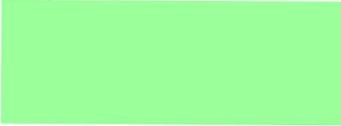


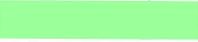


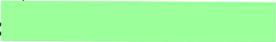
**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **MAR 05 2013** Office: LIMA, PERU

FILE 

IN RE: Applicant: 

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

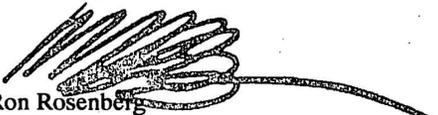
ON BEHALF OF APPLICANT:



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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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 one year or more and seeking readmission within 10 years of his last departure. The applicant's spouse and child are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States.

The field office director found that the applicant had established extreme hardship on a qualifying relative, but she denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) as a matter of discretion. *Decision of the Field Office Director*, dated February 3, 2012.

On appeal, counsel asserts that the applicant should be approved as a matter of discretion. *Brief in Support of Appeal*, dated March 1, 2012.

The record includes, but is not limited to, statements from the applicant's spouse, counsel's brief and previously submitted documents. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) 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.

....

(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.

The applicant entered the United States without inspection on or about August 1, 2001 and departed the United States on July 19, 2011. The applicant accrued unlawful presence during this entire period of time. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within 10 years of his July 19, 2011 departure from the United States.

A waiver of inadmissibility under section 212(a)(9)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO notes that the field office director found that the applicant had established extreme hardship to his spouse. The AAO will not disturb this finding and will address whether the applicant merits a waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (citations omitted).

The adverse factors in the present case are the applicant's unlawful presence, entry without inspection, unauthorized employment and criminal issues. On March 12, 2005, the applicant was charged with driving under the influence of alcohol/drugs and driving with alcohol concentration of .08+ and he was placed in a diversion program. He completed the diversion program, which included community service and monetary fees, and on August 3, 2006 the charges were dismissed. The applicant was convicted on August 2, 2005 of domestic battery against a family or household member in violation of Kansas Statutes section 21-3412(c)(1) and he was sentenced to 12 months of probation with an underlying sentence of 120 days in jail.¹ The record includes the applicant's order of probation.

The favorable factors include the presence of the applicant's U.S. citizen spouse and child, extreme hardship to his spouse, hardship to his child and the lack of a criminal record in approximately eight years. The applicant's spouse states that the applicant does not drink anymore, he has taken all of his classes and has completed his probation. Counsel states that the applicant has completed the required rehabilitative requirements ordered in his criminal matters. The record includes statements from the applicant's pastor, friends and family attesting to his good character. It is noted that an additional year has passed since the date of the field office director's decision and that record supports that the applicant has continued to conduct himself well during that time.

The AAO finds that the criminal and immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 rests with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained. The application is approved.

¹ The AAO notes that even if this conviction rendered the applicant inadmissible under section 212(a)(2)(A) for committing a crime involving moral turpitude, he would be eligible for the "petty offense" exception under section 212(a)(2)(A)(ii)(II) of the Act.