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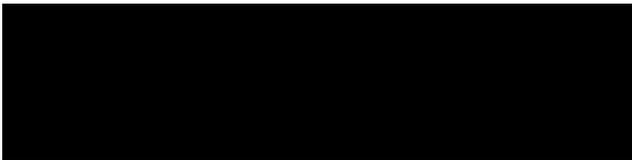
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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

HB



FILE: [REDACTED]

Office: SAN FRANCISCO, CA

Date: MAY 18 2005

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:



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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California. A subsequent appeal and motion to reopen and reconsider were dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted, the previous decisions of the district director and the AAO will be withdrawn and the application declared moot.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)(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 United States citizen and 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 his spouse.

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 for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated September 18, 2001. The decision of the district director was affirmed on appeal and on first motion to reopen and reconsider by the AAO. *See Decisions of the AAO*, dated August 5, 2002 and April 29, 2003, respectively.

On second motion to reopen and reconsider, counsel asserts that there is no unlawful presence presented in the application as contended by Citizenship and Immigration Services (CIS) and that CIS is estopped from applying the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 bar to such unlawful presence if it is present. *Motion for Reconsideration/Motion to Reopen*, dated May 28, 2003.

8 C.F.R. § 103.5(a)(2) (2002) states in pertinent part:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(3) (2002) states in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial 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.

....

(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 entered the United States with a valid visitor visa on August 12, 1995 with authorization to remain until July 10, 1996. On February 18, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On October 31, 1997, the applicant's Form I-485 application was denied for abandonment. On June 8, 1998, the applicant filed a second Form I-485 application. On December 11, 1998, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States on February 24, 1999.

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 accrued unlawful presence from October 31, 1997, the date on which his initial Form I-485 application was denied, until June 8, 1998, the date of his proper filing of the second 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. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of his 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 1999. It has now been more than three years since the departure that made the inadmissibility issue arise in his application. A clear reading of the law reveals that the applicant is no longer inadmissible. He, therefore, does not require a waiver of inadmissibility, so the motion will be granted, the decisions of the district director and the AAO will be withdrawn and the waiver application will be declared moot.

ORDER: The motion is granted, the previous decisions of the district director and the AAO are withdrawn and the application is declared moot.