U.S. Department of Homeland Security
20 Mass, N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 04 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Pakistan who entered the United States as a J-1 trainee and has been found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation and section 212(a)(9)(B)(i)(II), 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 having departed the United States. The applicant is married to a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) to reside in the United States with his family.

The director concluded that the record did not establish that a qualifying relative would suffer extreme hardship if the applicant's waiver request were denied. He denied the application accordingly. *Decision of the Director*, dated June 18, 2007.

On appeal, counsel for the applicant states that the applicant did not engage in fraud to obtain a J-1 visa and is inadmissible only because he overstayed his visa. Counsel contends that the applicant has established that both his spouse and child are suffering extreme hardship as a result of being separated from him and that he is, therefore, eligible for a Form I-601 waiver. *Form I-290B*, dated July 9, 2007; *Counsel's letter*, dated November 19, 2007.

The record indicates that on October 1, 1999, the applicant entered the United States as a J-1 nonimmigrant trainee and was given duration of status. He failed to complete his business management training program and subsequently departed the United States for Canada, although it is not clear from the record when this departure occurred.

On July 27, 2004, a Department of State consular officer at the U.S. consulate in Montreal denied the immigrant visa application filed by the applicant, based on a determination that he had fraudulently obtained a J-1 visa to enter the United States and had, therefore, been unlawfully present in the United States for the entire period of his residence, more than two years. *Letter from American Consular Officer,* dated July 27, 2002. While the AAO notes the letter issued to the applicant, it does not find the letter's statements sufficient to establish that the applicant fraudulently obtained his J-1 visa and was, therefore, unlawfully present in the United States from the time of his admission. The record offers no statement from the applicant admitting to fraudulently obtaining his nonimmigrant visa or any other evidence that would support this conclusion. The applicant's failure to complete his training program in the United States is not proof that he obtained his J-1 visa through fraud.

The record indicates that the applicant left the management training program for which he had obtained a J-1 visa shortly after arriving in the United States and moved to New York, where he worked without authorization. As of the unspecified date he abandoned his training program, the applicant was present in the United States without status.

The Citizenship and Immigration Services' Adjudicator's Field Manual (AFM) states, in pertinent part:

> An alien who remains in the United States beyond the period of stay authorized by the Attorney General [Secretary] is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service [CIS] policy, unlawful presence is counted in the following manner for nonimmigrants.
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> B. Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service [CIS] 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 Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations dated March 3, 2000. In the present case, the AAO finds that, although the applicant violated his J-1 status when he abandoned his training program, he left the United States prior to the determination of a status violation. Therefore, the applicant did not accrue unlawful presence for the purposes of section 212(a)(9)(B)(i) of the Act.

With no evidence to establish the applicant's intent at the time he applied for the J-1 visa that brought him to the United States, the AAO finds he is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having fraudulently obtained admission to the United States. The record also fails to demonstrate that the applicant accrued unlawful presence under section 212(a)(9)(B)(i)(II) prior to his departure for Canada. Therefore, the applicant is not inadmissible to the United States.

The AAO notes, however, that although the applicant is not inadmissible to the United States under the grounds of exclusion in section 212(a) of the Act, he is, nevertheless, ineligible to apply for the immigrant visa that would allow him to join his family in the United States. Pursuant to the requirements of section 212(e) of the Act, individuals admitted to the United States as J-1 nonimmigrants may not apply for immigrant visas or lawful permanent resident status until they have resided and been physically present in their countries of nationality or last residence for a period totaling at least two years. The record does not indicate that the applicant has satisfied the foreign residency requirement of section 212(e), which states:

> (e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission
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> (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,
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> (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J)

> was a national or resident of a country which the Director of the United States Information Agency [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or
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> (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services, CIS] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Department of Homeland Security (DHS), "Secretary"] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

The record contains a letter from the American Hospitality Academy, the organization that operated the training program in which the applicant initially participated, which indicates that the applicant's training was not sponsored by either the United States or Pakistani governments. The AAO notes, however, that the J-1 visa contained in the applicant's passport clearly indicates that the two-year foreign residency requirement discussed above does apply to the applicant in the present case. Therefore, in applying for an immigrant visa, the applicant must establish that he has resided and been physically present in Pakistan for at least two years or seek an exemption from the requirement by filing the Form I-612, Application for Waiver of the Foreign Residence Requirement. The applicant's years of residence in Canada do not satisfy the requirements of

section 212(e) of the Act, as such residence is specifically required to be in a J-1 nonimmigrant's country of nationality or last residence.

The record also includes a statement indicating that the Consulate of Pakistan in Montreal has no objection to the U.S. government's issuance of a visa to the applicant. The AAO acknowledges this statement, but notes that it does not meet the waiver requirements for a "no objection" letter, as set forth in the relevant regulation below and is not sufficient to grant a waiver.

The regulation at 22 C.F.R. § 41.63(d) states:

> Applications for waiver of the two-year home-country physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Director through diplomatic channels; i.e., from the country's Foreign Office to the Agency through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Director in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. Upon receipt of the no objection statement, the Waiver Review Branch shall instruct the applicant to complete a data sheet and to provide all Forms IAP-66 and the data sheet to the Waiver Review Branch. If deemed appropriate, the Agency may request the views of each of the exchange visitor's sponsors concerning the waiver application.

Until such time as the applicant complies with the two-year foreign residency requirement of section 212(e) of the Act or obtains a Form I-612 waiver of this requirement, he remains ineligible for a U.S. immigrant visa.

For the reasons noted in the preceding discussion, the AAO finds that the applicant in the present case is not inadmissible to the United States under the exclusion grounds found in sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act. As he is not inadmissible, he is not required to file the Form I-601. Accordingly, the director's decision will be withdrawn and the appeal will be dismissed as the underlying application is moot.

ORDER: The decision of the director is withdrawn. The appeal is dismissed as the underlying waiver application is moot.