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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
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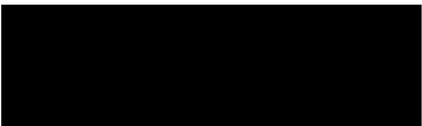
DATE: **MAY 02 2012** Office: NEW YORK, NEW YORK

File:

IN RE: Applicant:

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

Thank you,

Perry R. Hew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as it is unnecessary.

The applicant is a native and citizen of Ghana. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen. He 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).

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 19, 2008.

On appeal, counsel for the applicant asserts that the District Director's decision was arbitrary and capricious, and that she erroneously concluded that the applicant's spouse would not experience extreme hardship. *Form I-290B*, received on April 18, 2008.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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.

....

The District Director found the applicant to have accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until September 4, 2001, when he filed for adjustment of status under the LIFE Act. The record before the AAO does not, however, support this finding.

The record indicates that the applicant entered the United States without inspection in 1981. In 1991, the applicant applied for temporary resident status, submitting a Form I-687 that was rejected because he had failed to submit a fee with the application. On or about September 12, 1997, the applicant departed the United States, returning on October 2, 1997. On September 4, 2001, the applicant applied for adjustment under the LIFE Act. This application was not denied until April 21, 2006. The record reflects that the applicant's most recent departure occurred in 2004 and that he has since remained in the United States.

Based on the above history, the AAO finds that the applicant was not in lawful status on April 1, 1997, when the provisions of section 212(a)(9)(B)(i) went into effect. He, therefore, accrued unlawful presence from that date until his departure on September 12, 1997, a period of less than six months. We cannot, however, conclude that he accrued any unlawful presence thereafter.

The AAO finds the record to demonstrate that the applicant returned to the United States on October 2, 1997, but not how he returned. The stamp in the applicant's passport states "Admitted LPR." Relevant data bases document the applicant's October 2, 1997 return, but do not indicate that he was paroled into the United States and no electronic record has been found to establish that a Form I-94, Arrival-Departure Record, was issued to the applicant at that time. Therefore, we are unable to determine that the applicant accrued any unlawful presence prior to the filing of his adjustment application on September 4, 2001, which tolled any further unlawful presence until its denial on April 21, 2006. As the record establishes that the applicant accrued unlawful presence of less than six months, the AAO cannot find the applicant to be inadmissible under section 212(a)(9)(B)(i) of the Act, and he is not required to file a waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. As the record does not establish that the applicant is inadmissible under section 212(a)(9)(B)(v) of the Act, the appeal will be dismissed as the waiver application is unnecessary.

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