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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: MEXICO CITY (CIUDAD JUAREZ)

Date: **JAN 15 2010**

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)

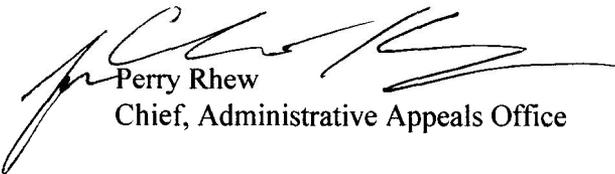
ON BEHALF OF APPLICANT:

[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.

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated November 14, 2006.

On appeal, counsel for the applicant asserts that the applicant's wife and daughter will suffer extreme hardship if the present waiver application is denied. *Statement from Counsel on Form I-290B*, dated December 14, 2006.

The record contains a statement from counsel on Form I-290B; an evaluation of the effect denial of the waiver application would have on the applicant's wife and daughter, conducted by a high school instructor and educational services director; statements from the applicant's wife; copies of birth certificates for the applicant, the applicant's daughter, and the applicant's wife; a copy of the applicant's marriage certificate; a psychological evaluation of the applicant, and; documentation regarding the applicant's unlawful presence in the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

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-

....

(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.

The record reflects that the applicant entered the United States without inspection in or about March 1986. On January 8, 2001, the applicant was arrested and charged with driving or actual physical control while under the extreme influence of intoxicating liquor under Arizona Revised Statutes § 28-1382.¹ The applicant was subsequently placed into removal proceedings in Immigration Court. On March 19, 2003, an Immigration Judge granted the applicant voluntary departure until July 17, 2003. The applicant departed to Mexico on July 17, 2003, within the time permitted by the voluntary departure order. Based on the foregoing, he accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until March 19, 2003, the date an Immigration Judge granted him voluntary departure. This period totals over five years.

The applicant now seeks admission as an immigrant pursuant to his marriage to a U.S. citizen. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

On June 5, 2003, the applicant's wife filed a Form I-130 relative petition on his behalf. On December 17, 2005, United States Citizenship and Immigration Services issued a request for evidence, providing the applicant's wife 12 weeks to submit additional documentation to support the petition. The applicant's wife failed to respond to the request for evidence within the 12-week period, and thus her Form I-130 petition was considered abandoned and denied pursuant to 8 C.F.R. § 103.2(b)(13). The record does not show that the applicant's wife filed a subsequent Form I-130 petition.

Accordingly, there is no underlying basis for the present waiver application. The Form I-130 petition was the basis for the applicant's potential eligibility for admission as the spouse of a U.S. citizen awaiting approval of a pending Form I-130 petition (K-3). Without an approved Form I-130 petition, the Form I-129F application for K-3 status on behalf of the applicant is moot. *See* 8 C.F.R. § 214.2(k)(1)(i) (prescribing the automatic termination of K-3 status upon denial of the underlying Form I-130 petition). Once the Form I-129F application became moot, the applicant's Form I-601 application for a waiver also became moot because he is no longer an applicant for admission to the

¹ The applicant was convicted under Arizona Revised Statutes § 28-1382 for which he was sentenced to a fine and 10 days of incarceration. It is noted that the record does not show that the applicant's conviction under Arizona Revised Statutes § 28-1382 constitutes a conviction for a crime involving moral turpitude. *See Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1194 (BIA 1999).

United States based on an approved spousal petition. For this reason, the applicant has not shown that he requires a waiver of inadmissibility, and the Form I-601 application may not be approved.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(a)(9)(B) 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 has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.