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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

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FILE:

Office: ST PAUL

Date: MAY 04 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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, St. Paul, Minnesota, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the decision of the district director withdrawn and the application declared moot.

The applicant has retained a series of attorneys while the waiver application and collateral matters were pending before USCIS. The representations of all of those attorneys will be considered, but the decision will be furnished only to the applicant and to his current attorney of record.

The record reflects that the applicant is a native and citizen of Mexico, the husband of a U.S. legal permanent resident (LPR), the father of three U.S. citizen sons, and the beneficiary of an approved Form I-130 petition. 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 remain in the United States with his wife and children.

The district director found that the applicant had been unlawfully present in the United States and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The district director also found that the applicant had failed to establish extreme hardship to his U.S. LPR spouse and denied the application.

On appeal, previous counsel asserted that the applicant qualifies for waiver and that his application was incorrectly denied. Although neither previous counsel nor present counsel appeared to contest the district director's determination of inadmissibility, the AAO will review that determination.

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.

A birth certificate in the record shows that the applicant was born on February 5, 1980 in Las Canollitas, Michoacan, Mexico.

On the Form I-601 waiver application the applicant, who signed that form on April 20, 2006, indicated that he had been continuously present in the United States since January 1993, with the exception of an absence from October 1998 to September 2000.

For the purposes of section 212(a)(9)(B)(i) of the Act, then, the applicant was unlawfully present in the United States from February 5, 1998, when he turned 18 years old, until his departure on October 5, 1998. The record shows that the applicant reentered the United States during September 2000, and does not show that he ever subsequently departed. The record, therefore, contains no evidence of an unlawful presence within the meaning of section 212(a)(9)(B)(i) of the Act after October 5, 1998.

The evidence in the record is sufficient to show that the applicant was unlawfully present in the United States from February 5, 1998 to October 5, 1998, a period of more than six months, thus triggering a three-year inadmissibility pursuant to section 212(a)(9)(B)(i) of the Act.

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 applicant's last departure occurred on October 5, 1998. 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.

ORDER: The appeal is dismissed, the decision of the district director is withdrawn and the application for a waiver of inadmissibility is declared moot. The district director is directed to reopen the Form I-485 on her own motion pursuant to 8 C.F.R. 103.5(a)(5) and to continue processing of the application.