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

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FILE: [redacted] Office: JACKSONVILLE, FLORIDA Date: DEC 30 2008

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:

SELF-REPRESENTED

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.

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge, Jacksonville, Florida, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the underlying application is moot. The matter will be returned to the district director for continued processing.

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. She sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated April 7, 2006.*

The AAO will first address the finding of inadmissibility. Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (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 . . . 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.
>
> . . . .

Unlawful presence accrues when an alien remains in the United States after the period of stay authorized by the Attorney General has expired, or is present in the United States without being admitted or paroled.[1] A properly filed adjustment of status application tolls any unauthorized time and is considered to be a period of stay authorized by the Attorney General.[2] Time in unlawful status that accrued prior to the filing of an adjustment of status application counts toward unlawful

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[1] Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii).

[2] *See,* Memo, Pearson, Exec. Assoc. Comm. Field Operations (HQADN 70/21.1.24-P, AD 00-07)(March 3, 2000).

presence under sections 212(a)(9)(B)(i)(I) and (II) of the Act.[3] For purposes of section 212(a)(9)(B) **of the Act, time in unlawful presence begins to accrue on April 1, 1997.**[4] The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by departure from the United States following accrual of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), do not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The documentation in the record reflects that on February 1, 2003 the applicant was admitted to the United States using a valid Border Crossing Card (BCC). She was issued an I-94 indicating the BCC was valid for multiple entries until July 31, 2003. The I-94 did not specify a time limitation for this particular entry, therefore, the visa is considered valid for duration of status. The applicant married her spouse on July 12, 2003, and a Petition for Alien Relative was filed on her behalf by her husband on November 6, 2003. The applicant filed an adjustment of status application with CIS on February 10, 2004, and departed from the United States pursuant to advance parole in August 2004.

The CIS Adjudicator's Field Manual (AFM) states, in pertinent part:

> An alien who remains in the United States beyond the period of stay authorized by the Attorney General [Secretary] is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service [CIS] policy, unlawful presence is counted in the following manner for nonimmigrants.
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> . . . .
>
> B. Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service [CIS] finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings...

See Memorandum by [redacted] Executive Associate Commissioner, Office of Field Operations dated March 3, 2000. The AAO finds that a status violation was not determined until the applicant was interviewed after the proper filing of her I-485 application for adjustment of status. She, therefore, did not accrue unlawful presence.

Based on the documentation in the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B) of the Act for unlawful presence. The waiver filed

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[3] *See Id.*

[4] *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The April 7, 2006 decision of the OIC is withdrawn. The appeal is dismissed as the underlying application is moot. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.