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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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[Redacted]

FILE: [Redacted]

Office: BALTIMORE, MARYLAND

Date: **NOV 09 2010**

IN RE: Applicant: [Redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Tariq Syed
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under 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), and the relevant waiver application is thus moot. The matter will be returned to the District Director for continued processing.

The applicant is a native and citizen of South Africa who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of 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 ten years of her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated March 12, 2008.

On appeal, counsel for the applicant asserts that the applicant's spouse would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; statements from the mother of the applicant's spouse; statements from family members of the applicant's spouse; published country conditions reports; a statement from the mother of the applicant; earnings statements for the mother of the applicant; tax statements; medical documentation for the applicant's child; medical claims for the mother of the applicant's spouse; an employment letter for the applicant's spouse; medical bills for the applicant; published reports on child care costs; a psychological evaluation; a W-2 form for the applicant's spouse; a statement from the applicant's previous attorney; bank statements; a utility bill; and statements from friends. The entire record was reviewed and considered in rendering a decision on the appeal.

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-

....

(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 case, the record indicates that on March 1, 2004 the applicant was admitted to the United States in J-1 status for duration of status (D/S). *Form I-94, Departure Record*. Counsel asserts that the applicant's status expired on or about September 15, 2004. *Attorney's brief*. The applicant filed a Form I-485, Application to Register Permanent Residence of Adjust Status on September 29, 2006. On February 7, 2007 the applicant departed the United States, returning under an authorization of parole on March 9, 2007. *SEVIS Exchange Visitor Information; Form I-512, Authorization of Parole of an Alien into the United States*.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. In regard to nonimmigrants admitted for duration of status (D/S), if USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. *See United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence*, at 25, dated May 6, 2009. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. *Id.* It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. *See 8 C.F.R. 239.3*. Although there is a September 15, 2004 finding regarding the August 16, 2004 J-1 violation of status for the applicant listed on the [REDACTED] Information form, that finding was not made during the course of adjudicating a request for an immigration benefit or by an immigration judge. The applicant, therefore, did not start to accrue unlawful presence based on the [REDACTED]

As the applicant has not any accrued unlawful presence, the applicant is not inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The waiver filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot.

¹ On May 31, 2007, the District Director made a determination that the applicant violated her J-1 status while adjudicating a request for an immigration benefit (the applicant's Form I-485). *Notice of Intent to Deny Form I-485*, dated May 31, 2007. However, the request for the immigration benefit has not been denied as the Form I-485 is still pending. As such, the applicant has not begun to accrue unlawful presence.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot. The District Director shall continue to process the adjustment of status application.