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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 0 9 2013 Office: LOS ANGELES, CA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by Field Office Director, Los Angeles, California, and 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 Japan who was found 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 six months, but less than one year and seeking readmission within three years of her last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her lawful permanent resident husband and U.S. citizen daughter.

In a decision dated October 11, 2012, the field office director found the applicant inadmissible after determining that she had failed to maintain her student status and accrued unlawful presence for more than six months, but less than one year. The field office director found that the applicant did not establish that her spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

On appeal, the applicant's spouse states that he will suffer extreme hardship as a result of the applicant's inadmissibility.

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-
>
> (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 (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> (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.
>
> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

The record reflects that the applicant was issued an F-1 student visa on July 12, 2004, which had a date of expiration on July 7, 2009. The record shows that the applicant's last entry on this visa was on May 8, 2007, with an authorized stay for the duration of her status. On November 8, 2007, her spouse filed an Alien Relative Petition (Form I-130) on her behalf and on May 24, 2008 the applicant's daughter was born. On May 9, 2012, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The record indicates that on September 21, 2012 the applicant stated during her adjustment interview that after the birth of her child and the filing of her husband's Form I-130, she no longer maintained her student status. The record does not indicate that the applicant has departed the United States since her entry on May 8, 2007.

We note that an applicant 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) or (II) of the Act. Under current USCIS 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. The AAO finds that a status violation was not determined until after the applicant filed a Form I-485 and therefore, the applicant did not accrue unlawful presence.

Furthermore, even if the applicant had accrued unlawful presence, she has not departed the United States and would not be subject to section 212(a)(9)(B)(i) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) 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.