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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

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FILE: [REDACTED] Office: KINGSTON, JAMAICA

Date:

JUN 01 2009

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:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Kingston, Jamaica and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the officer in charge will be withdrawn and the application declared moot. The matter will be returned to the officer in charge for continued processing.

The applicant is a native and citizen of Jamaica 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen mother.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the Officer in Charge*, dated July 18, 2007.

On appeal, counsel submits a brief, dated September 12, 2007 and referenced exhibits. In addition, on November 8, 2007, counsel submitted additional documentation in support of the appeal. The entire record was reviewed and considered in rendering this decision.

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

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....

In the present application, the record indicates that the applicant entered the United States with a student visa in 1995 to study at Hocking College, with authorization to remain in the country for duration of status. The applicant completed her two-year course in one year, thereby terminating her studies in August 1996. As such, as of August 1996, she was present in the United States without status.

Pursuant to the record, miscommunication occurred between the International Services Staff at Hocking College and international students, including the applicant, with regard to the processing of their Optional Practical Training (OPT) applications. *See Letter from [REDACTED] Assistant Vice President/PDSO, Student Affairs, Hocking College, dated May 18, 2006.* In 1997, the applicant departed the United States, and subsequently re-entered the United States in 1998, using her student visa. The applicant again departed the United States in 2000.

The decision of the officer in charge found that the applicant's departure triggered the tabulation of unlawful presence provisions under the Act. The officer in charge determined that the applicant accrued unlawful presence from the period when she completed her studies, in August 1996, until she departed the United States in 1997.¹ The officer in charge further noted that since the applicant re-entered in March 1998 by improperly using her student visa, she accrued unlawful presence from 1998 until her departure in 2000. The officer in charge concluded that the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

The AFM states, in pertinent part:

An alien who remains in the United States beyond the authorized period of stay is unlawfully present and becomes subject to the 3- or 10-year bar to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants:

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Card.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date USCIS finds a status violation while adjudicating a request for

¹ The AAO notes that the date of the enactment of the unlawful presence provisions was April 1, 1997. As such, any unlawful presence prior to that date can not be considered for purposes of inadmissibility under section 212(a)(9)(B) of the Act.

another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings....

See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, dated May 6, 2009. The AAO finds that a status violation was not determined prior to the applicant's departures from the United States and therefore, the applicant did not accrue unlawful presence.

Based on the record, it has not been established that the applicant accrued unlawful presence under section 212(a)(9)(B) of the Act. The AAO thus finds that the applicant is not inadmissible. Therefore, the Form I-601 is moot. Having found that the applicant is not in need of the waiver, no purpose would be served in discussing whether she has established extreme hardship to her U.S. citizen mother. Accordingly, the appeal will be dismissed, the prior decision of the officer in charge is withdrawn and the application for a waiver of inadmissibility is declared moot.

ORDER: The appeal is dismissed, the prior decision of the officer in charge is withdrawn and the application for a waiver of inadmissibility is declared moot. The officer in charge shall continue to process the immigrant visa application accordingly.