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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

[redacted]

H6

Date: JUN 06 2011 Office: NEW YORK FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[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.

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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, and 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 Spain, entered the United States in Visa Waiver status on April 3, 2003, with permission to remain until July 2, 2003. In August 2003, the applicant submitted a Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485), based on a concurrently filed Form I-130, Petition for Alien Relative. The Form I-130 was approved on April 5, 2005 but the concurrent Form I-485 was denied on May 5, 2005. The applicant filed a second Form I-485 in January 2006, which was denied on February 26, 2008. The applicant departed the United States on February 28, 2008.

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 Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009. As such, the applicant accrued unlawful presence from May 5, 2005, when the applicant's first Form I-485 was denied, until January 2006, when the second Form I-485 was submitted. The applicant was thus deemed to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant is seeking a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated February 26, 2008.

On appeal, counsel for the applicant submitted a brief and evidence of the applicant's departure from the United States on February 28, 2008. The entire record was reviewed and considered in rendering this decision.

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-
> >
> > . . . .
> >
> > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States...prior to commencement of

> proceedings...and again seeks admission within 3 years of the date of such alien's departure or removal...is inadmissible.

Pursuant to the record, the applicant departed the United States on February 28, 2008. Counsel explains that the applicant has not returned to the United States since receiving the decision from the district director and will not reenter until legally admitted. *See Brief in Support of Appeal,* dated May 25, 2008. Since he is residing outside the United States, the applicant is no longer eligible for adjustment of status, and it is necessary that he file a Form DS-230, Application for Immigrant Visa and Alien Registration, with the United States Consulate in Spain, where he resides. The regulation at 8 C.F.R. § 212.7(a) and the instructions of Form I-601 further provide that for individuals living outside the United States, Form I-601 must be submitted to the U.S. Embassy or consulate where the applicant is applying for a visa.[1] The Director of the New York District Office therefore no longer has jurisdiction over the applicant's Form I-601, application for waiver of inadmissibility.

As the applicant is residing outside the United States and is ineligible for adjustment of status, there is currently no underlying application for admission pending upon which to base a Form I-601 waiver application, and the District Director of the New York District Office no longer has jurisdiction over the waiver application. The appeal in the present matter will therefore be dismissed.

ORDER: The appeal is dismissed.

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[1] The applicant's last departure occurred in February 2008. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, and it therefore appears that he is no longer inadmissible and does not need a waiver under section 212(a)(9)(B)(v) of the Act if he applies for an immigrant visa.