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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: LOS ANGELES (SANTA ANA)

Date: JUL 01 2009

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:

[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.

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, 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 The appeal will be dismissed, the previous decision of the district director will be withdrawn, and the application declared moot.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 applicant is a native and citizen of Mexico who last entered the United States in April 1996 as a visitor for pleasure. She 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. The applicant is the spouse of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative and seeks a waiver of inadmissibility in order to remain in the United States with her husband and daughter.

The district director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 29, 2006.

On appeal, counsel asserts that the applicant qualifies for a waiver under section 212(a)(9)(B)(v) of the Act because her husband would suffer extreme hardship if she were removed from the United States. *See Counsel's Brief in Support of Appeal* at 1-2. In support of the appeal counsel submitted a psychological evaluation of the applicant's husband and other documentation concerning the potential psychological effects of separation from the applicant. 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 . . . 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 [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 case, the record reflects that the applicant is a forty-two year-old native and citizen of Mexico who entered the United States on April 16, 1996 as a visitor with a border crossing card. In a separate motion to reopen/ reconsider the applicant's waiver application, counsel states that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act because she has not departed the United States since 1996. *Motion to Reopen/ Reconsider, Form I-601 Waiver of Ground of Inadmissibility* dated October 30, 2006. Counsel further contends that the October 25, 1999 entry date listed on her I-485 application was the result of a clerical error made by the notary who prepared the application. *See Motion to Reopen* at 4. In support of the motion the applicant submitted an affidavit also stating that she had not departed the United States since her April 1996 entry. *Affidavit of* [REDACTED] dated October 27, 2006. The applicant further states that she has lawfully entered the United States with her parents numerous times since she was a child and was included in her mother's passport. *Id.*

Counsel submitted a copy of the applicant's mother's passport issued in 1979 in which the applicant was included as a child, which contains a stamp stating "cancelled without prejudice" dated October 25, 1999. *See passport of* [REDACTED] *issued May 30, 1979 listing the applicant and five other minor children.* Counsel suggests that the notary who prepared the I-485 application wrongfully concluded that this was an entry stamp indicating that the applicant had entered the United States on that date. *Motion to Reopen* at 4. The passport that contains the October 25, 1999 date stamp was not issued to the applicant but rather to her mother, and there is no indication that the stamp, even if it were evidence on a lawful entry on that date, relates to the applicant.

The decision of the district director states that the applicant testified that she had last entered the United States with a border crossing card on October 25, 1999, and concludes that she is inadmissible for unlawful presence from April 1, 1997 to October 1999. The applicant states that she became nervous and confused about her last entry date when asked about the October 25, 1999 entry listed on her I-485 application and she may have said she entered on that date. *Affidavit of* [REDACTED] dated October 27, 2006. The AAO notes that the record does not contain a written sworn statement made by the applicant that she departed the United States and reentered in October 1999. Further, the applicant submitted copies of pay stubs stating that she worked over forty hours per week for a four-week period beginning on October 7 and ending on November 3, 1999.

The applicant states that she never departed the United States after April 17, 1996, and counsel asserts that the October 25, 1999 entry date on her I-485 application was erroneously entered by a notary who prepared the form. In addition to affidavits from herself and her husband stating that she had not departed the United States since 1996, the applicant submitted documentary evidence indicating that she was in the United States for the entire month of October 1999. It appears that the finding that the applicant had departed the United States in 1999 after being unlawfully present for a period of one year or more was the result of a clerical error, and the applicant has met her burden of establishing that she is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The waiver application filed pursuant to section 212(a)(9)(B)(v) of the Act is therefore moot. As the applicant is not required to request the waiver, the appeal of the denial of the waiver will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) 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 is not required to file the waiver application. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed, the prior decision of the district director is withdrawn, and the application for a waiver of inadmissibility is declared moot. The district director shall continue processing the application for adjustment of status.