



U.S. Citizenship  
and Immigration  
Services

H<sub>2</sub>

FILE:

Office: CHICAGO

Date: DEC 08 2009

IN RE:

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, Chicago, Illinois, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico, the wife of a U.S. citizen, the mother of three U.S. citizen children, and the beneficiary of an approved Form I-130 petition.

The district director found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband and children. The district director also found that the applicant had not established that failure to approve the waiver application would cause extreme hardship to her U.S. citizen husband, and denied the application.

On appeal, counsel provided additional evidence and asserted that the evidence demonstrates that failure to approve the waiver application will cause the applicant's husband to suffer extreme hardship. Although counsel did not appear to contest the district director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

On the Form I-485 Application to Adjust Status the applicant, who signed that form on August 16, 1986, stated that she had last entered the United States without inspection during May 2000, that she subsequently received a V-1 visa, and that her visa expired on September 9, 2004.

Notes taken at the applicant's adjustment interview on April 13, 2007 show that the applicant stated to the interviewing officer that her first entry into the United States was during March of 1996, when she entered without inspection. She stated that she then remained in the United States until November of 1999, when she returned to Mexico for approximately six months. She then, after one unsuccessful attempt, reentered the United States without inspection during May of 2000, and has

remained in the United States since. She acquired a V-1 nonimmigrant visa on February 12, 2002, which ended her unlawful presence.

The chronology that the applicant provided at her interview was included in the March 14, 2007 decision denying the applicant's waiver application. On appeal, counsel did not appear to dispute that chronology.

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.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's first unlawful presence began on April 1, 1997 and continued until her November 1999 departure, a period of more than one year. That unlawful presence renders the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Waiver of the applicant's inadmissibility under section 212(a)(9)(B)(i) of the Act is governed by section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

The Attorney General [now Secretary of 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 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.

However, the record contains an additional inadmissibility issue that was not addressed in the decision of denial.

Section 212(a)(9) of the Act states in pertinent part:

....  
(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

As was discussed above, the applicant had been unlawfully present in the United States for more than a year when she departed during November 1999. The applicant remained outside the United States for only six months. By her own admission she then attempted to reenter the United States without being admitted, but was apprehended. A few days later, during May of 2000, she did reenter the United States without being admitted. Either the attempted reentry or the successful reentry was sufficient to render the applicant inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. The record contains no indication that the exception in section 212(a)(9)(C)(ii) of the Act applies in this case.

The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. No waiver of the ten-year inadmissibility imposed by that section is available. Given that the applicant is ineligible for adjustment of status as a consequence of this inadmissibility, no purpose would be served by determining whether the applicant's is eligible for waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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 rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.