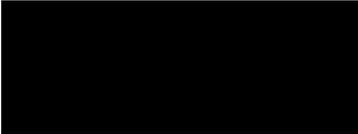




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy

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FILE: [REDACTED]

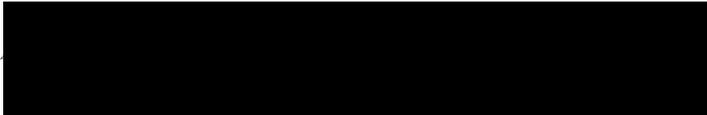
Office: MIAMI, FLORIDA

Date: **SEP 21 2005**

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: On January 9, 2004, the District Director, Miami, Florida denied the 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to § 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 citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her husband and family.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her spouse. The application was denied accordingly. The applicant submitted a timely appeal on February 9, 2004. On appeal, counsel asserts that pursuant to § 245(c)(2) of the Act and 8 CFR § 245.1(b)(5) and (6), the applicant is not subject to the inadmissibility provision applied to persons unlawfully present. The AAO notes, however, that these sections of law and regulations simply allow immediate relatives of U.S. citizens to apply for adjustment of status in certain circumstances; they do not mean that the bar found at § 212(a)(9)(B) is inapplicable to the applicant in this case. Counsel also maintains that the applicant's spouse would suffer emotional hardship upon the applicant's removal, and that the applicant herself would be at risk of physical harm in Nicaragua at the hands of her ex-husband.

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-

(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.

....

(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 on a visitor visa on June 18, 2000 with authorization to remain until December 18, 2000. On December 18, 2001 the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On December 20, 2001 the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States on January 16, 2002.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence for a period of 364 days from December 19, 2000, the date after her last day of authorized presence, until December 18, 2001, the date she filed the Form I-485. The AAO finds that the applicant is therefore inadmissible to the United States under § 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days. According to the evidence on the record, she was not unlawfully present for one complete year; hence, the ten year bar described at § 212(a)(9)(B)(i)(II) is not applicable. Pursuant to § 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The district director erroneously issued a denial of the applicant's I-485 application on April 20, 2004, based on his finding that the applicant had failed to submit a timely appeal of the denial of the waiver application. The record contains evidence that the applicant did indeed submit an appeal within the allowed thirty day period. The denial of adjustment of status was erroneous; thus, as of this date the applicant still seeks admission by virtue of adjustment from her parole status. The applicant's departure occurred between December 20, 2001 and January 15, 2002. It has now been more than three years since that departure; therefore, the applicant is no longer inadmissible. Thus, she does not require a waiver of inadmissibility.

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