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

H4

U.S. Citizenship and Immigration Services

[redacted]

PUBLIC COPY

FILE: [redacted] Office: SIOUX FALLS, SD 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 District Director, St. Paul, Minnesota, 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application will be declared moot.

The applicant is a native and citizen of Mexico who was found by the 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 and less than one year. The applicant is the beneficiary of an approved Petition for Alien Relative (LIN-00-113-50033) as the spouse of a U.S. citizen. He now 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 his spouse.

The 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 District Director Decision* dated April 5, 2001.

On appeal, counsel asserts that denial of the waiver application by the Immigration and Naturalization Service [now Citizenship and Immigration Services (CIS)] constitutes an abuse of discretion and that CIS only reacted to the evidence because CIS failed to conclude that the applicant's spouse would suffer an extreme hardship if the applicant were denied a waiver.

The record reflects that the applicant initially entered the United States without inspection and without an immigrant visa on an undetermined date in 1991 and was removed for the first time on September 2, 1992. The applicant again entered the United States without inspection and without an immigrant visa on an undetermined date and was removed a second time on February 2, 1995. In May 1999, the applicant reentered the United States without inspection and without an immigrant visa for the third time. The applicant married his U.S. citizen spouse in Winner, South Dakota on June 19, 1999. The applicant remained in the United States until March 1, 2000 when he was removed for the third time. On March 9, 2000, the applicant was paroled into the United States to testify at a court hearing and remains in the United States to date.

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 applicant accrued unlawful presence from May 1999, the date on which he reentered the United States, until March 1, 2000, the date of his removal from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days and 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 his departure. The applicant was paroled into the United States on March 9, 2000.

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 was in March 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 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.