

identity information related to
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U.S. Citizenship
and Immigration
Services

2005 JUN 14

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JUN 14 2005

[Redacted]

FILE:

[Redacted]

Office: EL PASO, TEXAS,

Date:

IN RE:

[Redacted]

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

ON BEHALF OF APPLICANT:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, El Paso, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the matter remanded for further action as noted below.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to § 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 applicant is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. She seeks a waiver of inadmissibility in order to reside in the United States with her husband.

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. On appeal, counsel asserts that the applicant's spouse will experience extreme hardship whether he remains in the United States or relocates to Mexico to accompany the applicant.

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 [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.

The applicant indicated that she entered the United States in December 1999, and, according to the district director's decision, she departed the United States on or after June 26, 2002, when she was issued an advance parole document, and reentered on July 1, 2002, pursuant to the advance parole. The record of proceeding does not contain documentation regarding whether or when the applicant applied for adjustment of status, a factor which is material to any decision on inadmissibility under § 212(a)(9)(B) of the Act.

The AAO notes that the Attorney General [Secretary] designated the proper filing of an affirmative application for adjustment of status as an authorized period of stay for purposes of determining bars to admission under § 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* In order to determine whether the applicant accrued unlawful presence, and if so, how much unlawful presence she accrued, CIS must consider the date (if any) on which she filed an application for adjustment of status. The AAO must have this information in order to confirm the ground of inadmissibility and determine whether the applicant is subject to the 3 year or 10 year bar.

The district director shall render a new decision laying out specifically the period of unlawful presence. If the decision is adverse to the applicant, it shall be certified to the AAO along with a complete record of proceeding containing all materials used to reach the decision. The applicant will be afforded the opportunity to respond to the certification without fee. As always, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The district director's decision is withdrawn. The application is remanded to the district director for entry of a new decision, which if adverse to the applicant, is to be certified to the AAO for review.