



U.S. Citizenship  
and Immigration  
Services

HM

[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX DISTRICT OFFICE Date:

**OCT 21 2004**

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

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, Director  
Administrative Appeals Office

identifying data deleted to  
prevent disclosure of unarranged  
information of a confidential nature

**DUPLICATE COPY**

**DISCUSSION:** The waiver application was denied by the District Director, Phoenix. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn, and the application declared moot.

The applicant is a native and citizen of Mexico who was found inadmissible to the United States under section 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of more than 180 days.<sup>1</sup> The applicant is the beneficiary of an approved Petition for Alien Relative as the spouse of a lawful permanent resident. She 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) in order to remain in the United States and reside with her spouse and three U.S. citizen children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of District Director* (November 7, 2002).

On appeal, counsel asserts that the USCIS should be barred by equitable estoppel from finding inadmissibility based on section 212(a)(9)(B) of the Act, when USCIS engaged in “affirmative misconduct” by granting the applicant advance parole with the knowledge that she had accumulated unlawful presence in the United States. *See Form I-290B, Notice of Appeal to the Administrative Appeals Unit (AAU)* and attachment. Additionally, counsel asserts that the district director failed to correctly assess extreme hardship to the applicant’s spouse.

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

(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 . . . prior to the commencement of [removal] proceedings . . . 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.

---

<sup>1</sup> It is not clear from the district director’s decision whether inadmissibility was found under subsection (i)(I) or (i)(II) of INA § 212(a)(9)(B), referring to unlawful presence for a period of under one year and over one year, respectively.

...

(v) Waiver.—The Attorney General [now Secretary 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 U.S. 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 would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

The proper filing of an affirmative application for adjustment of status has been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The record reflects that the applicant entered the United States without inspection in 1987. Form I-601, *Application for Waiver of Grounds of Inadmissibility* (filed August 10, 2001). The applicant filed an affirmative application for adjustment of status on November 12, 1997. The accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997. The applicant accrued unlawful presence in the United States from April 1, 1997 until her application for adjustment of status was filed, or a period of 225 days. Because the applicant was unlawfully present for more than 180 days but less than one year, the AAO finds that the applicable section of the Act is 212(a)(9)(B)(i)(I).

The applicant departed the United States at some point after December 17, 1999, and was paroled into the United States on January 22, 2000 to continue her application for adjustment of status. Form I-512, *Authorization for Parole of An Alien into the United States* (issued December 17, 1999). This departure triggered inadmissibility for unlawful presence. Pursuant to section 212(a)(9)(B)(i)(I), she was barred from again seeking admission within three years of the date of her departure.

The standard rule followed by USCIS is that an application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's adjustment application so, as of today, the applicant is still seeking admission by virtue of adjustment from her parole status to that of a lawful permanent resident. The applicant's departure was prior to January 22, 2000. As of the date of this decision, it has now been more than three years since the date of the departure that triggered inadmissibility. Therefore, the applicant is no longer inadmissible under INA § 212(a)(9)(B)(I). Therefore, she no longer needs a waiver of inadmissibility and the Form I-601 application is moot. The AAO therefore does not reach the merits of the "extreme hardship" determination on which the appeal was based or counsel's contentions with respect to "equitable estoppel."

**ORDER:** The appeal is dismissed. The prior district director decision is withdrawn and the application for waiver of inadmissibility declared moot.