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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

DATE: **MAY 14 2013** OFFICE: MEXICO CITY

FILE: [REDACTED]

IN RE: APPLICANT: [REDACTED]

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

ON BEHALF OF APPLICANT:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant's Form I-130, Petition for Alien Relative, was approved on February 26, 2011, and evidence of record indicates the petitioning U.S. citizen spouse died on March 25, 2011. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The Field Office Director concluded that although the applicant was no longer inadmissible under section 211(a)(9)(B)(i)(I) of the Act, she was not eligible for benefits under section 204(l) of the Act and denied the application accordingly. *See Decision of Field Office Director* dated October 11, 2012.

On appeal, the applicant submits a brief, documentation of her spouse's death, financial and medical documents, phone records, articles on country conditions in Mexico, and photographs. In the brief, the applicant asserts that the spouse could not relocate to Mexico before he passed away, and that he experienced extreme hardship given their separation.

The record includes, but is not limited to, the documents listed above, statements from the applicant and her spouse, letters from family and friends, documentation of birth, marriage, residence, and citizenship, other medical and financial documents, documentation of country conditions in Mexico, and other applications and petitions. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(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 (whether or not pursuant to section 244(e) 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) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(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.

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant was admitted to the United States in B-1/B-2 nonimmigrant status on August 16, 2008, with authorization to remain until November 15, 2008. The applicant remained past the date of her authorized stay, and filed a Form I-485, Application to Register Permanent Residence or Adjust Status on January 20, 2009. She withdrew the I-485 application and returned to Mexico in June 2009. The applicant accrued less than 180 days of unlawful presence from November 15, 2008 until her adjustment of status filing on January 20, 2009, and was therefore not inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act as the Field Office Director indicated.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or

admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In the present case, the applicant admitted under oath that in August 2008, she presented her nonimmigrant visa to immigration officials, and represented that she intended to visit for tourism, when she actually intended to marry a U.S. citizen and reside permanently in the United States. Inadmissibility due to misrepresentation or fraud is not contested on appeal. The AAO therefore finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation.

The applicant contends while her spouse was alive he experienced difficulties given their separation, and that he could not relocate to Mexico because his life was in the United States. The AAO notes that analysis of a waiver of inadmissibility where a petitioning spouse has died does not require an examination of the hardship the spouse suffered before he deceased.

The record reflects that the applicant and the I-130 petitioner married on September 19, 2008. The spouse's first Form I-130 Petition for Alien Relative was denied on October 20, 2009, and the applicant's spouse filed a second Form I-130 Petition on December 3, 2009. This second Petition was approved on February 26, 2011. A death certificate indicates the spouse died on March 25, 2011. The applicant admits in a statement submitted with the Form I-290B, Notice of Appeal or Motion, that she has resided in Mexico since June 2009.

With respect to spouses of deceased petitioners, 8 C.F.R. § 204.2(i)(1) (2013) states:

- (iv) A currently valid visa petition previously approved to classify the beneficiary as an immediate relative as the spouse of a United States citizen must be regarded, upon the death of the petitioner, as having been approved as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant for classification under paragraph (b) of this section, if, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section. If the petitioner dies before the petition is approved, but, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this

section, then the petition shall be adjudicated as if it had been filed as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant under paragraph (b) of this section.¹

The AAO concludes that the applicant has met the conditions in 8 C.F.R. § 204.2(b)(1) (2013), and consequently, the approved Form I-130 filed by the applicant's U.S. citizen spouse prior to his death is automatically converted to a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant.

Regarding to the applicant's spouse's death in March 2011 and its impact on the applicant's Form I-601, section 204(l) of the Act, which became effective on October 28, 2009, states as follows:

Surviving relative consideration for certain petitions and applications-

- (1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.
- (2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was—
 - (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 1151(b)(2)(A)(i) of this title);
 - (B) the beneficiary of a pending or approved petition for classification under section 1153(a) or (d) of this title;
 - (C) a derivative beneficiary of a pending or approved petition for classification under section 1153(b) of this title (as described in section 1153(d));

¹ Paragraph (b)(1) of 8 C.F.R. § 204.2 (2013) states:

(b) *Petition by widow or widower of a United States citizen*—(1) *Eligibility*. A widow or widower of a United States citizen may file a petition and be classified as an immediate relative under section 201(b) of the Act if: (i) He or she had been married for at least two years to a United States citizen. (ii) The petition is filed within two years of the death of the citizen spouse or before November 29, 1992, if the citizen spouse died before November 29, 1990; (iii) The alien petitioner and the citizen spouse were not legally separated at the time of the citizen's death; and (iv) The alien spouse has not remarried.

- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 1157 or 1158 of this title;
- (E) an alien admitted in `T' nonimmigrant status as described in section 1101(a)(15)(T)(ii) or in `U' nonimmigrant status as described in section 1101(a)(15)(U)(ii); or
- (F) an asylee (as described in section 1158(b)(3) of this title).

8 U.S.C. §1154(l) (2011). Although the record is unclear regarding where the applicant currently resides, as the record indicates she has mailing addresses in both the United States in Mexico, the applicant states she was not residing in the United States at the time of her spouse's death, and claims she continued to remain outside the United States after her June 2009 departure. Therefore, because she did not reside in the United States in March 2011 when her spouse died, and she has resided in Mexico since then, she does not qualify for relief under section 204(l) of the Act. Consequently, the applicant cannot be granted a waiver based on extreme hardship to her spouse, who is now deceased. The record does not contain documentation of any other qualifying relatives through which she could obtain a waiver under section 212(i) of the Act.

Without a qualifying relative, the AAO cannot find that the applicant has demonstrated the existence of extreme hardship to a qualifying relative as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether she merits a waiver as a matter of discretion.

In proceedings for a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.