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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: OCT 15 2008

IN RE:

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on October 19, 1999, was one of several aliens apprehended by immigration officers after they had entered the United States on October 18, 1999, without inspection. On the same day, the applicant was placed into immigration proceedings. On December 29, 1999, the immigration judge ordered the applicant removed *in absentia*. On January 4, 2000, a warrant for the applicant's removal was issued. The applicant failed to appear for removal or depart the United States. The applicant engaged in unauthorized employment and residence in the United States. On April 21, 2002, the applicant married his U.S. citizen spouse, [REDACTED], in Framingham, Massachusetts. On May 20, 2003, Ms. [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on December 12, 2005. On August 24, 2006, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 reside in the United States with his U.S. citizen spouse.

The director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without inspection, a ground of inadmissibility for which there is no waiver available. The director determined that no purpose would be served in adjudicating the Form I-212 and denied it accordingly. *See Director's Decision* dated June 21, 2007.

On appeal, counsel contends that the director erred in finding the applicant inadmissible pursuant to section 212(a)(6)(A)(i) of the Act. Counsel contends that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), but is eligible for a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), because [REDACTED] will suffer extreme hardship if the applicant is refused admission. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated August 2, 2007. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a) of the Act provides in pertinent part:

- (6) Illegal entrants and immigration violators.-
 - (A) ALIENS PRESENT WITHOUT admission or parole.-
 - (i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.
 - (ii) Exception for certain battered women and children.-Clause (i) shall not apply to an alien who demonstrates that-
 - (I) the alien qualifies for immigrant status under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1)

- (II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and
- (III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

Counsel asserts that the applicant voluntarily departed the United States in order to wait for consular processing of his immigrant visa on October 23, 2003, and has remained outside the United States since that date. [REDACTED], in her affidavit, states that the applicant, on October 23, 2003, departed the United States and returned to Brazil, where he has since resided. Counsel asserts that the applicant was scheduled for a visa interview at the U.S. Consulate in Rio de Janeiro, Brazil on November 16, 2006. Counsel asserts that this interview was rescheduled as the Form I-212 was still pending with Citizenship and Immigration Services (CIS). The AAO finds the evidence of record sufficient to establish that the applicant has returned to Brazil. Since he is no longer present in the United States, the applicant is not inadmissible pursuant to section 212(a)(6)(A)(i) of the Act.

However, the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, for departing the United States while an order of removal was outstanding. He is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act, as an alien who has accumulated more than one year of unlawful presence, from October 18, 1999, the date of his entry, until October 23, 2003, the date of his departure from the United States, and is seeking admission within ten years of that departure. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

The record indicates that the applicant has initiated consular processing in Brazil to obtain an immigrant visa to return to the United States. As required by 8 C.F.R. § 212.2(d), an immigrant visa applicant who is outside the United States and requires both a waiver and permission to reapply for admission must simultaneously file the Form I-601 and the Form I-212 with the U.S. Consulate having jurisdiction over the applicant's place of residence. As the applicant has not complied with the regulatory requirements for filing the Form I-212, the application in this matter was improperly filed. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.