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



U.S. Citizenship
and Immigration
Services



H6

DATE: **AUG 15 2012** Office: CHICAGO, IL FILE:

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:

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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is unnecessary.

The record reflects that the applicant is a native and citizen of Mexico 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 admission within ten years of her last departure. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated January 4, 2008.

On appeal, counsel asserts that the United States Citizenship and Immigration Services (USCIS) failed to consider all of the relevant hardship factors in the record. *Form I-290B, Notice of Appeal or Motion*, dated February 1, 2008; *see also Counsel's Brief on Appeal*.

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; statements from the applicant and her spouse; medical documentation relating to the applicant, her spouse and her children; documentation of the family's financial obligations; country conditions information on Mexico; school records for the applicant's older son; statements of support from friends of the applicant, as well as his pastor; and documentation of the applicant's financial support of his church. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

.....

(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.

The Field Office Director found the applicant to have stayed in the United States for approximately 19 months after her March 1998 entry using a Border Crossing Card. He, therefore, concluded that

she had been unlawfully present for more than one year and was subject to section 212(a)(9)(B)(i)(II) of the Act as she had returned to the United States on April 15, 2000, within ten years of her departure.

Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is present after the expiration of the period of stay authorized by the Secretary of Homeland Security or present without being admitted or paroled. When nonimmigrants are admitted to the United States, the period of stay authorized is generally noted on the Form I-94, Arrival/Departure Record.

The record reflects that the applicant entered the United States with a Border Crossing Card in March 1998 and remained until she returned to Mexico in October 1999. On April 15, 2000, the applicant again entered the United States using a Border Crossing Card and was admitted until October 14, 2000. The applicant did not depart the United States when her period of stay expired, but has continued to reside in the United States.

Although the record does not indicate the type of Border Crossing Card used by the applicant to enter the United States in March 1998, the AAO notes that prior to April 1, 1998, the legacy U.S. Immigration and Naturalization Service issued Nonresident Alien Border Crossing Cards (Forms I-186 and I-586) to Mexican nationals. Aliens admitted with Border Crossing Cards issued prior to April 1, 1998 generally were not issued a Form I-94 specifying a period of authorized stay.

For the purposes of determining unlawful presence, a nonimmigrant who is not issued a Form I-94 is considered a "non-controlled nonimmigrant" admitted for duration of status. If USCIS finds a non-controlled nonimmigrant to have committed a status violation while it is adjudicating a request for an immigration benefit, unlawful presence begins to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order is issued.¹

The record does not demonstrate that while the applicant was residing in the United States during 1998 and 1999, an immigration officer or an immigration judge determined that she had violated her nonimmigrant status. In the absence of such evidence, the AAO cannot conclude that the applicant accrued unlawful presence in the United States prior to her October 1999 departure for Mexico.

As the record fails to establish that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, she is not required to file the waiver application. Accordingly, the appeal will be dismissed.

¹ Memorandum from [REDACTED] Refugee, Asylum and Int. Ops., Pearl Chang, [REDACTED] U.S. Citizenship and Immigration Serv., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

ORDER: The appeal is dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary. The matter will be returned to the field officer director for further action consistent with this decision.