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Office: CALIFORNIA SERVICE CENTER

Date: DEC 19 2006

IN RE:

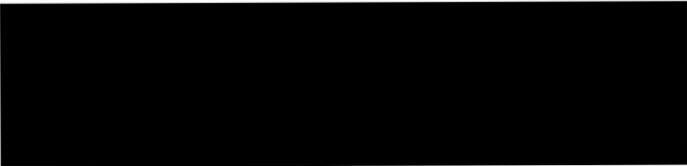
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil who entered the United States without a lawful admission or parole on September 10, 1994. On the same date the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was personally served on her. On November 16, 1994, the applicant failed to appear for the deportation hearing and she was subsequently ordered deported *in absentia* by an immigration judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. On July 27, 25, 1997, a Warrant of Removal/Deportation (Form I-205) was issued. On April 16, 2003, the applicant was apprehended and was placed on an Order of Supervision (Form I-220B). On April 29, 2003, the applicant filed a Motion to Reopen (MTR) her *in absentia* deportation order, which was denied on May 9, 2003. The record reflects that the applicant departed the United States on June 28, 2003, and as such self deported. The applicant is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). She is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to travel to the United States and reside with her U.S. citizen child.

The Director determined that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more, and that the unfavorable factors in the applicant's case outweighed the favorable ones. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated November 17, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

. . .

(ii) Other aliens. - Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief and requests an oral argument based on the “significant and novel issues of law.” Counsel states that it is clearly an error in law to minimize positive equities because they are “unlawful acquired” as stated in the decision. In his brief, counsel states that the Director failed to adequately consider all of the applicant’s favorable equities. Counsel states that the Director did not consider the recency of the applicant’s deportation and her contention that she did not know she was ordered deported. Counsel further states that the Director did not address any evidence of reformation and he failed to consider either the length of residence or the hardship to the applicant’s child. In addition, counsel alleges that the Director did not address the need for the applicant’s services in the United States, and he improperly balanced adverse and favorable factors by relying on case law that is not current. Furthermore, counsel states that the Director improperly weighed immigration violations in assessing the applicant’s moral character and discounted the fact that the applicant is the mother of a U.S. citizen. Finally, counsel states that the Director abused his discretion by not applying current case law and he arbitrarily and capriciously treated all of the applicant’s equities as adverse factors by discounting the weight of the applicant’s moral character, her employment experience and the fact that she is the mother of a U.S. citizen.

On appeal, counsel also requested oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

Before the AAO can review the discretionary factors in this case, it must first determine if the applicant can benefit from a waiver of inadmissibility due to her unlawful presence.

The proper filing of an affirmative application for adjustment of status has been designated by the 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.* As noted above, the applicant entered the United States without inspection on September 10, 1994. She was unlawfully present in the United States from April 1, 1997, the date calculation for unlawful presence begins, until her application for adjustment of status was filed. The record of proceeding reflects that her Application for Adjustment of Status (Form I-485) was received by the Vermont Service Center on August 1, 2001. The applicant departed the United States on June 28, 2003. **It was this departure that triggered her inadmissibility for unlawful presence.** She thus accrued unlawful presence from April 1, 1997, to August 1, 2001, a period of more than one year and, therefore, the applicant is clearly inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

(B) 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 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 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.

As stated above, section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, a U.S. citizen or lawfully resident spouse or parent. A review of the documentation in the record reflects that the applicant's parents and spouse reside in Brazil and they are not citizens or lawful permanent residents of the United States. The applicant's U.S. citizen child is not a qualifying relative. Therefore, the applicant does not have the qualifying family member required to file a waiver under section 212(a)(9)(B)(v) of the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

No purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.