



U.S. Citizenship
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Services

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FILE:

Office: HELENA, MT

Date:

JAN 31 2007

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of
the Immigration and Nationality Act, 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Helena, Montana, denied the waiver application and a subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO for review. The decision of the district director will be withdrawn and the application declared moot.

On June 12, 2002, the AAO rejected the applicant's appeal, withdrew the district director's decision and remanded the matter for further consideration and action because the record forwarded to the AAO did not contain appropriate evidence. *See AAO Decision*, dated June 12, 2002. The AAO instructed the district director to certify the decision for review to the AAO if the district director's post-remand decision was adverse to the applicant.

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)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant is married to a naturalized United States citizen and is the mother of a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her husband and child.

On remand, the district director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director*, dated June 10, 2005. The entire record was reviewed and considered in rendering a decision.

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.

(v) Waiver. - The Attorney General [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 was admitted to the United States as a nonimmigrant visitor on April 4, 1997. The applicant remained in the United States past October 3, 1997, the date on which her authorized stay expired. On June 11, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130). On November 15, 1999, 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 return to the United States on January 5, 2000. The applicant has not departed the United States since that date.

The applicant accrued unlawful presence from October 3, 1997, the date on which her authorized stay expired, until June 11, 1998, the date on which she filed the Form I-485. The applicant is, therefore, inadmissible to the United States under section 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 but less than one year. Pursuant to section 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). There has been no final decision made on the applicant's Form I-485, so the applicant, as of today, is still seeking admission by virtue of adjustment under section 245 of the Act. The AAO notes that the district director denied the applicant's Form I-485 on June 27, 2001, the same date as the original denial of the Form I-601. However, as the final determination on the Form I-485 application is dependent on the Form I-601, which is the subject of this appeal, the AAO finds that no final decision should have been issued on the Form I-485. Therefore, the Form I-485 is still pending. The applicant's last departure occurred prior to January 5, 2000. It has been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act. She, therefore, does not require a waiver of inadmissibility, so the decision of the district director will be withdrawn and the waiver application will be declared moot.

ORDER: The decision of the district director is withdrawn and the application for waiver of inadmissibility is declared moot.