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U.S. Citizenship
and Immigration
Services

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H3

[Redacted]

FILE:

[Redacted]

Office: PHILADELPHIA, PA

Date:

MAY 12 2008

IN RE:

Applicant:

[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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (I-601 application) was denied by the District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The decision of the district director will be withdrawn, and the I-601 application declared moot.

The record reflects that the applicant is a native and citizen of the United Kingdom. The applicant 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 and less than one year. The applicant has a United States citizen wife, and 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).

The district director found that the applicant had failed to establish his wife would suffer extreme hardship if he were denied admission into the United States. The I-601 application was denied accordingly.

On appeal, the applicant indicates, through counsel, that he fully complied with all U.S. Citizenship and Immigration Services (CIS) requests for evidence, and that CIS unreasonably and detrimentally delayed the processing of his adjustment of status application for four years. The applicant indicates, through counsel that he would not have left the United States and become inadmissible had CIS processed his adjustment of status application in a timely manner. The applicant concludes that CIS should therefore be estopped from enforcing the unlawful presence ground of inadmissibility against him. The applicant does not address the district director's finding that he failed to establish his wife would suffer extreme hardship if he were denied admission into the United States.

The AAO is unpersuaded by the applicant's assertions. The AAO notes first that its appellate jurisdiction is limited to the authority specifically granted to the AAO by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The AAO's appellate jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003), and the AAO has no jurisdiction over unreasonable delay claims arising under the Act or pursuant to constitutional due process claims. *See generally*, 8 C.F.R. § 103.1(f)(3)(iii) (2003) and 8 C.F.R. § 2.1 (2004). *See also Fraga v. Smith*, 607 F.Supp. 517 (U.S. Dist. Ct. Or. 1985) (relating to federal court jurisdiction over such claims.) The AAO notes further that estoppel is an equitable form of relief that is available only through the courts, and that the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991).

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

- (i) [A]ny 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, . . . is inadmissible.

(v) Waiver. – The Attorney General [Secretary, Department, Homeland Security] 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.

In the present matter, the record reflects that the applicant was admitted into the United States in H-2 non-immigrant status. The H-2 visa authorization expired on May 31, 1999. The applicant married a U.S. citizen on July 19, 1997. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) on December 21, 1999, 204 days after the applicant's H-2 nonimmigrant visa status expired. The applicant obtained Authorization for Parole of an Alien into the United States (Form I-512) on April 18, 2000. He subsequently departed the United States on May 1, 2000. On May 18, 2000, the applicant used his advance parole authorization to reenter the United States. The applicant became subject to section 212(a)(9)(B)(i)(I) of the Act inadmissibility provisions upon his May 1, 2000, departure from the United States.

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. In the present matter, the applicant accrued unlawful presence from May 31, 1999, until December 21, 1999, the date his Form I-485 application was properly filed. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year.

Pursuant to the terms of section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of his departure from the United States. The AAO notes, however, that 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). In the present case, the district director denied the applicant's Form I-485 application for adjustment of status on February 2, 2004, the same date as the denial of the applicant's I-601 application. The applicant was thus not afforded the opportunity to pursue the appellate process relating to his I-601 application denial prior to the district director's denial of his I-485 application.

The AAO finds, upon review of the evidence, that the district director's denial of the I-485 application was premature, and that, as of today, the applicant is still seeking admission into the United States by virtue of adjustment from his parole status. The record reflects that the applicant's last departure from the United States occurred in May 2000. More than three years have therefore passed since the departure that made the applicant inadmissible under section 212(a)(9)(B)(i)(I) of the Act. Accordingly, based on a reading of

the law, the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(I) of the Act, and the present I-601 application is moot.

ORDER: The appeal is dismissed. The decision of the district director is withdrawn, and the I-601 application for a waiver of inadmissibility is declared moot.