



U.S. Citizenship  
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[REDACTED]

FILE:

[REDACTED]

Office: SAN FRANCISCO, CA

Date: MAR 01 2006

IN RE:

[REDACTED]

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:

[REDACTED]

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.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

MAR 01 2006 - 02H3212

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FILE:



Office: SAN FRANCISCO, CA

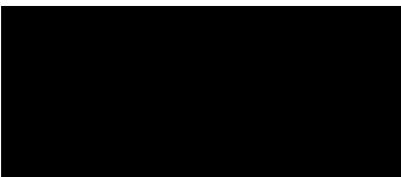
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Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under 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) and the waiver application is moot.

The applicant is a native and citizen of Brazil 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 seeking readmission within 10 years of her last departure from the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director*, dated April 28, 2004.

On appeal, counsel states that the district director failed to consider all of the applicant's spouse's hardship factors. *Brief in Support of Appeal*, at 2, dated May 28, 2004. Counsel also asserts that the applicant has not accrued the requisite amount of unlawful presence to trigger the relevant inadmissibility provisions. See *Statement of Facts*, at 4, undated. The entire record was reviewed and considered in rendering a decision.

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, . . . is inadmissible.

(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.

(v) Waiver. - The Attorney General [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 was admitted to the United States in lawful B-2 tourist status on February 12, 2001 with an expiration date of August 11, 2001. *Applicant's Form I-94*, dated February 12, 2001. The applicant filed a timely application to change status on July 27, 2001. *Applicant's Form I-539 Notice of Action*, dated July 27, 2001. The application was denied on October 24, 2002. *Applicant's Notice of Decision*, dated October 24, 2002. The applicant subsequently filed an application to adjust status on March 17, 2003. *Applicant's Form I-485, Application to Register Permanent Resident or Adjust Status*, dated March 17, 2003.

Counsel has submitted an Immigration and Naturalization Service [now, Citizenship and Immigration Services, CIS] memorandum which states that an applicant for a nonimmigrant change of status application is considered to be in an authorized period of stay until the application is decided, provided the application is not denied for being frivolous, untimely or due to unauthorized employment by the applicant. See *Memorandum by Michael A. Pearson, Deputy Executive Associate Commissioner, Immigration Services Division*, dated March 3, 2000. The applicant's notice of decision does not indicate that the change of status was denied for being frivolous, untimely or due to unauthorized employment by the applicant.

Furthermore, the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [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 only accrued 144 days of unlawful presence, from October 24, 2002, the date of denial of her change of status request, until March 17, 2003, the date of her proper Form I-485 filing. Therefore, the applicant's departure from the United States did not trigger either the three or ten year bars from sections 212(a)(9)(B)(i)(I) and 212(a)(9)(B)(i)(II) of the Act.

The AAO also notes that 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 I-485 application was denied on April 28, 2004. However, the district director treated the applicant's appeal, dated May 28, 2004, as a motion to reopen and reconsider and subsequently forwarded the I-601 application to the AAO for further review on August 23, 2004. As the I-601 application is still pending and a final decision on the I-601 is required to make a final decision on the I-485, the AAO considers the I-485 application to be currently pending a final decision from the district director. The district director's decision to affirm or reverse the initial I-485 decision is dependent on this AAO decision.

A clear reading of the law reveals that the applicant is not inadmissible based on her prior unlawful presence. Therefore, based on the current facts she does not require a waiver of inadmissibility and the appeal will be dismissed as the waiver application is moot.

**ORDER:** The appeal is dismissed as the waiver application is moot.