

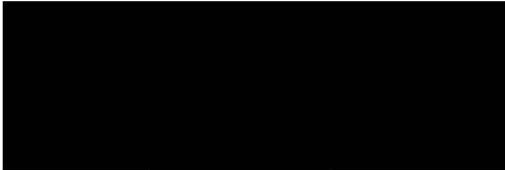
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U.S. Citizenship
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Services

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FILE: [REDACTED]

Office: St. PAUL, MN

Date: JUL 03 2008

IN RE: Applicant:



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:



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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Paul, Minnesota, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant, a native and citizen of Brazil, entered the United States as a visitor on July 30, 2003, with authorization to remain until October 29, 2003. The applicant remained in the United States beyond October 29, 2003 without authorization. The applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485) on January 5, 2005. In March 2005, the applicant was issued Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States.¹

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized 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*. As such, the applicant accrued unlawful presence from October 29, 2003 until January 5, 2005, the date of her proper filing of the Form I-485. The applicant was found to be inadmissible to the United States pursuant to 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), for having been unlawfully present in the United States for more than one year. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen 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 April 13, 2006*.

In support of the appeal, counsel submits a brief, dated May 9, 2006; information regarding the applicant's spouse's health insurance; medical records pertaining to the applicant's spouse; an affidavit from the applicant's spouse, dated May 5, 2006; information about United States Postal Service benefits for 2006; and information about country conditions in Brazil. The entire record was reviewed and considered in rendering this decision.

¹ Counsel asserts that the applicant was not aware that departing the United States would trigger the unlawful presence bars, and that the "...Immigration Service should be estopped from denying the adjustment of status where the parties reasonably relied on erroneous advice from the Service....It was only later when her [the applicant's] adjustment of status application was denied, that the parties learned that her departure and re-entry into the U.S. triggered the three and 10 year bars for unlawful presence...." *Brief in Support of Appeal, dated May 9, 2006*. The AAO notes that the Form I-512, issued to the applicant in March 2005 and subsequently presented by her upon re-entry to the United States in May 2005, clearly indicated, on its face, that "...If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(c)(9)(B)(i) of the Act when you return to the United States to resume the processing of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved...." See *Form I-512*. As such, the applicant should have known of the ramifications of departing and re-entering the United States when the Form I-512 was issued to her in March 2005, well before her decision to exit the United States.

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

Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(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 [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...

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant cannot be considered, except as it may affect the applicant's spouse.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The applicant must first establish that her U.S. citizen spouse would suffer extreme hardship were the applicant unable to remain in the United States due to her immigration violation. In this case, the applicant has not asserted what, if any, hardships her U.S. citizen spouse would suffer were she to relocate to Brazil while the applicant remains in the United States. The only statement made with respect to this prong is by counsel, who states that "...the only way for their marriage to remain viable is for them to continue to reside together...." *Id.* at 4. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, it has not been established that the applicant's U.S. citizen spouse would experience extreme hardship were he to remain in the United States while the applicant relocates abroad for a ten-year period.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. In this case, the applicant's spouse asserts the following regarding the hardships he will face were he to relocate to Brazil with the applicant:

...I discovered that I have problems with both eyes when I went for an eye exam. The doctor told me that I had three tears in my right retina and two in my left retina. I had multiple surgeries to glue the tears back together. On my left eye, the surgeons sort of welded the tears together. On my right eye, they froze them. A side effect of this is that cataracts will grow over them. A cataract grew over my right eye and had to be removed by surgery. Doctors replaced my right eye lens with a plastic lens. A cataract grew of the replacement lens, and my doctors had to burn off that cataract with a laser.

I will always have problems with my eyes. If I get hit or bumped in either eye, I need to see a doctor immediately to see if the tears open up, which would require more surgery. If they do open up, my retinas will dry up, and I will become blind.

I have medical insurance through my job at the United States Postal Service. I will always require medical treatment for my eyes. If I were forced to move to Brazil, I would no longer have the insurance coverage that I get from working for the Post Office, nor would I have access to my current surgeons whom I trust....

...I have lived in Minnesota my entire life. My family and friends are all in Minnesota. My doctors are in Minnesota. I have a good job at the U.S. Post Office and also work a part time job, which I have been working at for 21 years. I still have 14 years before I can retire from my job at the Post Office. I don't want to leave now and lose my retirement.

I have been working at the Post office since 1994. I don't speak Portuguese and would have a difficult time finding a good job in Brazil....I don't know how we would live when I was too old to work if I don't have my retirement....

Affidavit of [REDACTED] dated May 5, 2006.

Documentation regarding the applicant's spouse's medical condition has been provided. In addition, counsel further elaborates on the hardships the applicant's spouse would face were he to relocate to Brazil:

...If Mr. [REDACTED] [the applicant's spouse] were forced to go to Brazil, he would lose his employment with the U.S. Postal Service and would lose his health coverage....

It is only with the health coverage, that Mr. [REDACTED] has been able to undergo the surgeries in his eyes and follow-up treatment and care. He continues to require monitoring of his medical condition for his eyes and is in need of the medical coverage in order to obtain medical treatment. If he did not have such coverage, and if he needed to address any medical issue and failed to do so, he could face blindness....

...He has no relatives in Brazil and has no ties to that country....he has been involved in community affairs and continues to do so. These community ties would be broken if he would be forced to leave the United States....

The conditions in Brazil versus the United States would be significantly different from the standard of living enjoyed here. Mr. [REDACTED] would not have an immigration status, does not speak Portuguese, the language of the country, and would not be employable. His current job as Postal Service worker would not provide transferable skills, nor would he qualify for employment in Brazil....

Supra at 4-5.

Based on the applicant's spouse's serious medical condition and its need for constant monitoring and treatment by specialists, his dependence on affordable medical insurance coverage provided by his long-term employer, his unfamiliarity with the language and culture of Brazil and his career disruption and loss of retirement benefits were he to leave his long-term employ with the U.S. Postal Service, the AAO concludes that the applicant's spouse would face hardship beyond that normally expected of one facing relocation abroad based on the inadmissibility of a spouse. As such, the applicant's spouse would experience extreme hardship if he accompanied the applicant abroad, though, as noted above, not if he were to remain in the United States while the applicant relocates abroad.

A review of the documentation in the record, when considered in its totality reflects that the applicant has failed to show that her U.S. citizen spouse would suffer extreme hardship if she were unable to reside in the

United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.