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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

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[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: JUN 01 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.

Michael Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Mexico City, denied the instant waiver application. The matter 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application will be declared moot.

The record reflects that the applicant is a native and citizen of Mexico, the husband of a U.S. Legal Permanent Resident (LPR), the father of a U.S. citizen child, the father of two U.S. LPR children, and the beneficiary of an approved Form I-130 petition. The district director found the applicant inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i). The applicant seeks a waiver of inadmissibility in order to remain in the United States with his wife and children.

The district director also found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application. On appeal, counsel submitted a brief and additional evidence. Although counsel did not appear to contest the district director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(9) 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-
> >
> > > (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.
> > >
> > > (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.

On a Form DS-230 that the applicant signed on January 24, 2005, the applicant stated that he lived in Fort Worth, Texas from March 8, 1994 to February 21, 1998.

On a Form G-325A, which the applicant signed on June 23, 2005, the applicant stated that he had lived in Mexico from February 1998 through the date of his signature. Subsequently, that form was

amended to show that the applicant had lived in Mexico since October 1998. The information originally placed on that form was typed. The amendment was made with a ballpoint pen. The identity of the person who amended that form is unknown to the AAO. The applicant did not initial that amendment.

On the Form I-601 waiver application, the applicant, who signed that form on June 23, 2005, indicated that he lived in Forth Worth, Texas, from March 8, 1994 to February 28, 1998. Subsequently, that form was amended to show that the applicant had departed from the United States on October 28, 1998, rather than on February 28, 1998. Apparently at the same time, the acronym EWI was added, to indicate that the applicant's entry into the United States was without inspection. The information originally placed on that form was typed. The amendment was made with a ballpoint pen. The identity of the person who amended that form is unknown to the AAO. The applicant did not initial that amendment.

The applicant's criminal history printout (rap sheet) states that he was arrested February 22, 1998 in Hurst, Texas, for "failure to identify." That arrest does not, in itself, contribute to the applicant's inadmissibility, but does confirm that the applicant was in the United States on that date.

Although the record contains no other evidence to demonstrate that the applicant entered without inspection, neither does it contain any evidence that he ever achieved any legal status in the United States. Further, neither counsel nor the applicant has ever contested the finding that he was in the United States unlawfully. The AAO finds, on the balance, that the applicant was in the United States unlawfully.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

> (a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

> TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

For the purpose of unlawful presence pursuant to section 212(a)(9)(B)(i) of the Act, then, the applicant's unlawful presence began on April 1, 2007. If he departed on February 28, 1998, then he was unlawfully present for more than six months, but less than one year, thus becoming inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, and was inadmissible for the following three years.

If he departed on October 28, 1998, on the other hand, then he was unlawfully present in the United States for more than one year, and, pursuant to section 212(a)(9)(B)(i)(II) of the Act, became inadmissible, upon his departure, for ten years.

Whether the applicant departed on February 28, 1998 or on October 28, 1998 is unclear to the AAO. The AAO, however, will not dwell on that issue, as it is moot. Even if the applicant did not leave until October 28, 1998, and thus was inadmissible for ten years from that date, those ten years have elapsed.

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).

The applicant's last departure occurred no later than October 28, 1998. Because ten years have elapsed since that departure, a clear reading of section 212(a)(9)(B)(i) of the Act reveals that the applicant is no longer inadmissible.

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