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

H3B

[redacted]

FILE: [redacted] Office: PHOENIX, ARIZONA Date: JUN 7 2004

IN RE: Applicant: [redacted]

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 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

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 The appeal will be sustained, the decision of the district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Colombia who was found by the Interim District Director to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year. The applicant is the beneficiary of an approved Petition for Alien Relative filed by her U.S. citizen spouse. 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 U.S. citizen spouse.

The Interim 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 Interim District Director's Decision* dated June 13, 2003.

On appeal counsel asserts that the Interim District Director failed to correctly assess extreme hardship to the applicant's spouse.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (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 record reflects that on April 24, 1998, the applicant was admitted into the United States with a K-1 visa, as a fiancé of a U.S. citizen for a period of three months, expiring on June 23, 1998. The applicant married her U.S. citizen fiancé on May 5, 1998. She was unlawfully present in the United States from July 23, 1998, the date her authorized stay expired, until her application for adjustment of status was filed. A review of the documentation in the applicant's service file confirms that her Form I-485, Application for Adjustment of Status, was received by the Immigration and Naturalization Service ("INS", now known as Citizenship and Immigration Services, "CIS") on March 29, 1999. She thus accrued unlawful presence from July, 24, 1998, to March 29, 1999, a period in excess of 180 days but less than one year, making her inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

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

> (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 (whether or not pursuant to section 244(e)) 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 aliens' departure or removal is inadmissible.*** [Emphasis added.]

The record reflects that an Authorization for Parole of an Alien into the United States (Form I-512) was issued to the applicant on July 5, 1999. The record indicates that the applicant departed the United States on

an unknown date after the issuance of the Form I-512 and was paroled back on August 12, 1999. It was this departure that triggered her 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 applicant departed one more time with a Form I-512 that was issued on November 6, 2000, and was paroled into the United States on November 30, 2000, to continue her application for adjustment of status.

The standard rule followed by CIS 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 I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment from her parole status. The applicant's departures were after July 5, 1999, and November 6, 2000. It has now been more than three years since the departure that made the inadmissibility issue arise. A clear reading of the law reveals that the applicant is no longer inadmissible. She, therefore, does not need a waiver of inadmissibility, so that application is moot.

ORDER: The appeal is sustained, the interim district director decision's is withdrawn and the application for waiver of inadmissibility declared moot.