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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: MIAMI

Date: FEB 22 2005

IN RE:

[Redacted]

APPLICATION: Application for Adjustment of Status under section 245 of the Immigration and
Nationality Act, 8 U.S.C. § 1255

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.

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

Robert P. Wiemanni, Director
Administrative Appeals Office

DISCUSSION: The application for adjustment of status was denied by the Acting District Director for Services, Miami and is now before the Administrative Appeals Office (AAO) on certification. The acting district director's decision will be withdrawn and the matter remanded for further consideration.

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)(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 married to a naturalized United States citizen and asserts, through counsel, that he is not inadmissible to the United States and thus requires no waiver to reside in the United States with his wife.

The acting district director found that based on the evidence in the record, the applicant was inadmissible to the United States due to his accrual of unlawful presence. The applicant did not seek a waiver of inadmissibility. The application was denied accordingly and certified to the AAO. *Decision of the Acting District Director for Services*, dated July 31, 2003.

On certification, counsel advances the argument that Citizenship and Immigration Services, (CIS) erred in concluding that the applicant was inadmissible pursuant to section 212(a)(9)(B) of the Act. Consequently, according to counsel, the applicant did not require a waiver. *See Memorandum Addressing Notice of Appeal Form I-290B*, dated August 5, 2003, (hereinafter, Memorandum). While counsel concedes that the applicant accrued time unlawfully in the United States, she asserts that, nevertheless, the applicant is not subject to the statutory three year bar. Counsel has presented a memorandum in support of the applicant's position. 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, or

(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.

Factual Background

Before addressing the merits of the appeal, the AAO will briefly review the facts of the case. The record reflects that the applicant is a forty-six-year-old native and citizen of Brazil. He initially entered the United States on December 14, 1998, as a B-2 non-immigrant visitor for pleasure, authorized to remain until June 13, 1999. He was placed into removal proceedings on January 5, 1999, in Miami, Florida and was ordered removed in-absentia on March 19, 1999 by an immigration judge. The applicant failed to appear for his scheduled removal on April 9, 1999, but subsequently filed a Motion to Reopen the proceedings alleging that he had not received notice of the hearing. During the intervening time, the applicant had married his U.S. citizen spouse on August 3, 1999. The motion to reopen filed by counsel was granted and the proceedings were rescheduled for September 1999. The proceedings were rescheduled two times during which time the applicant and his spouse were pursuing a Petition for Alien Relative (Form I-130), and an Application for Adjustment of Status (Form I-485). The I-130 was approved on November 19, 1999, and the I-485 was filed on February 4, 2000. Subsequently, the applicant sought and obtained termination of the immigration proceedings on March 10, 2000, with the consent of government counsel, in order to pursue his adjustment application before the district director. During the course of the processing of the application, CIS notified the applicant, through previous counsel, that he appeared to be inadmissible and that an Application for a Waiver of Inadmissibility (Form I-601) should be submitted. *See Notice Dated April 12, 2001.* In addition, during the pendency of the adjustment of status application, the applicant had sought, and received, advance parole. It appears from the record that the date of his last arrival in the United States took place on March 1, 2001.

The applicant's period of unlawful presence is calculated from the date of the expiration of his period of authorized stay beginning on June 14, 1999, until the date of the filing of the I-485 on February 4, 2000, a period of more than 180 days but less than one year. If subject to a bar on admissibility, it is the three year bar pursuant to section 212(a)(9)(B)(i)(I).

