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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: CHICAGO, ILLINOIS Date: JAN 29 2003

IN RE: Applicant: [redacted]

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

IN BEHALF OF APPLICANT: SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected. The decision of the district director will be withdrawn, and the matter will be remanded to him for further consideration and action.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year. The applicant is the unmarried daughter of a lawful permanent resident father and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to remain in the United States and adjust her status to that of a lawful permanent resident.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, the applicant states that the decision to deny her waiver request contains errors regarding the filing date of her adjustment of status application and her dates of departure from the United States. She also states that she should not have been granted advance parole if it was going to jeopardize her case and that her father will suffer great hardship if she is removed from the United States because she lives with him and helps support him.

The record reflects that the applicant initially entered the United States without inspection in July 1988. On October 16, 1997, she filed her first application for adjustment of status, which was denied, according to the district director, because a visa number was not available to the applicant at that time. Evidence of the date of the denial of the applicant's first adjustment application is not contained in the record of proceeding. However, the denial must have been issued after November 7, 1997 because on that date the applicant was issued advance parole indicating that she had an application for adjustment of status pending. A parole document contained in the record of proceeding indicates that it was issued on November 7, 1997 valid for multiple entries for a period of one year, until November 6, 1998. The parole document issued to the applicant did not contain a warning that her departure from the United States may render her inadmissible for unlawful presence.

The applicant states that after having filed for adjustment of status on October 16, 1997, she subsequently departed the United States on two occasions, returning on January 13, 1998 and October 26, 1998. A parole document contained in the record confirms that the applicant was paroled into the United States on January 13, 1998. There is no documentation on the other arrival. The applicant

filed a second application for adjustment of status on May 20, 1999.

In his denial of the applicant's waiver request, the district director indicates that he found the applicant inadmissible to the United States for having been unlawfully present for a period of more than 180 days but less that one year from April 1, 1997, the date the calculation for unlawful presence begins, until, apparently, her second application for adjustment of status on May 18, 1999. The district director noted that the applicant had departed the United States at some point prior to her second application for adjustment of status and had returned on June 28, 1998. In a letter to the applicant dated August 8, 2002, the district director indicated that even if the Service counted the applicant's October 16, 1997 date of filing for her first adjustment of status application, she still had accrued more than 180 days of unlawful presence.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> (9) ALIENS PREVIOUSLY REMOVED.-
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> * * *
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> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > (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 § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.
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> * * *

> (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.

Service instructions at O.I. 103.3(c) provide, in part, that the record of proceeding must contain all evidence used in making the decision, including the following items arranged from top to bottom in the following order:

(1) Notice of Entry of Appearance as Attorney or Representative (Form G-28).

(2) Brief, statement, and/or supporting evidence.

(3) Notice of Appeal to the Administrative Appeals Office (Form I-290B).

(4) Decision.

(5) Any response to notice of intent to take unfavorable action.

(6) Notice of intent to take unfavorable action.

(7) Investigative reports and/or other derogatory information.

(8) Application or petition (Form I-601).

(10) Evidence in support of application or petition.

The record of proceeding, as presently constituted, does not include evidence of a notice to take unfavorable action or any response to such notice. There is also no evidence contained in the record to establish that the applicant was given an opportunity to submit evidence to establish extreme hardship to a qualifying relative. And, although the record indicates that the applicant has an attorney, no G-28 is contained in the record of proceeding.

The district director's decision in the matter will therefore be

withdrawn. The appeal of the district director's decision will be rejected and the record remanded to him to adjudicate the case and enter a new decision based on documentation contained in a record of proceeding that can be properly reviewed by the Associate Commissioner. If that decision is adverse to the applicant, the district director will certify his decision to the Associate Commissioner for review accompanied by a properly prepared record of proceeding.

ORDER: The district director's decision is withdrawn. The appeal is rejected. The matter is remanded to the district director for further action consistent with the foregoing discussion and entry of a new decision which, if adverse to the applicant, is to be certified to the Associate Commissioner for review.