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U.S. Department of Homeland Security
20 Massachusetts Ave., NW., Room 3000
Washington, D.C. 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: ST. PAUL, MINNESOTA

Date: JAN 06 2009

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. section 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

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 District Director, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot. The matter will be returned to the district director for continued processing.

The record shows that the applicant is a native and citizen of Nigeria 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 one year or more. 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 U.S. citizen spouse.

In a decision dated July 11, 2006, the director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On August 14, 2006, counsel for the applicant filed a Form I-290B, Notice of Appeal. No reason for appeal was stated on the appeal form, although counsel checked the block indicating that he was requesting 30 days to submit a brief and/or evidence to the AAO. In a letter attached to the Form I-290B, counsel reiterated that he would need additional time to prepare a brief but did not state any reason for the extension request, or any reason for the appeal. Because the record shows that no further brief or documentation was submitted by counsel or the applicant after the appeal was filed, on December 12, 2008, the AAO issued a request for a copy of the brief and/or additional evidence. Counsel responded on December 19, 2008, stating that all documents were submitted at the time of the appeal, and counsel had not intended to submit further record. Counsel resubmitted copies of evidence already in the record and requested that the AAO take into account the fact that the applicant and his spouse have been married since 1995; the approval of the Form I-130, Petition for an Alien Relative, filed on behalf of the applicant; and the hardship to the applicant's spouse described in her affidavit and in her psychologist evaluation. Counsel also asserts that, based on an Immigration and Naturalization Services, now U.S. Citizenship and Immigration Services (USCIS), interoffice memorandum, the grant of advance parole to the applicant in 2001 should be interpreted as an indication that a waiver of inadmissibility would be granted.

The entire record was reviewed and considered in rendering this decision.

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

(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 [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 record reflects that the applicant entered the United States without inspection in July 1994. On October 7, 1995, the applicant married his current U.S. citizen spouse. In March 1996, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. In July 2001, while the Form I-485 was pending adjudication, the applicant applied for, and was granted, Authorization for Advance Parole (Form I-512). The applicant departed the United States in July 2001 and returned to the United States in August 2001.

In his decision, the director determined that the applicant was in unlawful status from his entry in 1994 through July 2001, when he departed the United States, and that his departure in 2001 triggered the ten-year bar to admissibility pursuant to Section 212(a)(9)(B)(II) of the Act. However, it is noted that the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized 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.* Since the applicant properly filed a Form I-485 in March 1996, prior to the April 1, 1997 enactment of the unlawful presence provisions under the Act, the applicant has not accrued unlawful presence for purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the director's determination that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act is in error and is hereby withdrawn.

Because the ground for inadmissibility set forth in the director's decision is in error and there appears to be no other grounds for inadmissibility in this instance, the AAO finds that the applicant has not been determined to be inadmissible under the Act. Therefore, the applicant's appeal will be dismissed and his application for waiver of inadmissibility will be declared moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.