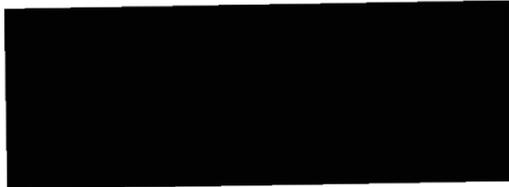




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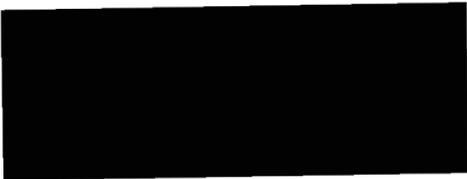
FILE:  Office: MEXICO CITY [PANAMA]  
(consolidated therein)

Date: **JAN 08 2010**

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.

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Colombia who initially entered the United States on September 10, 1986, on a B-2 nonimmigrant visa with authorization to remain in the United States until March 9, 1987. On September 16, 1986, the applicant filed an Application for Change of Nonimmigrant Status (Form I-506) from a B-2 nonimmigrant to an F-1 student. On October 17, 1986, the Director, Miami, Florida, denied the applicant's Form I-506, and ordered the applicant to depart the United States by December 1, 1986. On an unknown date, the applicant departed the United States.

On October 8, 2002, the applicant married his first wife, Ms. [REDACTED], a native and citizen of Colombia, in Colombia. On February 22, 2003, the applicant entered the United States without inspection. On the same day, a Notice to Appear (NTA) was issued against the applicant. On November 13, 2003, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On or about March 8, 2004, the applicant divorced his first wife. On March 26, 2004, the applicant married his second wife, Ms. [REDACTED] a native of Colombia, in Florida. On April 6, 2004, an immigration judge denied the applicant's Form I-589 and ordered the applicant removed from the United States. On April 23, 2004, the applicant, through counsel, filed an appeal of the immigration judge's decision with the Board of Immigration Appeals (Board). On August 30, 2005, the Board summarily affirmed the immigration judge's decision. On October 24, 2005, the applicant, through counsel, filed a petition for review with the Eleventh Circuit Court of Appeals (Eleventh Circuit). On December 16, 2005, the Eleventh Circuit dismissed the applicant's appeal. On January 11, 2006, a Warrant of Removal/Deportation (Form I-205) was issued. On January 12, 2006, the applicant, through counsel, filed an Application for Stay of Deportation or Removal (Form I-246). On January 20, 2006, the Field Operation Director, Miami, Florida, denied the applicant's Form I-246. On February 1, 2006, the applicant was removed from the United States.

On March 10, 2006, the applicant divorced his second wife. On March 25, 2006, the applicant married his third wife, Ms. [REDACTED], a naturalized United States citizen, in Colombia. On July 10, 2006, the applicant's third wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 4, 2006, the applicant's Form I-130 was approved. On May 29, 2007, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and an Application for Waiver of Ground of Excludability (Form I-601). On January 10, 2008, the District Director, Mexico City, Mexico, denied the applicant's Form I-212 and Form I-601, finding that the applicant failed to establish that extreme hardship would be imposed on his spouse or that he merited the favorable discretion. On September 8, 2008, the applicant was paroled into the United States for ninety (90) days. There is no evidence in the record that the applicant departed the United States when his authorization expired. On February 11, 2009, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485).

On appeal, the applicant, through counsel, states the applicant's wife and child have suffered extreme hardship since the applicant was removed from the United States. *Form I-290B*, filed February 12, 2008.

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 did not accrue one year of unlawful presence during a single stay. The AAO notes that the applicant accrued unlawful presence from February 22, 2003, the date he entered the United States without inspection, until November 13, 2003, the date the applicant filed his Form I-589.

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)...". On December 17, 2005, the applicant again began accruing unlawful presence the day after the Eleventh Circuit dismissed the applicant's appeal, until February 1, 2006, the date the applicant was removed from the United States. On December 8, 2008, the applicant again began accruing unlawful presence the day after his parole authorization expired, until February 11, 2009, when the applicant filed his Form I-485. 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.* The AAO finds that even though the applicant accrued a total of 375 days of unlawful presence, he only accrued 310 days of unlawful presence during his first stay and 65 days of unlawful presence during his second stay; therefore, the applicant did not accrue the required amount of unlawful presence, which is one year, during a single stay. Therefore, the AAO finds that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The AAO finds that the District Director 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 did not depart the United States voluntarily prior to the initiation of removal proceedings. 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.

**ORDER:** The decision of the District Director is withdrawn as it has not been established that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) or section 212(a)(9)(B)(i)(I) of the Act. The appeal is dismissed as moot.