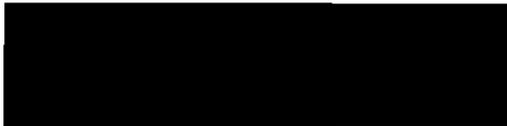




**U.S. Citizenship
and Immigration
Services**



tlc

DATE: DEC 19 2012

OFFICE: BOSTON, MA

FILE: [REDACTED]

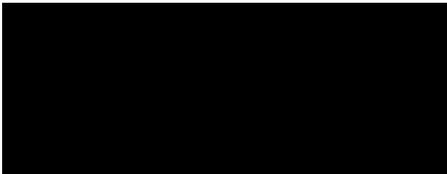
IN RE:

APPLICANT: [REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boston, Massachusetts, 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 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 and seeking readmission within 10 years of her last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. Citizen daughter.

The Field Office Director concluded that the applicant did not have a qualifying relative for a waiver of inadmissibility and denied the application accordingly. *See Decision of Field Office Director* dated December 28, 2011.

On appeal, counsel concedes the applicant accrued unlawful presence pursuant to section 212(a)(9)(B)(i)(II) of the Act, but contends she is admissible for adjustment of status purposes because she was previously admitted to the United States in B-2 status in December 2004, and seeking adjustment of status is not the same as seeking admission.

The record includes, but is not limited to, statements from the applicant's daughter, educational and financial documents, evidence of birth, marriage, residence, and citizenship, other applications and petitions, and articles on country conditions in Brazil. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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-

....

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant was admitted to the United States on August 17, 2001 in B-2 status, remained past the date of her authorized stay, and returned to Brazil in April 2003. The record further reflects that she was readmitted to the United States on December 27, 2004 as a nonimmigrant.¹ The AAO therefore finds that the applicant accrued more than one year of unlawful presence and is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant indicates on the I-601 waiver application that her U.S. Citizen daughter is her qualifying relative for purposes of this waiver. The AAO notes that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Only hardship to an applicant's U.S. Citizen or lawful permanent resident parent or spouse can be considered in an analysis of extreme hardship for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. In the present case, the applicant has not shown that she has a qualifying relative for a waiver. Without a qualifying relative, the AAO cannot find that the applicant has demonstrated the existence of extreme hardship to a qualifying relative as required under section 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether she merits a waiver as a matter of discretion.

Counsel contends that in seeking adjustment of status, the applicant does not need to be admissible because she is not applying for admission, especially in light of the fact that she was admitted as a nonimmigrant in 2004. Counsel's contention is incorrect. First, although the applicant was admitted when she entered the United States in 2004, when she remained past the date of her authorized stay she had no immigration status. Thus, though the applicant is not making another entry into the United States, she is out of status and is again applying for admission through adjustment of status. Second, counsel's dependence on *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 578, 2006) is misplaced. The holding in *Aremu* by the Fourth Circuit Court of Appeals does not apply to the applicant, who resides within the jurisdiction of the First Circuit Court of Appeals. An alien, such as the applicant, who is seeking to adjust her status to that of a lawful permanent resident is assimilated to the position of an applicant for entry into the United States. *Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir.1981); *Yui Sing Tse v. INS*, 596 F.2d 831 (9th Cir.1979); *Matter of Hernandez-Puente*, Interim Decision 3153 (BIA 1991); *Matter of Rosas*, 22 I&N Dec. 616 (BIA

¹ The record also indicates that the applicant was admitted to the United States on May 24, 2000. It is unclear from the record when she departed the United State subsequent to this prior admission.

1999). For this reason, the applicant remains an individual seeking admission to the United States through her application for adjustment of status.

In proceedings for a 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.