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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H6

[REDACTED]

Date: JUL 12 2011

Office: NEW YORK

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i), 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the New York District Office denied the application for waiver of inadmissibility, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the district director will be withdrawn and the matter remanded to the district director for a decision consistent with this decision.

The record reflects that the applicant is a native and citizen of Brazil. On September 22, 2000, the applicant's prior spouse, [REDACTED], filed a Petition for Alien Relative (Form I-130) on his behalf. The approval of this petition was revoked on March 25, 2003 after the applicant's prior spouse withdrew the petition and admitted that she was not engaged in a bona-fide marriage with the applicant. On November 23, 2007, the applicant's current spouse filed a Form I-130 on the applicant's behalf. On May 5, 2009, the district director denied the Form I-130 pursuant to section 204(c) of the Act because the applicant entered into his prior marriage for the purpose of evading the immigration laws. This denial is now on appeal before the BIA, and the record reflects that the appeal is still pending before the BIA. The AAO notes that it is not clear whether the appeal has been forwarded to the BIA.

On May 5, 2009, the district director determined that the applicant is ineligible for a waiver because there is no waiver available for inadmissibility under section 204(c) of the Act. The district director further determined that the waiver is moot because the underlying Form I-130 has been denied. The district director denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

The filing of a Form I-601 waiver application is predicated on the necessity to demonstrate admissibility, which in this case is a requirement for adjustment to permanent resident status under section 245 of the Act. Although USCIS allows for the simultaneous filing of Forms I-130 and I-485 (Application to Register Permanent Residence or Adjust Status), the applicant's eligibility to apply for adjustment to permanent resident status is dependent on approval of the Form I-130 petition filed by his spouse. In the absence of an approved I-130 petition, the applicant is not entitled to apply for adjustment of status, and his application for adjustment cannot be approved regardless of whether he is admissible or, if not, whether a waiver is available for any ground of inadmissibility. Furthermore, a determination that the applicant has demonstrated extreme hardship to his spouse and thus qualifies for a waiver of inadmissibility will be rendered moot if the BIA dismisses the applicant's appeal and determines that the applicant is ineligible to be a beneficiary of a Form I-130 petition.

The appeal of the denial of the Form I-130 is still pending before the BIA. The AAO finds that in the absence of a decision on the appeal, the district director's decision denying the Form I-601 was premature. The decision of the district director will be withdrawn and the matter remanded to the district director to hold the matter until the BIA issues a decision on the appeal of the denial of the Form I-130 petition. If the BIA dismisses the applicant's spouse's appeal, the district director shall deny the Form I-485 and Form I-601 accordingly. If that petition is approved, the district director shall issue a new decision addressing the merits of the applicant's Form I-601 application. If that decision is adverse to the applicant, the district director shall certify the decision to the AAO for review.

ORDER: The decision of the district director will be withdrawn and the matter remanded to the district director for actions consistent with this decision.