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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

Office: PHOENIX, AZ

Date: OCT 26 2007

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 202(a)(2)(B) of the Nicaraguan Adjustment and Central American Relief Act, P.L. No. 105-100.

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

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 sustained.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A) of the Immigration and Nationality Act (the Act). She is the wife of a lawful permanent resident of the United States. The applicant seeks a waiver of inadmissibility. The District Director denied the application finding a waiver of inadmissibility was not warranted. *Decision of District Director, dated July 29, 2006.*

As a preliminary matter, pursuant to 8 C.F.R. § 245.13(d)(4)(i) the appeal of the denial of the waiver application is properly within the jurisdiction of Citizenship and Immigration Services (CIS).

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(A).

Section 212(a)(9)(A)(i) of the Act states that any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

Section 212(a)(9)(A)(ii) of the Act states that any alien who is not described in clause (i) who has been ordered removed under section 240 or any other provision of law, or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

The exception to these grounds of inadmissibility is found in 8 C.F.R. § 245.13(c)(2), which states that an applicant for adjustment of status under section 202 of Public Law 105-100 who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States. Such an alien must file a Form I-601, Waiver of Grounds of Excludability.

The evidence in the record reflects the following. The applicant entered the United States without inspection on December 28, 1986. *Form I-213.* The record contains the applicant's application for asylum and the acting district director's denial, dated September 22, 1989, of the application. The record contains the Decision of the Immigration Judge, dated February 4, 1991, granting the applicant voluntary departure to Nicaragua in lieu of deportation on or before October 4, 1991. On March 14, 2000, the district director, Los Angeles, California, stated that the applicant is subject to removal/deportation from the United States, based on a final order by an immigration judge in exclusion, deportation, or removal proceedings. *Form I-205.* The district director indicated that the applicant is prohibited from entering, attempting to enter, or being in the United States for a period of 10 years from the date of her departure from the United States because she was found deportable under section 241 of the Act and ordered removed from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act. *Form I-294.*

On appeal, counsel asserts that the applicant has met all of the requirements to adjust status under section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA).

Section 202 of NACARA provides for the adjustment of status of nationals of Nicaragua and Cuba physically present in the United States since December 1, 1995 if he or she applies for adjustment of status before April 1, 2000. A person can adjust even if ordered excluded, deported, removed or failed to depart voluntarily after a voluntary departure order. The grounds for inadmissibility specified in paragraphs (4)[public charge], (5)[labor certification], (6)(A)[entry without inspection], and (7)(A)[no documents], and 9(B)[3/10 year bar] of section 212(a) of the Act shall not apply. CIS may also waive section 212(a)(9)(A)[persons previously removed]. The criteria for waiver are the same as used when making a determination on a person's application for consent to reapply. The waiver of section 212(a)(9)(A) is filed on Form I-601. Memo, Pearson, Ex. Assoc. Comm. HQADN 70/23.1-P, 70/6/13-P (Feb. 14, 2001). The Pearson Memo, at page 2, states the following:

The provisions of LIFE allow that an alien's inadmissibility under INA Section 212(a)(9)(A) and INA Section 212(a)(9)(C) may now be waived in NACARA 202 and HRIFA cases. The enabling legislation contained in LIFE states that in granting waivers of these grounds of inadmissibility, the Attorney General shall use the "standards" utilized in granting consent to reapply under INA Sections 212(a)(9)(A)(iii) and (C)(ii). When making a determination on an alien's application for consent to reapply, Service officers generally consider factors enumerated in precedent decision such as *Matter of Tin*, 14 I &N Dec. 371, 373-374 (Comm. 1971), *Matter of Carbajal*, 17 I &N Dec. 272 (Comm. 1978), and *Matter of Lee*, 17 I &N Dec. 275 (Comm. 1978). Thus, the following factors shall also be applied in determining whether INA 212(a)(9)(A) or (C) should be waived in the case of an eligible NACARA 202 or HRIFA applicant.

- 1) The length of time the alien previously resided (or has resided) in the United States.
- 2) The alien's moral character.
- 3) The alien's responsibilities to family members residing in the United States.
- 4) The likelihood that lawful permanent residence will ensue in the near future.
- 5) Other hardships that could reasonably be foreseen.

The aforementioned list of factors is not all-inclusive. Furthermore, Congress has made its intent clear that NACARA 202 and HRIFA applicants may apply for waivers of INA Sections 212(a)(9)(A) and (C) while present in the United States.

Applying section 202 of NACARA, the record before the AAO indicates that the applicant is an eligible NACARA section 202 applicant. She was physically present in the United States since December 1, 1995. *Decision of the District Director, dated January 2, 2004, regarding Application to Register Permanent Residence or Adjust Status.* She applied for adjustment of status before April 1, 2000. *Application to Register Permanent Residence or Adjust Status, received by CIS on August 14, 1998.* Although the record conveys that the applicant was ordered removed, section 202 of NACARA states that a person can adjust even if ordered excluded, deported, removed or failed to depart voluntarily after a voluntary departure order.

The grant or denial of the above waiver also requires determining whether an exercise of discretion is warranted. The applicant, who is 45 years old, has resided in the United States since 1986. She has a U.S. citizen son and a U.S. citizen daughter, and a daughter who is a NACARA section 202 applicant. She is

married to her husband, who is a lawful permanent resident in the United States. Her husband's affidavit states that his wife's departure would profoundly affect his family; that he could not raise the children without his wife; that the children cannot relocate to Nicaragua; that his wife helps the family financially, physically, and morally; and that he has type II Diabetes and is under a doctor's care. There is little likelihood that lawful permanent residence will ensue for the applicant in the near future. The record does not indicate that the applicant has any criminal convictions.

The favorable factors in this matter are the hardship to the applicant's spouse and her U.S. citizen children and her daughter who is a NACARA section 202 applicant; the applicant's consistent work record; her active involvement with her church as a Sunday school teacher and church leader; and her lack of a criminal record. The unfavorable factors in this matter are the applicant's order of removal, her illegal entry in the United States, and periods of unauthorized presence. While the AAO cannot emphasize enough the seriousness with which it regards the applicant's immigration violations, the AAO finds that the positive factors outweigh the negative factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

A review of the documentation in the record, when considered in its totality, reflects that the applicant's inadmissibility pursuant to section 212(a)(9)(A) of the Act should be waived.

In proceedings for application for waiver of grounds of inadmissibility under section 202 of the NACARA, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.