U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: SAN ANTONIO Date: SEP 2 1 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting District Director, San Antonio, Texas, denied the application for waiver of inadmissibility that is now before the Administrative Appeals Office (AAO). The appeal will be rejected.

The record reflects that the applicant is a native and citizen of Mexico, the wife of a U.S. citizen, the mother of a U.S. citizen daughter, and the beneficiary of an approved Form I-130 petition. On November 6, 2006 the Acting District Director denied the applicant's Form I-601 Application for Waiver of Inadmissibility, finding that the applicant failed to demonstrate that its denial would cause extreme hardship to a qualifying relative. The applicant appealed from that denial of his waiver application.

Section 212(a)(9)(B)(i) of the Act provides:

> 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 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,
>
> is inadmissible.

The AAO notes that the evidence in the record suggests that the applicant entered the United States on May 1, 1988, and does not suggest that she has ever acquired any legal status. The record also does not suggest, however, that the applicant has ever left the United States. Inadmissibility pursuant to section 212(a)(9)(B)(i) is only triggered when the alien, after accruing unlawful presence in the United States, departs the United States. As such, the applicant is not presently inadmissible to the United States based on her unlawful presence of over one year.

However, neither the record nor USCIS computer records contain a Form I-485, Application to Adjust Status, nor any indication that the applicant has filed such an application. Because the record does not indicate that the applicant has a pending application to adjust status there is no underlying petition or application to support the filing of the Form I-601 waiver application, and it should have been rejected accordingly.

Further, the evidence in the record does not indicate that the applicant entered the United States pursuant to inspection and admission by an immigration officer. Pursuant to 8 C.F.R. § 245.1(b)(3), the applicant appears to be barred from adjusting status without first leaving the United States.

ORDER: The appeal is rejected.