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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

H3

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 28 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v)
of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF PETITIONER:

[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 "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the service center director will be withdrawn, and the application declared moot.

The applicant is a native and citizen of Venezuela who was admitted to the United States on January 6, 2000 as a visitor for pleasure with authorization to remain until July 5, 2000. He 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 one year. The applicant is the spouse of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative and seeks a waiver of inadmissibility in order to remain in the United States with his wife.

The service center director found 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 Service Center Director* dated February 28, 2007.

On appeal, counsel asserts that the U.S. Citizenship and Immigration Services (USCIS) applied the wrong standard and did not give proper consideration to the evidence presented in the case. *See Notice of Appeal to the AAO (Form I-290B)*.

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, . . . is inadmissible.

(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 [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.

In the present case, the record indicates that the applicant entered the United States as a B2 visitor for pleasure on January 6, 2000 with authorization to remain in the United States until July 5, 2000. On June 13, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On September 16, 2003, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512). The applicant departed the United States and reentered the United States on September 28, 2003 using the advance parole authorization.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of authorized 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. The applicant accrued unlawful presence from July 5, 2000 until June 13, 2001, the date of his proper filing of the Form I-485. As noted by the service center director in a decision denying the applicant's application for adjustment of status, the applicant was unlawfully present in the United States for less than 365 days. The applicant was inadmissible 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 section 212(a)(9)(B)(i)(I) of the Act, the applicant was barred from again seeking admission within three years of the date of his departure in September 2003.

An application for admission or adjustment of status 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 service center director denied the applicant's I-485 application before denying the I-601 application, erroneously stating in that decision that the I-601 application had been denied. *See Decision of the Service Center Director denying Form I-485* dated June 24, 2006. 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 his parole status. The applicant's last departure occurred in 2003. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible.

ORDER: The appeal is dismissed, the prior decision of the director is withdrawn, and the application for a waiver of inadmissibility is declared moot. The director shall reopen the denial of the I-485 application and continue processing the application for adjustment of status.