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FILE:



Office: ST. PAUL, MINNESOTA

Date:

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IN RE:



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

ON BEHALF OF PETITIONER:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Paul, Minnesota, and is now 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn, and the application declared moot.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 to be inadmissible to the United States pursuant to 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. The applicant is married to a U.S. Citizen and seeks a waiver of inadmissibility in order to remain in the United States with her husband.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *See Decision of the District Director*, dated April 28, 2006.

On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act because she did not accrue one year or more of unlawful presence before departing the United States. Counsel states that the applicant was unlawfully present in the United States on at least two occasions in 1998 and 1999, but never accrued one year of unlawful presence. Counsel further states that although it is not clear whether the applicant entered the United States prior to being admitted as a visitor for pleasure on January 2, 1998, any unlawful presence before that date would amount to less than one year because section 212(a)(9)(B)(i) of the Act was not in effect before April 1, 1997, less than one year before the applicant's January 1998 admission. *See Brief in Support of Appeal* at 3. Counsel cites a 1997 memorandum from then-Acting Executive Associate Commissioner of the Immigration and Naturalization Service ("INS", now Citizenship and Immigration Services, "CIS") to support the assertion that unlawful presence under section 212(a)(9)(B)(i) of the Act is not considered in the aggregate, and therefore the applicant's separate periods of unlawful presence prior to departing the United States do not amount to one year or more. Counsel concedes that the applicant was unlawfully present on at least one occasion for more than 180 days, which rendered her inadmissible under section 212(a)(9)(B)(i)(I) of the Act for a period of three years beginning on or before her last entry in February 2000. Since more than three years has passed since that date, counsel asserts that the applicant is no longer inadmissible and was erroneously required to file an application for a waiver of inadmissibility.

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

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 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, . . . is inadmissible.

(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.

....

(v) Waiver. – The Attorney General [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 Attorney General [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.

In the present case, the record indicates that the applicant entered the United States as a visitor for pleasure on January 2, 1998 with authorization to remain in the United States until July 1, 1998. *See I-94 Departure Record* dated January 2, 1998. the applicant is not certain when she departed the United States, but records indicate she was again admitted to the United States as a visitor for pleasure on March 22, 1999, less than one year after her previous authorized stay expired on July 1, 1998. *See I-94 Departure Record* dated March 22, 1999. The record does not establish how long the applicant remained in the United States, but records indicate she was again admitted to the United States on February 8, 2000. *See I-94 Departure Record* dated February 8, 2000.

Counsel concedes that the applicant testified at her adjustment of status interview that she entered the United States in 1997 and that she was confused about her dates of entry and periods of authorized stay in the United States. *See Brief in Support of Appeal* at 2. Counsel further states that the applicant believes this information is erroneous and that her first entry to the United States was on January 2, 1998, but asserts that even if the applicant had been unlawfully present in the United States at some point in 1997, she would not have accrued one year of unlawful presence. *Id.* Counsel points out that the accrual of unlawful presence could not have begun before April 1, 1997, even if the applicant were present in the United States before that date, and that the applicant would have departed the United States at some point before her January 2, 1998 entry and therefore accrued at the most nine months of unlawful presence. *Brief* at 3. Counsel further asserts that the applicant never accrued one year or more of unlawful presence in the United States because each period of unauthorized presence would be counted separately rather than in the aggregate. *Brief* at 2. Counsel cites an INS memorandum that states, “Unlike section 212(a)(9)(C)(i)(I) of the Act, which is discussed further below, the periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate. . . [E]ach period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i) of the Act.” *See Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, June 17, 1997.

The AAO finds that the information in the record confirms counsel’s assertions and finds that the applicant did not accrue more than 180 days of unlawful presence at any time and is therefore inadmissible under section 212(a)(9)(B)(i)(I) of the Act and is subject to the three year bar.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The AAO notes that the director denied the applicant's I-485 application on the same date as the denial of the I-601 application. The applicant was not afforded the opportunity to pursue the appellate process prior to the denial of the I-485. The AAO finds that the denial of the I-485 was premature and that, as of today, the applicant is still seeking admission by virtue of adjustment of status. The applicant's last departure occurred before February 8, 2000. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible.

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