Counsel's Arguments on Appeal

The AAO turns now to counsel's arguments in support of the claim that CIS erred in finding that the applicant was inadmissible. Counsel presents two arguments in support of her position. The AAO will first consider the argument that because the applicant sought and obtained termination of the proceedings he has "prevailed" in the proceedings and therefore cannot be considered to be inadmissible. Counsel does not cite any statutory, regulatory, or case law authority in support of this position. The AAO is unaware of any such authority and believes that this is because no such authority exists, as the statute makes no exception to the ground of inadmissibility for aliens who "prevail" on proceedings. Rather than relying on traditional sources of authority, counsel bases her argument upon her interpretation of agreements purportedly reached between the American Immigration Lawyer's Association, (AILA) and the former General Counsel of the Immigration and Naturalization Service (INS) in the course of liaison meetings on issues of mutual concern. According to counsel's memorandum in support of appeal, "INS agreed that time in proceedings would be tolled for unlawful presence purposes if an individual prevailed in proceedings." *See Memorandum, at p.3.*

Specifically, counsel relies upon a discussion of item "number 12" in an attached list of liaison issues dated December 10, 1999, and discussed between the parties. That item reads as follows:

An alien does not accrue unlawful presence time when an immigration judge's order denying voluntary departure is reversed on appeal. The period from the denial of voluntary departure to the grant of voluntary departure on appeal will be considered authorized by the Attorney General. It should be noted that unless otherwise in a period of stay authorized by the Attorney General, the alien is accruing time unlawfully present while he or she is appealing the IJ ruling denying voluntary departure. Only after the alien prevails on appeal will the INS go back and determine that there was not net accrual of time unlawfully present during the time the ruling was on appeal.

See Summary of Resolved Items, dated December 10, 1999.

The district director considered counsel's argument and found it unpersuasive, noting that the issue raised in the AILA minutes was distinguishable as in that situation the alien departed the United States pursuant to voluntary departure but in the instant case the alien returned subsequent to the termination of proceedings. The AAO likewise finds counsel's reliance upon item 12 of the AILA minutes unpersuasive. First, AILA meeting minutes do not constitute binding authority that compels a certain treatment of an issue by CIS. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions and similar statements of position are not similarly binding. The summary itself disclaims any binding effect and appears to be an understanding on an issue limited to the unique facts presented. Second, and more fundamentally, the AAO does not agree with counsel's assessment of the relevance of item 12 to the situation at hand. Although the AAO agrees with the district director that the instant case is distinguishable because the applicant did not, in fact, remain outside of the United States, a more compelling distinction is that the circumstances are fundamentally different. The idea that an alien who is denied voluntary departure by an immigration judge but ultimately prevails on appeal should be considered to be in an authorized period of stay has as its source the principle that aliens continue to accrue unlawful presence during the course of litigating their cases, even where the matter is being appealed. This principle likely originates from Congress' sense that aliens should not benefit from pursuing litigation that prolongs their stay in the United States. The accommodation reflected in the minutes provides for an exception in the limited situation where the immigration judge's position regarding eligibility for voluntary departure (necessary for the alien to avoid another ground of inadmissibility), is found to be erroneous. Thus, an administrative accommodation was made to allow an alien to benefit from a successful appeal of a denial of voluntary departure initially sought, but erroneously denied, thus permitting the time on appeal to be considered period of authorized stay.¹

However, the same situation is not present in this case. While counsel argues that the termination of the proceedings here poses an equivalent situation, the AAO disagrees. First, the appeal from a voluntary departure denial is clearly a situation where an alien has prevailed, at least as to that issue. In contrast, a termination of a case may occur for a number of different reasons, and have a variety of effects. Even

¹ While counsel's memorandum asserts that the former INS agreed with this position, based on a conclusion that due process required such a finding, no such conclusion is apparent or should be read into an INS willingness to consider time on appeal to be authorized in the limited situation where the decision on appeal reverses a denial of voluntary departure.

assuming that some terminations should be considered the equivalent of a reversal on appeal, the termination in the instant case was in no way a termination reflecting that the applicant had prevailed in the sense that the term is normally understood. There was no finding from an adjudicator that the applicant was not removable and had prevailed on the merits. Rather, it was a non-substantive termination, obtained through a mutual agreement of the parties. The termination was designed as a convenience for all concerned in order for the applicant to pursue the possibility of adjusting his status. If the applicant is unsuccessful, the proceedings are subject to being reinstated. It cannot, therefore, said to be a situation where the applicant prevailed.²

