

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

[REDACTED]

H6

DATE: **OCT 04 2012**

OFFICE: NEW YORK, NY

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 District Director, New York, New York, 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 Senegal who was found to be inadmissible to the United States under 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 U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility under 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.

In a decision dated September 14, 2009, the director concluded the applicant had failed to establish that his U.S. citizen spouse would experience extreme hardship if he were denied admission into the United States. The waiver application was denied accordingly.

It is noted the director's decision indicates the applicant also requires a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), for having committed fraud or a willful misrepresentation of a material fact, in violation of section 212(a)(6)(C)(i) of the Act, 8 U.S.C. section 1182(a)(6)(C)(i). The director's decision does not further discuss the finding, and no reference is made to the basis of such a finding. The director's statement regarding the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act is thus unsubstantiated. The record also contains criminal history information reflecting that on April 11, 2000, the applicant was convicted of Harassment in the Second Degree, in violation of section 240.26 of the New York Penal Code. The issue was not addressed in the director's waiver denial decision, and the applicant was not found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. In addition, neither matter was raised on appeal. The present AAO decision therefore pertains solely to inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Counsel asserts on appeal that the applicant exited and returned to the United States pursuant to a grant of advance parole; under *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the applicant did not make a departure for section 212(a)(9)(B)(i) of the Act purposes; and the applicant is thus not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. To support these assertions, counsel submits a copy of the *Matter of Arrabally and Yerrabelly* decision.

The record also contains previously submitted evidence relating to hardship the applicant's wife would suffer if the applicant were denied admission into the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

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

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.

Section 212(a)(9)(B)(i)(II) was added to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208, September 30, 1996) (IIRIRA). IIRIRA became effective on April 1, 1997, and only periods of unlawful presence spent in the U.S. after its April 1, 1997 effective date count towards unlawful presence for sections 212(a)(9)(B)(i)(I) and (II) of the Act purposes. Accrual of unlawful presence also stops on the date that an adjustment of status application is properly filed, until the application is denied.

In the present matter, the record reflects the applicant entered the United States without inspection in September 1987. A Form I-130 and corresponding Form I-485 Application to Register Permanent Residence or Adjust Status (Form I-485) were filed on February 1, 1995; the I-130 was withdrawn and the I-485 no longer viable as of July 9, 1997. Another application for adjustment of status was filed on January 5, 2006 and denied May 9, 2006. A third adjustment of status application, subject of the present appeal decision, was filed on July 22, 2002 and denied on March 18, 2008. The applicant was therefore unlawfully present in the United States between July 9, 1997, and July 22, 2002.

Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is triggered upon departure, and remains in force until the alien has been absent from the United States for ten years. The record reflects the applicant traveled outside of the United States pursuant to an approved Form I-512,

*Authorization for Parole of an Alien into the United States*, and was inspected and paroled back into the United States on five occasions: September 9, 1995; January 6, 1996; May 17, 1997; January 6, 1999; and September 10, 2003.

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 applicant obtained advance parole authorization 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 and Yerrabelly*, 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.