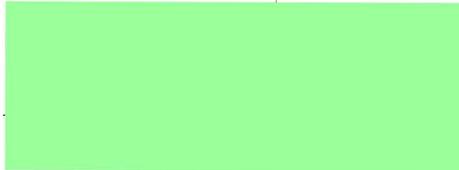




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Date: **JAN 18 2013** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Nebraska Service Center on behalf of the Field Office Director, Ciudad Juarez, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 Act for having been unlawfully present in the United States for more than one year, and section 212(a)(9)(A)(ii) of the Act as an alien who was ordered removed. The applicant is engaged to a U.S. citizen and seeks a waiver of inadmissibility and permission to reapply for admission to the United States in order to reside with her fiancé in the United States.

The field office director found that the applicant established extreme hardship to her U.S. citizen fiancé, but denied the waiver application as a matter of discretion. Specifically, the field office director found that an application may be denied as a matter of discretion if the applicant is also inadmissible on a ground for which no waiver is available. The field office director found that the applicant is inadmissible under section 212(a)(9)(C) of the Act, and since fewer than ten years have elapsed since the applicant last left the United States, the applicant is ineligible to apply for consent to reapply for admission to the United States. The field office director also found that the applicant had previously had a Petition for Alien Relative (Form I-130) denied after a finding that the marriage was entered into for the purpose of circumventing immigration laws. The field office director denied the waiver application as a matter of discretion.

On appeal, counsel contends that the field office director mistakenly determined that the applicant is inadmissible under section 212(a)(9)(C) of the Act. Counsel contends the applicant has never entered, or attempted to reenter, the United States after her removal. In addition, counsel contends the Form I-130 was denied because the couple did not meet the higher standard of proof by clear and convincing evidence that the marriage was bona fide. According to counsel, the denial of the Form I-130 did not make a finding that the marriage was fraudulent and was denied only because of the stringent, heightened standard for marriages entered into while one spouse is already in removal proceedings.

The record contains, *inter alia*: letters from the applicant; letters from the applicant's fiancé, [REDACTED] a letter from the applicant's ex-husband; a psychological evaluation; numerous letters of support, including from the applicant's family and [REDACTED] family; documentation addressing the applicant's and [REDACTED] involvement with their church; photographs of the applicant and her family; numerous articles addressing country conditions in Mexico; and an approved Petition for Alien Fiancé (Form I-129F). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (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.

....

(iii) Exceptions.

....

(II) Asylees. - No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

....

(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.

Section 212(a)(9)(A)(ii) of the Act provides, in pertinent part:

Any alien not described in clause (i) who--

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

In this case, the record shows, and counsel concedes in his brief, that the applicant is inadmissible to the United States under sections 212(a)(9)(B)(v) and 212(a)(9)(A)(ii) of the Act. Specifically, the record shows that the applicant entered the United States in approximately 1991 when she was fourteen years old. In November 1996, the applicant filed an asylum application which was administratively closed on April 5, 1997. On April 6, 2008, the applicant's ex-husband filed a Form I-130 on the applicant's behalf. This Form I-130 was denied on January 2, 2009. On May 15, 2009, the applicant was granted voluntary departure by an immigration judge. The applicant failed to timely depart the United States and was removed from the United States in March 2010. The applicant accrued unlawful presence beginning on April 5, 1997, when her asylum application was closed, until her removal in March 2010. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more, and section 212(a)(9)(A)(ii) of the Act as an alien who was ordered deported and removed from the United States.

The field office director also found that the applicant is inadmissible under section 212(a)(9)(C) of the Act. Section 212(a)(9)(C) of the Act provides, in pertinent part:

(C) Aliens unlawfully present after previous immigration violations. -

(i) In general. - Any alien who -

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

After a careful review of the record, the AAO agrees with counsel that the applicant is not inadmissible under section 212(a)(9)(C) of the Act. There is no evidence in the record showing the applicant has entered, or attempted to reenter, the United States without being admitted. Therefore, the applicant is eligible to apply for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) for her unlawful presence, and is eligible to apply for permission to reenter the United States pursuant to Section 212(a)(9)(A)(iii) of the Act for her previous removal. Section 212(a)(9)(C) of

the Act provides no bar to the applicant's waiver application or Form I-212 Application for Permission to Reapply for Admission as the applicant is not inadmissible under section 212(a)(9)(C) of the Act. The AAO also concurs with counsel that the prior Form I-130 was denied based on section 204(g) of the Act and there was no finding of a fraudulent marriage.

The field office director found that the applicant established extreme hardship to her fiancé if her waiver application was denied and the AAO will not disturb that finding. Therefore, the sole issue on appeal is whether or not the applicant warrants a favorable exercise of discretion.

Extreme hardship, once established, does not create an entitlement to a waiver of inadmissibility, but is one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996). The Secretary of the Department of Homeland Security has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999). In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In this case, documentation in the record shows that the applicant entered the United States as a minor, that she attended and graduated from high school in the United States, and that her brother and sister have become naturalized U.S. citizens. According to the applicant, since graduating from high school, she has made a career in real estate and worked for a mortgage company. The applicant states she and her brother have started their own mortgage company. In addition, the applicant states she is very close with her brother and sister as well as her eight nieces and nephews, and that they are all members of the [REDACTED]. She states she met her fiancé at a church activity and that before she departed the United States, they went to church together every Sunday.

Therefore, the positive factors in this case include: the applicant's significant family ties in the United States, including her U.S. citizen fiancé, brother, sister, nieces, and nephews; the applicant's long-time residence of almost twenty years in the United States, beginning when she was fourteen years old; the extreme hardship to the applicant's fiancé as well as the hardship to the rest of the applicant's family if she were denied admission to the United States; the applicant's history of employment; the applicant's involvement with her church; letters of support in the record describing that she is good for [REDACTED] and how he is now a happy and totally different person; and a lack of any criminal arrests or convictions.

The adverse factors in this case include: the applicant's unlawful presence in the United States; failing to depart the United States as ordered; being removed from the United States; working in the United States without authorization; and failing to meet her burden of proving her first marriage was a bona fide marriage.

After balancing all of the positive and negative factors, the AAO finds that although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable

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factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

The AAO notes that the field office director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the field office director's decision on the Form I-212 and render a new decision.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

As the applicant has established eligibility for both a waiver of inadmissibility and permission to reapply for admission after removal, the appeal will be sustained.

ORDER: The appeal is sustained.