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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: ROME, ITALY Date: JUN 2 8 2007

IN RE: [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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Acting District Director, Rome, Italy, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO). The decision of the acting district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Portugal who is 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 and is seeking admission within three years of her last departure. The applicant is married to a naturalized U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her husband.

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 Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director,* dated June 10, 2005.

The record shows that, on July 7, 2003, the applicant was admitted to the United States as a nonimmigrant visitor for pleasure under the Visa Waiver Program (VWP). The applicant remained in the United States after her authorized stay expired on October 6, 2003. On June 18, 2004, the applicant left the United States and returned to Portugal where she has since resided. On February 21, 2005, the applicant married [redacted], a naturalized U.S. citizen, in Portugal. On February 24, 2005, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 23, 2005, the applicant filed the Form I-601 along with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her spouse.

On appeal, counsel contends that the waiver should be granted because [redacted] is concerned over the applicant's psychological wellbeing, which has been compromised by their separation. *Counsel's Brief,* dated August 9, 2005. In support of these assertions, counsel submits the referenced brief and medical documentation in regard to the applicant. The entire record was reviewed and considered in rendering a decision in this case.

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.
> >
> > . . . .

> (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 accrued unlawful presence from October 6, 2003, the date on which her authorized stay expired, until June 18, 2004, the date on which she returned to Portugal. 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). There has been no final decision made on the applicant's Application for Immigrant Visa and Alien Registration (Form DS-230), so the applicant, as of today, is still seeking admission by virtue of her immigrant visa application. The applicant's departure causing the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act occurred on June 18, 2004. It has 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 pursuant to section 212(a)(9)(B)(i) of the Act. She, therefore, does not require a waiver of inadmissibility, so the decision of the acting district director will be withdrawn and the waiver application will be declared moot.

ORDER: The decision of the acting district director is withdrawn and the application for waiver of inadmissibility is declared moot.