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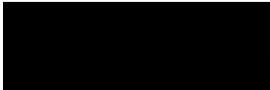
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FILE:



Office: SAN FRANCISCO, CALIFORNIA

Date:

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 waiver application was denied by the District Director, San Francisco, California, and 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 The appeal will be dismissed, the previous decision of the District Director will be withdrawn and the application declared moot.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 record reflects that the applicant is a native and citizen of the Philippines 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 in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The record indicates that the applicant is married to a naturalized United States citizen and she is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her United States citizen husband.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated June 18, 2004.

On appeal, the applicant, through counsel, asserts that the denial of the applicant's admission into the United States would result in extreme hardship to her United States citizen husband. *Form I-290B*, filed June 30, 2004. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 (whether or not pursuant to section 244(e)) 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, 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.

(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 on November 30, 2001, the applicant entered the United States on a B2 nonimmigrant visa, with authorization to remain in the United States until May 30, 2002. On March 21, 2003, the applicant married [REDACTED], a naturalized United States citizen. On May 12, 2003, the applicant filed a Form I-130 and an Application to Register Permanent Resident or Adjust Status (Form I-485). On May 12, 2003, the applicant filed an Application for Travel Document (Form I-131), which was approved on June 4, 2003. The applicant departed for the Philippines and returned to the United States on September 9, 2003. On February 2, 2004, the applicant's Form I-130 was approved. On June 18, 2004, the District Director denied the Form I-485, finding the applicant was inadmissible for having been unlawfully present in the United States for over a year. On April 21, 2004, the applicant filed a Form I-601. On June 18, 2004, the District Director denied the applicant's Form I-601, finding that the applicant accrued more than a year of unlawful presence and she failed to demonstrate extreme hardship to her United States citizen spouse.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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 [REDACTED] Executive Associate Commissioner, Office of Field Operations, dated June 12, 2002. The applicant accrued unlawful presence from May 30, 2002, the date the applicant's authorization to remain in the United States expired, until May 12, 2003, the date the applicant properly filed her 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. 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 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 District Director improperly denied the applicant's Form I-485 application for adjustment of status prior to the adjudication of the appeal of the waiver denial. The decision on the Form I-485 must be withdrawn and the application reopened. That application is considered to be still pending, and, as such, the applicant, as of today, is still seeking admission by virtue of adjustment of her nonimmigrant status. The applicant's departure occurred in May 2003. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible. She, therefore, does not require a waiver of inadmissibility, so the appeal

will be dismissed, the decision of the District Director will be withdrawn, and the waiver application will be declared moot.

**ORDER:** The appeal is dismissed, the prior decision of the District Director is withdrawn, and the application for waiver of inadmissibility is declared moot. Further, the District Director is ordered to reopen the applicant's application for adjustment of status.