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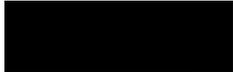
U.S. Citizenship
and Immigration
Services

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FILE:



Office: LIMA, PERU

Date: JUL 29 2008

IN RE:

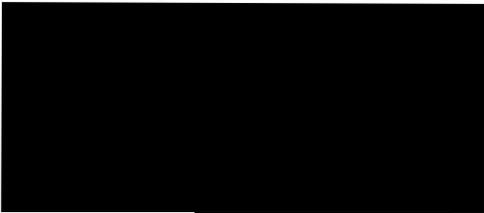
Applicant:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-In-Charge (OIC), Lima, Peru, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The record reflects that the applicant is a native and citizen of Peru, who initially entered the United States without inspection on March 9, 1991. On September 28, 1994, the applicant filed a Request for Asylum (Form I-589), which was referred to an immigration judge. On August 15, 1995, an Order to Show Cause (OSC) was issued against the applicant. On February 8, 1996, an immigration judge granted the applicant voluntary departure to depart the United States by April 8, 1996. On February 20, 1996, the applicant filed an appeal with the Board of Immigration Appeals (Board). On February 22, 2001, the applicant's employer filed an Immigrant Petition for Alien Worker (Form I-140) on behalf of the applicant. On June 11, 2001, the Board dismissed the applicant's appeal. The applicant failed to depart the United States as ordered. On August 8, 2001, the applicant's Form I-140 was approved. On October 3, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On July 14, 2003, a Warrant of Removal/Deportation (Form I-205) was issued, and on July 31, 2003, the applicant was removed from the United States. On November 7, 2003, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On May 21, 2004, the applicant's Form I-212 was approved. On July 22, 2004, the applicant's employer filed another Form I-140 on behalf of the applicant, which was approved on November 11, 2004. On December 22, 2005, the applicant filed an Application for Waiver of Grounds of Excludability (Form I-601). On March 20, 2006, the OIC denied the applicant's Form I-601, finding that the applicant failed to demonstrate extreme hardship to his United States citizen spouse.

On appeal, the applicant's wife states that she and her sons have suffered extreme hardship since the applicant was removed from the United States. *Affidavit of [REDACTED]*, filed April 20, 2006.

The AAO notes that the applicant 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 and seeking readmission within 10 years of his last departure from the United States. However, the AAO notes that the applicant began accruing unlawful presence from June 11, 2001, the date the Board dismissed his appeal, until October 3, 2001, the date the applicant filed his Form I-485. Pursuant to section 212(a)(9)(B)(iii)(II) of the Act, "[n]o period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i)...". The AAO finds that the applicant's unlawful status began to run on June 11, 2001, with the final adjudication of his asylum application by the Board.¹ The AAO notes that the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary, Department of Homeland Security] 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.* Therefore, the AAO finds that the applicant's unlawful presence ended on October 3, 2001, when he filed his Form I-485.

¹ The AAO notes that there is no evidence in the record that the applicant filed an appeal of the Board's decision.

The AAO finds that the OIC erred in concluding that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, as there is no evidence in the record that the applicant was unlawfully present in the United States for more than one year. Additionally, the AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, as he was not unlawfully present in the United States for a period of more than 180 days.² As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(a)(9)(B)(v) is also moot and thus will not be addressed. The AAO notes that if the applicant has applied for a visa in Peru, he should contact the office where he submitted his application to determine what further actions he needs to take.

ORDER: The decision of the Officer-In-Charge is withdrawn as it has not been established that the applicant is inadmissible. The appeal is dismissed as moot.

² The applicant was unlawfully present in the United States for 114 days.