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

H3

FILE: [redacted] (CDJ2004 614 206) Office: CIUDAD JUAREZ, MEXICO Date: APR 30 2009

IN RE: [redacted]

APPLICATION: 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 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Ciudad Juarez, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, as the applicant is not inadmissible under 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), and the relevant waiver application is thus moot. The matter will be returned to the Officer in Charge 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)(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 and seeking readmission within ten years of her last departure from the United States. The applicant is married to a naturalized United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their children.

The Officer in Charge found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Officer in Charge,* dated February 21, 2006.

On appeal, the applicant's accredited representative contends that United States Citizenship and Immigration Services (USCIS) erred in finding that the applicant failed to meet the burden of establishing extreme hardship to her qualifying relative, as necessary for a waiver under 212(a)(9)(B)(v) of the Act. *Form I-290B*; *Representative's statement*, undated.

In support of these assertions, the applicant's accredited representative submits a statement. The record also includes, but is not limited to, a statement from the applicant's spouse; a statement from the applicant's employer; a medical letter for the applicant's children; a statement from the applicant's child's school; a statement from the applicant's church; and a police clearance letter for the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

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

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

> (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 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.

In the present application, the record indicates that the applicant entered the United States with a valid Border Crossing Card in April 1999 and remained in the United States until February 2002. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated May 12, 2005. The Officer in Charge found that the applicant had accrued unlawful presence from April 1999 until her departure in February 2002, and was thus inadmissible under section 212(a)(9)(B)(i)(II) of the Act. *Decision of the Officer in Charge*, dated February 21, 2006.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility.

Section 222(g) of the Act provides, in pertinent part:

> (1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

Aliens who remain in the United States beyond the period of stay authorized by the Attorney General accrue unlawful presence towards the three- and ten-year bars under section 212(a)(9)(B)(i)(I) and (II) of the Act. *Memorandum, Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, U.S. Department of Justice, Immigration and Naturalization Service, HQ 70/1 2-P*, dated March 3, 2000.

Chapter 15 of the Inspector's Field Manual provides, in pertinent part:

> 15.15 Cancellation of nonimmigrant visas under section 222(g) of the Act.
>
> (c) General Applicability. Section 222(g) of the Act applies to aliens who were " . . . admitted on the basis of a nonimmigrant visa . . . .(Emphasis added.) Section 222(g) does not apply to:
>
> (1) Aliens not admitted on the basis of a nonimmigrant visa.

. . .

(C) Aliens who were admitted with an I-185 or I-586, Canadian or Mexican Border Crossing Card (BCC) and remain in the United States beyond the authorized period of admission. (Note: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are subject to section 222(g) of the Act if they remain in the United States beyond the authorized admission, including those who were not issued a Form I-94. However, the overstay should be documented through a sworn statement or other credible evidence.)

At the time of her immigrant visa interview, the applicant testified that she had entered the United States with a valid Border Crossing Card. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated May 12, 2005. The notes from the consular officer who interviewed the applicant at the time of her immigrant visa interview do not indicate, however, that the applicant was documented with a combination B-1/B-2 NIV/BCC that would have subjected her to the provisions of section 222(g) of the Act rather than a Form I-185 or I-586 Mexican Border Crossing Card, issued by the legacy Immigration and Naturalization Service, to which section 222(g) would not have applied. As no sworn statement or other credible evidence in the record establishes that the applicant used a combination B-1/B-2 NIV/BCC to enter the United States in 1999, the AAO does not find the applicant to be subject to section 222(g) of the Act and to have accrued unlawful presence from April 1999 until February 2002.

As the record does not establish that the applicant accrued unlawful presence for one year or more, she is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act and the waiver filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed as the underlying application is moot. The case is returned to the Officer in Charge so that he may notify the U.S. Consulate of the AAO decision in the matter.