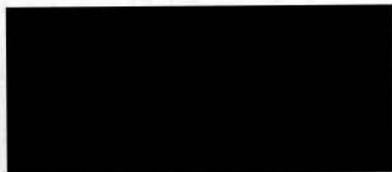


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H6

DATE DEC 19 2011 Office: MOSCOW, RUSSIA FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

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, Moscow Russia, and the decision was affirmed in a decision on a motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The field office director's decisions will be withdrawn and the matter remanded to the field office director for further action consistent with the present decision.

The applicant is a native of the U.S.S.R. and a citizen of Armenia 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 and seeking readmission within ten years of his last departure from the United States. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Field Office Director*, dated September 9, 2010. The field office director affirmed the decision in response to the applicant's motion to reopen and reconsider. *Motion to Reopen and Reconsider Decision of the Field Office Director*, dated October 25, 2010.

On appeal, counsel asserts that the applicant has established extreme hardship to his spouse. *Form I-290B*, dated November 16, 2010.

The record includes, but is not limited to, counsel's brief, prior AAO decisions, medical records, the applicant's statement, the applicant's spouse's statement, the applicant's spouse's parents' statement, the applicant's spouse's brother's statement, a statement from a friend of the applicant's spouse and financial records. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States on June 11, 2002 on a J-1 visa for duration of status, he applied for asylum on June 12, 2003, he was referred to immigration court on July 22, 2003, he was ordered removed *in absentia* on November 20, 2003 and he was removed from the United States on April 1, 2009. The applicant accrued unlawful presence from the date he was found to have violated his J-1 status, November 20, 2003, until April 1, 2009, the date he was removed from the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his April 1, 2009 departure from the United States. The applicant and his counsel do not dispute the field office director's finding of inadmissibility.

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 addition, although not noted by the field office director, the applicant appears to be inadmissible pursuant to section 212(a)(6)(B) of the Act. Section 212(a)(6)(B) of the Act provides, in pertinent part:

- (B) Failure to attend removal proceedings.—Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

As noted above, the record reflects that the applicant failed to attend a removal hearing and was ordered removed *in absentia* on November 20, 2003. The record further reflects that the applicant was removed from the United States on April 1, 2009.

There is no statutory waiver available for the ground of inadmissibility arising under section 212(a)(6)(B) of the Act. However, an alien is not inadmissible under section 212(a)(6)(B) of the Act if the alien can establish that there was a "reasonable cause" for failure to attend his removal proceeding. See *Memo from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Off. Of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators 13*, dated March 3, 2009.

Although the field office director noted that the applicant had been ordered removed *in absentia* on November 20, 2003 and that the applicant was removed from the United States on April 1, 2009, the field office director did not address the applicant's inadmissibility under section 212(a)(6)(B) of the

Act. The AAO finds that, if the applicant is inadmissible under section 212(a)(6)(B) of the Act, such inadmissibility could properly be used by the field office director as a basis for denying the applicant's Form I-601, as no purpose would be served in adjudicating a waiver application where the visa application cannot be approved because of a separate non-waivable ground of inadmissibility.

Therefore, the AAO finds it necessary to remand the present matter to the field office director for a new decision addressing the applicant's inadmissibility under section 212(a)(6)(B) of the Act. If the applicant is found to be inadmissible under section 212(a)(6)(B) of the Act, then the field office director may deny the Form I-601 on that basis. If the applicant is found not to be inadmissible under section 212(a)(6)(B), then the field office director should address the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) and eligibility for a waiver under section 212(a)(9)(B)(v). In that case, if the new decision is adverse to the applicant, the decision shall be certified to the AAO for review.

ORDER: The field office director's decisions are withdrawn and the matter remanded to the field office director for further action consistent with the present decision.