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**U.S. Citizenship
and Immigration
Services**

HA

FILE:

Office: ALBANY, NY

MAY 15 2007

IN RE:

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

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 Officer-in-Charge, Albany, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the officer-in-charge will be withdrawn and the application declared moot.

The applicant is a native and citizen of Romania 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 applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge 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. *Decision of the Officer-in-Charge*, dated December 23, 2004.

On appeal, counsel states that the applicant's spouse is suffering from health problem and requires the care of the applicant. *Counsel's Brief*, undated. Counsel also submits additional documentation concerning the applicant's filing of an Application to Extend/Change Nonimmigrant Status (Form I-539).

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 application, the record indicates that the applicant entered the United States on a visitor's visa on August 10, 2001 with an authorized period of stay until February 9, 2002. On April 1, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant was then issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart the United States on June 3, 2003. She reentered the United States on July 2, 2003.

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 officer-in-charge found that the applicant accrued unlawful presence from February 9, 2002, the date her authorized stay expired, until April 1, 2003, the date of her proper filing of the Form I-485.

However, on appeal counsel submitted evidence showing that the applicant timely filed a Form I-539, tolling her period of unlawful presence. The record indicates that on February 7, 2002 the applicant filed a Form I-539. The applicant's Form I-539 was denied on October 10, 2002. She then filed a motion to reconsider on November 7, 2002. This motion was denied on February 10, 2003. The AAO finds that the applicant's period of unlawful presence tolled for 120 days beginning on February 9, 2002, the date her authorized stay expired.

Section 212(a)(9)(B)(iv) of the Act provides:

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

Based on the newly submitted documentation, the AAO finds that the applicant was not accruing unlawful presence during the pendency of her request for extension, until June 9, 2002, 120 days from the expiration of her authorized stay. The applicant's period of unlawful presence was from June 10, 2002 until April 1, 2003, the date of her proper filing of the Form I-485, a total of 295 days.

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 but less than one year. 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 based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission. The applicant's departure occurred in 2003. It has now been more than three years since the departure that made the inadmissibility issue arise in her application. 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 officer in charge will be withdrawn and the waiver application will be declared moot.

ORDER: The appeal is dismissed, the prior decision of the officer in charge is withdrawn and the application for waiver of inadmissibility is declared moot.