

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

tlc

DATE: OCT 01 2012

Office: LOS ANGELES, CA

FILE: [REDACTED]

IN RE: [REDACTED]

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,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California and 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 El Salvador 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. The applicant is the spouse of a Lawful Permanent Resident and the mother of a U.S. citizen. 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 found 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 February 17, 2010.

On motion, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred in finding the applicant had not established that her Lawful Permanent Resident spouse would suffer extreme hardship if the waiver application were denied. *Form I-290B, Notice of Appeal or Motion*, dated March 15, 2010.

The record of proceeding includes, but is not limited to, the following evidence: counsel's brief; statements from the applicant's spouse and daughter; medical documentation relating to the applicant's spouse and daughter; letters of support from the secretary of the applicant's church and her current and former employers; country conditions information on El Salvador; and a court record relating to the applicant's conviction. 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 record reflects that the applicant entered the United States without inspection in 1995. It also indicates that she was initially approved for Temporary Protected Status (TPS) on December 19,

2001, a status she continues to hold. The applicant remained in the United States until she departed under an advance parole issued on February 5, 2004. She was paroled back into the United States on March 13, 2004.

The Board of Immigration Appeals (BIA) has held in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i) of the Act. Here, as in *Arrabally*, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled back into the United States. The applicant's 2004 departure is, therefore, not a departure for the purposes of section 212(a)(9)(B)(i) of the Act and she is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Although not addressed by the Field Office Director, the record also reflects that, in 2008, the applicant was convicted of misdemeanor Trespass, California (Cal.) Penal Code § 602(k), for which she was placed on probation for two years and sentenced to one day in jail, less credit for one day. The applicant was also fined \$200, and assessed a penalty of \$340, an installment and accounts receivable fee of \$35 and a restitution fine of \$100.

At the time of the applicant's conviction, Cal. Penal Code § 602(k) stated:

Except as provided in paragraph (2) of subdivision (v), subdivision (x) and Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

....

(k) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

The AAO, however, does not find it necessary to consider whether the applicant's offense constitutes a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, as we find it subject to the petty offense exception of section 212(a)(2)(A)(ii) of the Act, which states:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

- (I) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The applicant has only one conviction, that for Trespass, Cal. Penal Code § 602(k). As the maximum sentence of imprisonment for a violation of Cal. Penal Code § 602 does not exceed six months and the applicant was sentenced to only one day in jail, her conviction, even if found to be a crime involving moral turpitude, would not bar her admission to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

As the record does not demonstrate that the applicant is inadmissible to the United States under either section 212(a)(9)(B)(i) or section 212(a)(2)(i)(I) of the Act, she is not required to obtain a waiver. Accordingly, the appeal will be dismissed as the waiver application is unnecessary.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary.