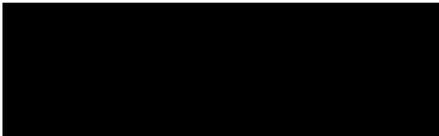




U.S. Citizenship
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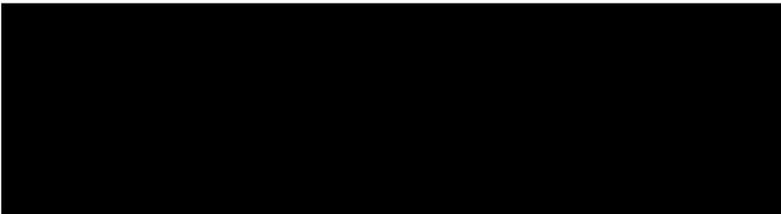
MAR 23 2007

IN RE:



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, Chief
Administrative Appeals Office

DISCUSSION: The Interim District Director, Philadelphia, Pennsylvania, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the interim district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of the Dominican Republic 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 is the spouse of a U.S. citizen. He 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 reside in the United States with his spouse.

The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Interim District Director*, dated January 13, 2004. On February 12, 2004, counsel filed a motion to reopen the applicant's Form I-601 and submitted additional evidence. The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the motion to reopen accordingly. *Decision of the Interim District Director*, dated February 19, 2004

The record reflects that, on April 29, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed by the applicant's previous U.S. citizen spouse, [REDACTED]. On November 19, 1999, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart the United States on December 14, 1998, and return to the United States on January 25, 1999. The applicant has not departed the United States since that date. On June 19, 1999, the applicant's Form I-485 was denied after he failed to appear for an interview. On January 19, 2001, the applicant divorced [REDACTED]. On February 24, 2001, the applicant married his current U.S. citizen spouse [REDACTED]. On March 30, 2001, the applicant filed a second Form I-485 based on a Form I-130 filed on his behalf by [REDACTED]. On September 25, 2001, the applicant appeared at Citizenship and Immigration Services' (CIS) Philadelphia, Pennsylvania District Office. The record reflects that, in March 1991, the applicant entered the United States without inspection and remained unlawfully in the United States. On November 19, 1998, the applicant was issued advance parole. The applicant left and returned to the United States utilizing the advance parole on January 25, 1999. On November 2, 2001, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel contends that the applicant's spouse would suffer extreme hardship. *See Counsel's Brief*, dated April 19, 2004. The entire record was reviewed in rendering a decision in this case.

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 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 interim district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's testimony that he was unlawfully present in the United States from June 19, 1999, the date on which his first Form I-485 was denied, until March 30, 2001, the date on which he submitted the second Form I-485.

On appeal, counsel does not contest the interim district director's determination of inadmissibility, however, the AAO finds that the applicant has not accrued unlawful presence in the United States that would cause him to be inadmissible under section 212(a)(9)(B)(i) of the Act. Despite entering the United States in 1991, the applicant could not begin to accrue unlawful presence until April 1, 1997, the date of enactment of the unlawful presence provisions of section 212(a)(9)(B)(i) of the Act. 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 sections 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.* Since the applicant had already filed an affirmative application for adjustment of status prior to April 1, 1997, he was in a period of stay authorized by the attorney general prior to the enactment of the unlawful presence provisions and until the Form I-485 was denied on June 19, 1999. His departure in January 1999 did not trigger inadmissibility under section 212(a)(9)(B)(i) of the Act. After the denial of his initial application for adjustment of status, the applicant remained in the United States without authorization until the filing of his second application for adjustment of status on March 30, 2004. Though he was present without authorization for a period of time, unlawful presence under section 212(a)(9)(B)(i) of the Act is not triggered until an alien leaves the United States. In the present matter, the applicant has not departed since his last departure in 1999. He has, therefore, not accrued unlawful presence and is not inadmissible under section 212(a)(9)(B)(i) of the Act.

The AAO notes that the interim district director denied the applicant's Form I-485 on January 13, 2004, the same date as the original denial of the Form I-601. However, as the final determination on the Form I-485

application is dependent on the Form I-601, which is the subject of this appeal, the AAO finds that no final decision should have been issued on the Form I-485. A clear reading of the law reveals that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. He, therefore, does not require a waiver of inadmissibility, so the decision of the interim district director will be withdrawn and the waiver application will be declared moot. As the AAO has found that the applicant is not inadmissible, the interim district director must reopen the application for adjustment of status to re-examine the applicant's eligibility.

ORDER: The appeal is dismissed, the decision of the interim district director is withdrawn and the application for waiver of inadmissibility is declared moot.