U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-A-

DATE: OCT. 7, 2016

APPEAL OF JACKSONVILLE, FLORIDA FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native of Iran and citizen of Germany, seeks a waiver of inadmissibility for unlawful presence. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Jacksonville, Florida, denied the application. The Director concluded that there is no evidence that the Applicant is inadmissible, and the Form I-601 is missing evidence that the application is based on an immigrant visa application, nonimmigrant K or V visa application, a pending Form I-485, Application to Register Permanent Residence or Adjust Status, or a pending Form I-821, Application for Temporary Protected Status.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that he is inadmissible under section 212(a)(9)(B) of the Act, and his mother and stepfather would experience extreme hardship upon his removal.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), provides that a foreign national who 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 the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such departure or removal, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act provides that a foreign national who 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 departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or is present in the United States without being admitted or paroled.

II. ANALYSIS

The issues presented on appeal are whether the Applicant is inadmissible to the United States, whether he has an underlying application to adjust status required file a Form I-601, and if so, whether he was established extreme hardship to a qualifying relative. The Applicant states on appeal that he is inadmissible under section 212(a)(9)(B)(i) of the Act and that his mother and stepfather would experience extreme hardship upon his removal. We find that there is no evidence that the Applicant is inadmissible under section 212(a)(9)(B) of the Act as it appears he has not departed the United States since his entry on September 2, 2015. In addition, the Applicant is in the United States and does not have an underlying application for adjustment of status, which is required to file a Form I-601. As such, we will not address if he has a qualifying relative who would experience extreme hardship or is otherwise eligible for a waiver of inadmissibility.

The Applicant is a beneficiary of an approved Form I-130, Petition for Alien Relative, filed under the second preference visa category, which is for an unmarried son or daughter of a lawful permanent resident. However, there is not a visa available for the second preference category, and the Applicant is not eligible at this time to apply for adjustment of status. As of this date, the Applicant has not been deemed inadmissible and there is no underlying application on which to seek a waiver of inadmissibility.

The record does not show that the Applicant has filed an application for an immigrant visa, for a K or V nonimmigrant visa, or to adjust status to that of lawful permanent resident. A waiver application serves the purpose of removing the inadmissibility bar to allow for approval of one of these applications. 8 C.F.R. § 212.7(a)(1). As that purpose cannot be served in this case, the waiver application is properly denied in the exercise of discretion.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant does not have an underlying application for adjustment of status and has not been found inadmissible. The waiver application was properly denied, and we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of N-A-*, ID# 117168 (AAO Oct. 7, 2016)