Counsel's second argument is that the applicant is not subject to the bar because he departed the United States following the commencement of proceedings, and thus is exempt from the bar. According to counsel, the applicant's departure following the termination of the proceedings fits within the statute's exemption from the bar because, reading the statute literally, the applicant departed after proceedings were commenced. Counsel takes issue with the district director's finding that the applicant's departure did not cure the unlawful presence bar because the alien returned to the United States. According to counsel, such an interpretation is inappropriate because it would subject any alien who "prevailed" to the unlawful presence bar. This decision has previously discussed why the AAO does not equate the termination in this case to an alien prevailing in proceedings. Thus we need not reach the issue of whether an alien who otherwise prevails in proceedings resulting in a termination would somehow be harmed by the district director's interpretation.³ The AAO, while generally supporting the district director's interpretation, bases its finding more specifically fact that the applicant's departure was an act that was not in any way related to the proceedings. An examination of the record reveals that the applicant departed, not as a consequence of being an alien in proceedings who was persuaded to depart by the commencement of those proceedings, but as an alien who was departing the United States pursuant to a previous grant of advance parole who had every intention of returning. The proceedings had ended through the agreement between his counsel and counsel for the government. To the extent that the statutory language offers an incentive to aliens by excusing from the bar to admissibility those aliens who depart when proceedings are commenced, such incentive is inapplicable to the applicant who departed independent of such proceedings. The applicant did not depart either prior to their conclusion or pursuant to an order of voluntary departure. In fact, the proceedings concluded in a manner that removed any trace of compulsion that the commencement of proceedings may provide to an alien. In other words, the applicant was restored to the same position as an alien who departed the United States prior to the commencement of proceedings, and who, pursuant to the statute is subject to the unlawful presence bar.

Although the AAO has elected to discuss its views of the arguments presented by counsel, in order to discourage a belief that its conclusion in this case results from arguments which it finds unpersuasive, a definitive conclusion on the issues raised is unnecessary. The passage of time has created a new circumstance which renders the applicant free from any bar to inadmissibility based upon his unlawful presence. The

² Moreover, given the absence of such language in the statute, and as previously discussed, the merely advisory and non-binding nature of AILA minutes, the emphasis and attempt to draw parallels as to whether an applicant has "prevailed" is misplaced. The mere fact that the AAO is addressing counsel's argument should not be construed as any acceptance or recognition of its adoption of a standard where aliens who "prevail" in some aspect of an immigration proceeding are exempt from statutory bar.

³ While counsel is concerned about the inappropriateness of the bar applying in such situations, Congress did not distinguish between situations involving appropriate and inappropriate applications of the bar. The AAO notes that while the statutory language exempts from the bar aliens who depart after the commencement of proceedings, a bar is nonetheless imposed on aliens who depart the United States before proceedings are even initiated. Thus, an attempt to impose a sense of appropriateness, itself subject to debate, in a statutory framework that makes no distinction would be futile and irrelevant.

applicant departed the United States on a date prior to his last entry on March 1, 2001. Even assuming he had last departed on February 28, 2001, he would have been inadmissible for a period not exceeding three years, or until February 28, 2004. It is apparent, therefore, that the applicant's period of inadmissibility has now expired and he is no longer subject to the bar. Consequently, although the AAO does not agree with counsel's arguments as to why the bar never applied to the applicant in the first place, at this point the bar has lapsed and no longer affects the applicant's admissibility. Therefore, unless he has departed from the United States within three years prior to the date of this decision, the applicant is no longer required to seek a waiver of inadmissibility in connection with his adjustment of status application.

ORDER: The decision of the acting district director is withdrawn and the matter is remanded to the district director for additional consideration of the application for adjustment of status.