the record does not indicate, and the district director did not find, that the applicant subsequently departed the United States after accruing more than one year of unlawful presence. Thus, although the applicant accrued unlawful presence as of April 1, 1997, the three- and ten-year bars have not been triggered by a departure of the applicant from the United States. Consequently, the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant was also found inadmissible pursuant to sections 212(a)(9)(C)(i)(I) and (II) of the Act.³ The Act at 212(a)(9)(C)(i)(I) states any alien who has been unlawfully present in the United States for an aggregate period of more than 1 year and who enters or attempts to reenter without being admitted is inadmissible. The AAO has already determined that the applicant did not accrue unlawful presence in the United States after April 1, 1997. He is therefore not inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

Section 212(a)(9)(C)(i)(II) of the Act states that any alien who has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible. Section 212(a)(9)(C)(i)(II) of the Act applies to those aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any

³ The AAO notes that inadmissibility under section 212(a)(9)(C) is cured by the filing of an I-212, and therefore, is not properly discussed in an I-601 proceeding, but, as the director discussed this inadmissibility in her decision, the AAO will likewise analyze the applicant's inadmissibility under this section.

time on or after April 1, 1997. An alien may be placed in removal proceedings before or after April 1, 1997, but the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997.⁴

On April 22, 1986 an order of deportation was entered in absentia against the applicant pursuant to section 242(b) of the Act. A warrant of deportation was issued on April 19, 1990. The applicant had reentered the country in 1989. The applicant's orders of deportation and reentry all occurred prior to April 1, 1997. Consequently, he is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

In addition, the applicant was found inadmissible under sections 212(a)(9)(A)(i) and 212(a)(9)(A)(ii)(I) and (II) of the Act based on his order of deportation. A waiver of these sections is found at section 212(a)(9)(A)(iii) of the Act. This waiver is applied for through the submission of a Form I-212. The record indicates that the applicant's Form I-212 was approved on July 1, 1991. There is nothing in the record to indicate that it has been revoked or otherwise nullified.

Based on the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II), of the Immigration and Nationality Act (the Act). As the applicant is not required to file the I-601 waiver application, the appeal of the denial of the waiver will be dismissed.

ORDER: The decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.

⁴ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043).