U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

H4

[redacted]

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FILE: [redacted] Office: PHOENIX, AZ Date: FEB 19 2004

IN RE: [redacted]

PETITION: 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 PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Acting 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot.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 naturalized United States citizen and she is the beneficiary of an approved Petition for Alien Relative (WAC-97-173-50380). The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband and children.

The acting district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen husband. The application was denied accordingly. *See* District Director Decision, dated December 23, 2002.

On appeal, counsel states that denial of the waiver and subsequent removal to Mexico would cause extreme hardship to a U.S. citizen and that a waiver is well within the discretion of the Attorney General [now Secretary of Homeland Security (Secretary)] for a "de minimus" violation of section 212(a)(9)(B)(i)(I) of the Act.

In support of these assertions, counsel submits a brief as well as a copy and translation of the marriage certificate for the applicant and her spouse; copies of the naturalization certificates for the applicant's spouse and son; a copy of the photograph page of the U.S. passport of the applicant's daughter; copies of resident alien cards issued to three of the applicant's children; a copy of the approval of the Petition for Alien Relative (Form I-130) filed for the applicant by her son and a copy and translation of a letter from the physician treating the applicant's mother in Mexico, dated October 11, 1999.

The record also contains a statement from the applicant's son, undated and a statement from the applicant, undated. The entire record was reviewed and considered in rendering a decision on the appeal.

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 in February 1987. On October 14, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On October 20, 1999, 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 21, 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 October 14, 1997, the date of her 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 her 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 her parole status. The applicant's departure was in June 2000. It has now been more than three years since the departure that made the inadmissibility issue arise in her application. A clear reading of the law reveals that the applicant is no longer inadmissible. She, therefore, does not need 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 district director is withdrawn and the application for waiver of inadmissibility is declared moot.