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U.S. Citizenship
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Services

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APR 26 2007

FILE:

[REDACTED]

Office: PHOENIX, AZ

Date:

IN RE:

[REDACTED]

APPLICATION:

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

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 District Director, Phoenix, Arizona and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Mexico who applied for a waiver under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v). The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant is married to a U.S. citizen and the daughter of a lawful permanent resident. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and mother.

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. *Decision of the District Director*, dated May 25, 2005.

On appeal, counsel asserts that the District Director erred as a matter of fact and law in finding that the applicant was unlawfully present for more than 180 days and in finding that she failed to meet the burden of establishing extreme hardship to her qualifying relatives necessary for a waiver. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, country condition reports; employment letters for the applicant and her spouse; letters of support for the applicant; and tax statements for the applicant and her spouse. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) 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 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.

(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 application, the record indicates that the applicant entered the United States with B-2 visitor status on June 15, 1999, January 18, 2000, and March 10, 2001. On May 25, 2001 the applicant entered the United States with V-2 status valid until February 18, 2002. *See Form I-94*. The applicant entered the United States in July or August 2002 with a Border Crossing Card. *Form I-485; Decision of the District Director*, dated May 25, 2005. According to the District Director, the applicant's authorized period of stay expired three days after she entered with the Border Crossing Card. *Decision of the District Director*, dated May 25, 2005. On November 1, 2002 the applicant married a U.S. citizen. *See marriage certificate*. On February 25, 2003 the applicant filed an Application to Adjust to Permanent Resident Status. *See Form I-485*. On April 5, 2003 the applicant's Application for Travel Document was approved. *See Form I-131*. As noted on her Authorization for Parole of an Alien into the United States, she returned to the United States on April 27, 2003. *See Form I-512*. The applicant therefore departed the United States after April 5, 2003 but before April 27, 2003. The record also notes that the Service approved the applicant's second Application for Travel Document on February 11, 2004 (See Form I-512), and the applicant re-entered the United States on April 1, 2004.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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 by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant accrued unlawful presence from the day after her authorized period of stay expired in July or August 2002 until February 25, 2003, the date of her proper filing of the Form I-485. The applicant was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure, April 2003.

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). The applicant's Form I-485 was issued a Notice of Intent to Deny on March 22, 2005 and her Form I-601 application was denied on May 25, 2005. As the final determination on the I-485 application is dependent on the I-601 application, which is the subject of this appeal, the AAO finds that the Form I-485 application is still pending.

The applicant's departure from the United States occurred in April 2003, therefore, it has been more than three years since the departure that raised the inadmissibility issue. A clear reading of the law reveals that the applicant is no longer inadmissible based on her prior unlawful presence as she is not seeking admission (in this case, through her I-485 application) within 3 years of her initial departure. Based on the current facts, she does not require a waiver of inadmissibility and the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.