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



U.S. Citizenship  
and Immigration  
Services

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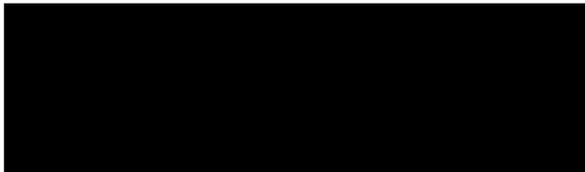
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FILE:  Office: BALTIMORE, MARYLAND Date: **JAN 24 2011**

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:

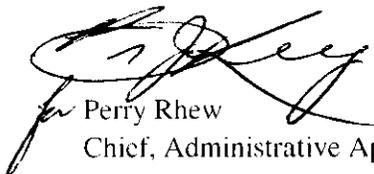


INSTRUCTIONS:

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 District Director, Baltimore, Maryland, 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 Kenya 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 is married to a United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his wife.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 8, 2008. On appeal, the applicant asserts that he did not accumulate unlawful presence in the United States because he maintained lawful status as a student from the date of entry in August 1995, and that denial of his waiver application would result in extreme hardship to his spouse. *See Form I-290B, Notice of Appeal* dated July 24, 2008.

The record includes, but is not limited to, a letter from the applicant describing the hardship his spouse will suffer if his waiver request is denied and he is removed from the United States, copies of bank and other financial documents, copies of the applicant's wife's Earnings and Tax Statements (Form W-2) copies of the applicant's wife's U.S. Individual Income Tax Returns (Form 1040) and Maryland Resident Income Tax Returns (Form 502), copies of utility, mortgage, auto insurance and other bills, and a copy of a U.S. Department of State Travel Warning on Kenya, dated October 18, 2007, and various news articles about conditions in Kenya. The entire record was reviewed and considered in rendering this decision on appeal.

Section 212(a)(9) 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 [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.

An alien who remains in the United States beyond the authorized period of stay is unlawfully present and becomes subject to the 3- or 10-year bar to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants:

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Card.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date USCIS finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings....

*See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.*

In the present case, the record reflects that on August 13, 1995, the applicant was admitted into the United States as an F-1 student with authorization to remain in the United States for the duration of his status. The record reflects that the applicant [REDACTED] [REDACTED] from the fall of 1995 until he graduated from the University of Maryland on January 7, 2001. The applicant and his wife were married in Towson, Maryland, on March 30, 2001. On April 19, 2001, the applicant's United States citizen wife filed a Form I-130 on the applicant's behalf. On February 24, 2004, the Form I-130 was approved. On October 24, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130 petition. In December 2006, the applicant departed the United States to Kenya, pursuant to advance parole and returned to the United States in January 2007. During the adjustment of status interview, the applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant filed a Form I-601 waiver application on January 4, 2008. On July 8, 2008, the district director denied the Form I-601 and the Form I-485, finding that the applicant violated his student status, had accumulated unlawful presence in the United States for

a period of more than one year and had failed to establish extreme hardship to a qualifying relative. The district director further noted that the applicant's departure from the United States in December 2006 triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] 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 Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.* In this case, the applicant properly filed a Form I-485 on October 24, 2006. He traveled outside the United States on advance parole in December 2006. The district director determined on July 8, 2008, that the applicant violated his student status. Based on the record, the AAO finds that a status violation was not determined prior to the applicant's departure from the United States in December 2006 and therefore, the applicant did not accrue unlawful presence. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(2)(9)(B)(v) of the Act is moot and will not be addressed.

**ORDER:** The appeal is dismissed, the district director's decision is withdrawn and the waiver application declared moot.