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U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: PHOENIX, AZ Date: NOV 23 2004

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, Director
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 The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot.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)(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 more than 180 days. The applicant is married to a United States citizen and 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 reside in the United States with his spouse and children.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director,* dated August 14, 2001.

On appeal, counsel states that the Immigration and Naturalization Service [now Citizenship and Immigration Services] erred in determining that the applicant had not evidenced that extreme hardship would be imposed on his spouse and children if the applicant returned to Mexico. *Form I-290B*, dated September 28, 2001. The entire record was reviewed and considered in rendering a 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 without inspection on August 7, 1993. On September 30, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On April 4, 2000, the applicant was issued Authorization for Parole

of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States on June 8, 2000.

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 April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until September 30, 1997, the date of his proper filing of the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of his departure.

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 his parole status. The applicant's departure occurred in 2000. It has now been more than three years since the departure that made the inadmissibility issue arise in his application. A clear reading of the law reveals that the applicant is no longer inadmissible. He, therefore, does not require a waiver of inadmissibility, so the appeal will be dismissed, the decision of the district director will be withdrawn and the waiver application will be declared moot.

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