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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 06 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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I601) was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the Form I-601 is moot.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant presently seeks a waiver of her ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The director determined that the applicant had failed to submit evidence to establishing a qualifying family member would suffer extreme hardship if the applicant were denied admission into the United States. The applicant's Form I601 was denied accordingly.

Through counsel, the applicant indicates that the director failed to properly consider psychosocial evaluation evidence, as well as affidavit and school record evidence submitted by the applicant. The applicant indicates that a proper review of the evidence establishes her husband and children will suffer extreme hardship if she is denied admission into the United States, and the applicant requests, through counsel, that the matter be remanded to the director for readjudication.

The record reflects that the applicant entered the United States without parole or authorization in February 1991. The applicant married [redacted]) in New York on January 20, 1993. Mr. [redacted] became a naturalized U.S. citizen on January 9, 1998. The record reflects that the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status (Form I485) on January 14, 1998. The applicant departed the U.S. on October 16, 1998. She was subsequently paroled into the United States with advanced parole authorization on October 28, 1998.

The proper filing of an affirmative I 485 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. In the present matter, the applicant began to accrue unlawful presence on April 1, 1997, the date section 212(a)(9)(B) of the Act, unlawful presence provisions became effective. The applicant's unlawful presence continued through January 14, 1998, the date her Form I485 application was properly filed. The applicant was therefore unlawfully present in the United States for a period of more than 180 days but less than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part that:

> (i) [A]ny alien . . . 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, Department, Homeland Security] 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.

Pursuant to the terms of section 212(a)(9)(B)(i)(I), the applicant is barred from seeking admission within three years of the date of her departure from the United States.

The AAO notes an application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). In the present matter, the director denied the applicant's Form I485 application for adjustment of status on January 25, 2006, the same date as the denial of her Form I601 application. The applicant was thus not afforded the opportunity to pursue the appellate process relating to her Form I601 denial prior to the director's denial of her Form I485.

The AAO finds that the director's denial of the Form I485 application was premature, and that, as of today, the applicant is still seeking admission into the United States by virtue of adjustment from her parole status. The record reflects that the applicant's last departure from the United States occurred in October 1998. It has now been more than three years since the departure that made the applicant inadmissible under section 212(a)(9)(B)(i)(I) of the Act. **Accordingly, the applicant is no longer inadmissible under section** 212(a)(9)(B)(i)(I) of the Act, and the present Form I601 application is moot.

ORDER: The appeal is dismissed. The decision of the director is withdrawn, and the Form I601 application for a waiver of inadmissibility is declared moot.