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



**U.S. Citizenship
and Immigration
Services**

H6

[REDACTED]

DATE: **JUL 26 2012** OFFICE: SAN BERNARDINO, CA FILE: [REDACTED]

IN RE: [REDACTED]

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:
[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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, San Bernardino, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native and citizen of El Salvador 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 mother is a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his family.

In a decision dated August 6, 2010, the director concluded the applicant had failed to establish that his U.S. citizen mother would experience extreme hardship if he were denied admission into the United States. The waiver application was denied accordingly.

Section 212(a)(9) of the Act provides:

(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.

Under section 212(a)(9)(B)(v) of the Act:

The Attorney General [now, Secretary, Department 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.¹

¹ The director's decision erroneously indicates that the applicant requires waivers of inadmissibility under sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(h) and 1182(i). However, neither the decision nor the record reflect that the applicant has committed fraud or willfully misrepresented a material fact, or that he has committed or admitted to committing a crime involving moral turpitude, such that a waiver under these sections of the Act is

The record reflects that the applicant entered the United States without inspection or admission on April 15, 1999.² The applicant remained in the United States until January 10, 2006. On that date he traveled to El Salvador pursuant to an approved Form I-512, Authorization for Parole of an Alien into the United States. The applicant was inspected and paroled back into the United States on January 26, 2006, and he has not departed the country since that time. The applicant was found to be inadmissible due to his unlawful presence in the United States for more than one year between April 15, 1999 and January 13, 2003, when his application for temporary protected status was approved.

It is noted that the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F. 2d 997, 1002 n. 9 (2d Cir. 1989).

The Board of Immigration Appeals (Board) held in its recent decision, *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here the record reflects that the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In accordance with the Board’s decision in *Matter of Arrabally*, the applicant did not make a “departure” from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant’s waiver application is thus unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.

required. The AAO finds the error to be harmless, as it does not affect or change the analysis or outcome of the director’s decision.

² The record is inconsistent concerning the applicant’s date of entry into the United States. Some documents indicate he entered on April 1, 1998. Other records indicate he entered on April 15, 1999. The inconsistent dates of entry are not relevant in the present case, as the earlier date of entry would not have changed the unlawful presence finding and analysis outlined in the director’s decision.