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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3100
Washington, DC 20529

U.S. Citizenship and Immigration Services

#3

[redacted]

FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: MAY 22 2008
CDJ 2004 603 154 (RELATES)

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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 waiver application was denied by the District Director, Mexico City (Ciudad Juarez), Mexico, 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 The appeal will be dismissed, the previous decision of the District Director will be withdrawn and the application declared moot.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)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more subsequent to April 1, 1997. She seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her lawful permanent resident husband, lawful permanent resident father and U.S. citizen daughter.

The applicant's daughter, Consuelo Garcia, filed a Petition for Alien Relative (Form I-130) on the applicant's behalf that was approved on March 29, 2009. The applicant filed an Application for Immigrant Visa (Form DS-230) in Ciudad Juarez, Mexico on July 13, 2005. The applicant filed an Application for Waiver of Grounds of Excludability (Form I-601) on October 11, 2005 on which she indicated that she was unlawfully present in the United States from June 2000 to June 2001.

The District Director determined that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for a period in excess of one year. *Decision of District Director*, dated July 11, 2006. The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Id.*

On appeal, counsel submits a brief in which he contends that though the applicant has admitted to being unlawfully present in the United States in excess of six months, she has not admitted to being unlawfully present in United States for over a year. Counsel summarizes the evidence and contends that the applicant's daughter, who was born in the United States during a previous stay by the applicant here, is in "dire need of her mother's assistance" with her two children. He asserts that the applicant's daughter "faces the possibility of being homeless if she pays her mortgage payment versus daycare and other costs associated with raising two minor children alone." Counsel contends that when the hardship to the applicant, her husband, children and grandchildren is considered in the aggregate, this hardship constitutes extreme hardship.

The record contains a brief from counsel, a letter from the applicant's spouse, a letter from the applicant's father, a letter from the applicant's daughter, letters from friends of the applicant's mother, pay stubs for the applicant's daughter, mortgage documents for the applicant's daughter, utility bills, satellite television bills and family photographs. The entire record has been reviewed in rendering a decision on the appeal.

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

> (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 . . . 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 of removal, or
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> (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.
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> . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (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 [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.

As stated above, the applicant admitted on her Form I-601 waiver application that she was unlawfully present in the United States from June 2000 until her departure to Mexico in June 2001. However, on her Form G-325A, Biographic Information, which the applicant submitted with her waiver application, the applicant lists the dates of her presence in the United States as June 2000 to March 2001. On her Form DS-230 visa application, the applicant previously had indicated that she departed the United States in May 2001. In an affidavit dated October 3, 2007, the applicant's daughter states that her mother entered without inspection in approximately June 2000 and departed in either May or June 2001. She asserts that she does not remember the exact dates of her mother's departure, but is "fairly certain" that her mother did not remain in the United States for a full year.

The AAO notes that the applicant has the burden of proving that she is admissible to the United States by a preponderance of the evidence. *See* section 291 of the Act, 8 U.S.C. § 1361. Apart from the admissions of the applicant and her daughter, the record contains no evidence showing the period in which the applicant was unlawfully present in the United States. The AAO acknowledges that the applicant has presented some inconsistent information concerning the dates of her presence in the United States, but concludes that the preponderance of the evidence shows that the applicant was unlawfully present in the United States for a period of more than 180 days but less than one year. Accordingly, the determination that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act is withdrawn. Based on the evidence in the record, the applicant's unlawful presence would render her inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

However, 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).

There has been no final decision made on the applicant's visa application, so the applicant, as of today, is still seeking admission. The applicant's departure occurred in 2001. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible. The applicant does not require a waiver of inadmissibility. 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.