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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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Date: **APR 21 2011**

Office: MANILA

FILE: 

IN RE: 

PETITION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Manila, Philippines, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant, a native and citizen of the Philippines, procured entry to the United State with a valid nonimmigrant visa in August 2004, with permission to remain until February 2005. In January 2005, the applicant filed Form I-539, Application to Extend/Change Nonimmigrant Status (Form I-539). The Form I-539 was denied on February 23, 2005. The applicant did not depart the United States until November 2006. The applicant was thus found to be inadmissible to the United States 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), for having been unlawfully present in the United States for more than one year. The applicant sought a waiver of inadmissibility in order to reside in the United States with her U.S. citizen daughter.

The field office director concluded that as the applicant did not have a United States citizen or lawful permanent resident spouse or parent, she was statutorily ineligible for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. The field office director denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 8, 2009.

In support of the appeal, the applicant¹ submits the Form I-290B, Notice of Appeal, and medical documentation. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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.

....

¹A completed Form G-28, Notice of Entry of Appearance as Attorney or Representative (Form G-28), was submitted by [REDACTED] an "attorney and member of the Bar of the Philippines." See *Form G-28*, dated February 2, 2009. As noted in section 1.1(f) of Title 8 of the Code of Federal Regulations, the term "attorney" means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth or the District of Columbia. As such, all representations will be considered but the decision will be furnished only to the applicant.

(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...

The applicant contends that to constitute unlawful presence, malice must be shown but in this case, the applicant's unlawful presence in the United States was not intentional and as such, "the legal remedy of waiver of inadmissibility sought to be imposed against the applicant is without justifiable basis...." See *Form I-290B*, dated February 2, 2009. Specifically, the applicant claims that she overstayed her visa because she was diagnosed with cervical cancer in January 2005 and had to undergo chemotherapy treatment immediately and was advised by her treating physician to refrain from traveling due to her poor health condition.² Letter from [REDACTED] Section 212(a)(9)(B)(i)(II) of the Act does not provide for an exception based on an individual's purpose, intent or state of mind when remaining in the United States beyond the period of authorized stay. As such, the AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence. This ground of inadmissibility was triggered by the applicant's departure from the United States on October 31, 2006.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Section 212(a)(9)(B)(v) does not provide for a waiver based on extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant herself a permissible consideration under the statute. In the instant appeal, the applicant has not established that a qualifying relative for purposes of a Form I-601 waiver under section 212(a)(9)(B)(v) of the Act exists, namely, a U.S. citizen or lawful permanent resident spouse or parent. The applicant is thus statutorily ineligible for relief.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.

² The AAO notes that although the applicant requested an extension of her B-2 status by submitting Form I-539 in January 2005, she did not reference her medical condition or need for medical treatment on the application. Rather, she asserted that she wished to remain in the United States to help her daughter and son-in-law with respect to the care of her grandchildren. The Form I-539 was subsequently denied. *Notice of Decision*, dated February 23, 2005.