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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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PUBLIC COPY



FILE:

Office: SAN FRANCISCO, CA

Date: **JUL 11 2006**

IN RE:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Brazil who was determined to be inadmissible to the United States pursuant to 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 more than 180 days but less than one year. The applicant is the spouse of a citizen of the United States and the beneficiary of an approved Petition for Alien Relative (Form I-130). She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her spouse.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated June 20, 2003.

On appeal, the applicant's spouse states that the applicant's previous representative did not explain that the applicant was supposed to establish extreme hardship. The applicant's spouse states that he and the applicant rushed to submit the required paperwork and contends that they did not have enough time to adequately prepare. He requests Citizenship and Immigration Services to review the additional documentation which he provides. *Letter from [REDACTED]* dated July 22, 2003. In support of these assertions, the applicant's spouse submits a declaration; employment ads from a Brazilian newspaper; a copy of his health insurance card; letters of support; evidence of the scholastic achievement of the applicant's spouse and copies of financial documents for the applicant and her spouse. The entire record was reviewed and considered in rendering a decision on the applicant's appeal.

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

(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 . . . 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, or

. . . .

(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.

In the present application, the record indicates that the applicant entered the United States in December 2000 pursuant to a valid visitor visa. The applicant failed to depart from the United States upon the expiration of her period of authorized stay. On January 22, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On May 2, 2002, the applicant obtained advance parole authorization and subsequently departed and re-entered the country.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (Secretary)] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant therefore accrued unlawful presence from June 7, 2001, the date on which her authorized stay in the United States expired until January 22, 2002, the date of her proper filing of the Form I-485 application. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The applicant's departure occurred in 2002. It has now been more than three years since the departure that made the inadmissibility issue arise in her application. A clear reading of the law reveals that the applicant is no longer inadmissible. She, therefore, does not require a waiver of inadmissibility, so the appeal will be dismissed, the previous decision of the acting district director will be withdrawn and the application declared moot.

ORDER: The appeal is dismissed, the previous decision of the acting district director is withdrawn and the application declared moot.