

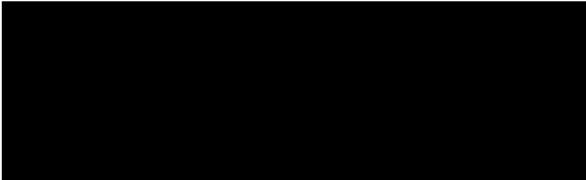
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

FEB 12 2008

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:



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 Director, Vermont Service Center and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Iraq 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 is the husband and father of U.S. citizens and seeks a waiver of inadmissibility in order to reside in the United States with his family.

The director found that the record failed to establish that the denial of the Form I-601, Application for Waiver of Grounds of Inadmissibility, would result in extreme hardship to the applicant's spouse. He denied the application accordingly. *Decision of the Director*, dated May 14, 2007.

On appeal, counsel contends that the applicant's unauthorized presence in the United States was minimal. He further states that the medical problems of the applicant's spouse warrant the approval of the applicant's waiver application. *Form I-290B, Notice of Appeal or Motion*, dated June 11, 2007.

The record indicates that the applicant was admitted to the United States on April 23, 2001 on a B-2 nonimmigrant visa valid until October 22, 2001. On August 28, 2001, the applicant filed a Form I-589, Application for Asylum and for Withholding of Removal. The applicant's Form I-589 was denied by the immigration judge on January 3, 2003 and he appealed to the Board of Immigration Appeals (BIA). On April 23, 2004, the BIA affirmed the immigration judge's decision. On June 2, 2004, the applicant departed the United States to seek asylum in Canada and, based on the record, has remained in Canada since that date.

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

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 AAO notes that the director determined that the applicant's period of authorized stay in the United States ended on October 22, 2001 and that he accrued unlawful presence until he departed the United States in 2004, thus making him subject to the ground of inadmissibility in section 212(a)(9)(B)(i)(II) of the Act. However, based on the record, the AAO finds the director to have erred in concluding that the applicant accrued more than one year of unlawful presence in the United States.

On April 23, 2001, the applicant was admitted to the United States as a B-2 visitor for a six-month period ending on October 22, 2001. Prior to the expiration of his nonimmigrant status, the applicant applied for asylum. Pursuant to section 212(a)(9)(B)(iii) of the Act, no period of time in which an alien has a pending bona fide application for asylum may be taken into account in determining unlawful presence, unless the alien was employed without authorization in the United States. Citizenship and Immigration Services (CIS) considers an asylum application to be pending while an alien is in administrative or judicial proceedings. [REDACTED] Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, 96ACT 043, HQIRT 50/5.12 (June 17, 1997). Accordingly, if the applicant in the present matter was not employed without authorization during the period that began on August 27, 2001 with the filing of the Form I-589 and ended on April 23, 2004 with the BIA's affirmation of the immigration judge's denial, the applicant's unlawful presence in the United States is limited to a 39-day period, that began April 24, 2004 and ended June 2, 2004 with his departure to Canada.

In the record are copies of Employment Authorization Documents (EADs) issued to the applicant, which indicate that he was authorized employment in the United States from February 19, 2002 until March 31, 2005. The Form G-325A, Biographic Information sheet, submitted for the applicant indicates that his U.S. employment began in August 2002. A May 26, 2004 letter from the Health Sciences Center at the University of Oklahoma states that their employment of the applicant began on August 1, 2003 and ended on April 26, 2004, two days after the BIA's issuance of its decision regarding the applicant. As the record establishes by a preponderance of evidence that the applicant did not work in the United States without authorization, the AAO finds that he did not accrue more than 39 days of unlawful presence in the United States. Accordingly, he does not need to seek a waiver of inadmissibility under either section 212(a)(9)(B)(i)(I) or section 212(a)(9)(B)(i)(II) of the Act.

In that the applicant is not inadmissible to the United States under section 212(a)(9)(B) of the Act, the director's decision will be withdrawn and the appeal will be dismissed as the underlying application is unnecessary and, therefore, moot.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the director's decision will be withdrawn and the appeal dismissed as the underlying application is moot.

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