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

U.S. Citizenship  
and Immigration  
Services



H3

FILE: 

Office: CIUDAD JUAREZ

Date: JUN 08 2009

IN RE: 

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

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge (OIC), Mexico City, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the OIC will be withdrawn and the application declared moot.

The record reflects that the applicant is a native and citizen of Mexico, the spouse of a U.S. citizen, and the beneficiary of an approved Form I-129F, Petition for Alien Fiancée. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i). The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The OIC found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse and denied the application. On appeal, the applicant's husband asserted that the evidence in the record does show that denying the waiver application would cause him extreme hardship. Although the applicant and her husband did not appear to contest the OIC's determination of inadmissibility, the AAO will review that determination.

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-

(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.

In the decision of denial, the OIC stated that the applicant was unlawfully present in the United States from December 2003 until September 2004. That period of time is greater than six months but less than a year, and, if unlawful presence during that period were amply demonstrated, it would render the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act.

The record contains no evidence from which the AAO is able to discern that the applicant was unlawfully present during the months stated.

Assuming that the applicant was unlawfully present, as the OIC found, and departed the United States during September 2004, as the OIC found, that unlawful presence and departure gave rise to a three-year inadmissibility that commenced upon the applicant's September 2004 departure. More than three years have passed since September 2004, however, and that unlawful presence, even if demonstrated, would no longer render the applicant inadmissible.

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).

It has now been more than three years since the alleged departure that the OIC found 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.

**ORDER:** The appeal is dismissed, the prior decision of the OIC is withdrawn and the application for a waiver of inadmissibility is declared moot.