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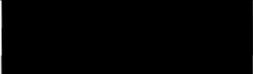
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FILE:



Office: JACKSONVILLE, FLORIDA

Date: **MAR 26 2008**

IN RE:

Applicant:



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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge (OIC), Jacksonville, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), thus the relevant waiver application is moot.

The applicant, \_\_\_\_\_ is a native and citizen of Iran who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than 1 year. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the OIC denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the OIC, dated October 25, 2005.* The applicant submitted a timely appeal.

On appeal, counsel states that the applicant did not accrue more than 180 days of unlawful presence in the United States prior to filing for adjustment of status. Counsel states that the applicant entered the United States at Blaine, Washington, on December 28, 1999 as a B-2 visitor with authorization to stay until December 30, 2000. The applicant remained in the United States, counsel states, for one day of shopping in Seattle, Washington, returning to Canada the same day. He states that the OIC was incorrect in finding the applicant remained in the United States until she filed for adjustment of status on December 18, 2001.

Section 212(a)(9)(B)(i)(I) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup>

The three- and ten-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. *See* DOS Cable, note 1. *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

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<sup>1</sup> 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).

<sup>2</sup> *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

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 that the applicant entered the United States at Blaine, Washington, on December 28, 1999 as a B-2 visitor with authorization to stay until December 30, 2000. It shows that on March 15, 2001 she was issued a visa from the U.S. post in Vancouver, Canada, with a June 14, 2001 expiration date and the annotation that the applicant is a permanent resident in Canada. The record shows that she filed an application to adjust status as a permanent resident on December 18, 2001. It shows that she was paroled into the United States on September 6, 2004 for the purpose of pursuing the pending adjustment application.

Counsel states that on April 29, 2001 the applicant entered the United States by crossing over land in Blaine, Washington, in a motor vehicle. He states that she traveled to Florida and on June 15, 2001 was issued a Florida driver's license.

The letter dated November 20, 2001 by \_\_\_\_\_ the director with London School Hairdressing and Aesthetics, indicates that the applicant completed 1500 hours of training in Hairdressing between the months of March 2000 and February 2001. The Visa statements in the record reflect transactions in Canada for the entire year of 2000 up to April 17, 2001.

It is noted that the record shows the applicant as entering the United States sometime in 2001. The applicant's visa was issued on March 15, 2001, with an expiration date of June 14, 2001. The applicant therefore must have used the visa between March 15, 2001 and June 14, 2001. On appeal, counsel states that the applicant entered on April 29, 2001. If so, her period of her authorized stay began on that date. Because the applicant's Form I-94 is not in the record, the AAO is unable to determine the actual period of authorized stay. However, the normal period of time given for an authorized stay is six months, which would bring the applicant to September 29, 2001. The Form I-485 was filed on December 18, 2001, so if the September 29 date is correct, there were less than 180 days of unlawful presence in the United States. The AAO notes, however, that sometimes the period of authorized stay given is shorter than six months, sometimes as little as a week. It is conceivable that the applicant had more than 180 days, but this cannot be determined from the record. In any event, even if she had entered on March 15, 2001 with one week of authorized stay, it would have been less than one year before she filed her Form I-485.

As previously stated, section 212(a)(9)(B)(i)(I) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The AAO notes that the director denied the applicant's I-485 application on the same date as the denial of the I-601 application. The applicant was not afforded the opportunity to pursue the appellate process prior to the denial of the I-485. The AAO finds that the denial of the I-485 was premature and that, as of today, the applicant is still seeking admission by virtue of adjustment from her parole status.

Based on the documentation in the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act. The waiver filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

**ORDER:** The October 25, 2005 decision of the OIC is withdrawn. The appeal is dismissed as the underlying application is moot.