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U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

H1

[redacted]

FILE: [redacted] Office: TUCSON, AZ Date: NOV 01 2004

IN RE: [redacted]

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:

[redacted]

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.

Ellen C. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Tucson, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the United Kingdom 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 his last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility (Form I-601) in order to reside in the United States with his wife.

The interim district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the Interim District Director,* dated July 3, 2003.

On appeal, counsel asserts that the Interim District Director erred in denying the applicant's waiver request asserting that he failed to consider relevant evidence in reaching his decision and that the denial was an abuse of discretion.[1] *Form I-290B*, dated July 24, 2003.

In support of these assertions, counsel offers a brief in which he summarizes the information provided in the twelve affidavits submitted in conjunction with the waiver request, and sets forth his legal argument as to why the information contained in the affidavits supports the grant of the waiver. 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.
> >
> > . . . .

[1] It is noted that counsel asserts in his brief that it was an abuse of discretion for Interim District Director to fail to conduct any interviews in connection with the adjudication of the waiver. However, counsel points to no authority requiring that the adjudicator conduct interviews in connection with a waiver application. Moreover, the decision reflects that all of the affidavits submitted on behalf of the applicant were considered by the Interim District Director, and there is no indication that any of the evidence was discounted or given less weight by virtue of the absence of interviews of the applicants.

> (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.

In the present case, the record indicates that the applicant entered the United States under the Visa Waiver Pilot Program (VWPP) as a non-immigrant visitor for pleasure, authorized to remain in the United States until May 1995. The applicant remained in the United States without authorization from May of 1995 until September of 1999. He departed the United States in September 1999 and reentered on December 21, 1999, under the VWPP as a non-immigrant visitor for pleasure authorized to remain until March 20, 2000. On March 22, 2000, the applicant filed an Application to Adjust Status (Form I-485) concurrently with a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. At the time the applicant filed the I-485, the applicant had accrued more than one year of unlawful presence after April 1997.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized 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.* The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until March 22, 2000, the date of his proper filing of the Form I-485. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his September 1999 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) 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 to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Counsel asserts that the applicant's spouse would face extreme hardship if she relocated to the United Kingdom in order to remain with the applicant. The extreme hardship the applicant's spouse would suffer, according to counsel, would result from a variety of factors. These factors, as detailed in counsel's brief and supported by the affidavits, fall into three general categories: 1) the financial hardship that would befall the spouse due to her inability to maintain the U.S. business she has established with the applicant, and due to her inability to pursue her profession as a teacher in the United Kingdom; 2) the emotional hardship the spouse would suffer if she left the United States with her husband due to her close ties to her family members, particularly her elderly parents; and 3) the psychological hardship she would suffer if separated from her husband if she elected to remain in the United States, given that her husband has been a source of significant emotional and psychological support and has helped her overcome periodic depression. This following is a discussion of each of those factors.

First, a review of the record indicates that a significant portion of the evidence submitted addresses the issue of the financial hardship that would befall the U.S. citizen spouse should the applicant be required to return to the United Kingdom. Specifically, a number of the affidavits submitted are from friends and business associates of the couple who have come to know them on account of the applicant's operation of his leather goods store, [redacted], in Tucson, Arizona. The affidavits generally indicate that the business is dependent upon the applicant's skills in leatherwork, and that while the applicant's spouse assists with the business, it is his skills that have been the major factor in the success of the business. Several of the affiants predict that if the applicant is required to leave the United States it would lead to the closure of the business and would pose an extreme financial hardship to the applicant's spouse. The applicant and his spouse likewise indicate that should the applicant be required to depart the United States the business would not exist without the applicant's leather work talents and that "it would be a tremendous financial loss of a thriving business and our investment." *See* Affidavit of Ronald James, dated April 21, 2003; Affidavit of Sylvia Flores, dated April 20, 2003.

While the affiants are consistent in their belief that the business would suffer and likely close if the applicant were required to depart the United States, there is an absence of objective evidence of the impact of the loss of the business on the U.S. citizen spouse's ability to support herself. We note that the evidence indicates that the applicant's spouse has income that is independent from the couple's business, by virtue of her full-time teaching position at the [redacted] *See* Affidavits of Sylvia Flores, [redacted] In addition, there is no evidence in the record that demonstrates the current financial situation of the couple and the impact on the spouse's financial condition of the loss of the business. However, the evidence demonstrates that the spouse has a separate full-time job that is likely her primary source of income, and would enable her to support herself. Furthermore, the fact that the spouse has assisted in the management of the couple's business operations and has, according to at least one affidavit, operated a business endeavor, could enable her to earn additional income in addition to her full-time teaching position. Furthermore, it is apparent that the applicant possesses a marketable skill and presumably would be able to generate income with those skills in the United Kingdom. That income, in turn, would be available to continue to help support his spouse if necessary. Therefore, the record fails to demonstrate that the applicant will be unable to contribute to his wife's financial well being from a location outside of the United States.

Finally, counsel asserts in his brief that if the spouse elected to accompany her husband to the United Kingdom, she would suffer extreme hardship based upon her inability to obtain a teaching position due to her

failure to meet appropriate credentialing and licensing requirements, her absence of contacts, and the issue of age discrimination. *See* Counsel's Brief at p.14. However, aside from counsel's brief, there is no evidence in the record to support these allegations. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Consequently, counsel's statements regarding the spouse's inability to obtain employment in the United Kingdom are merely speculation.

The second and third factors raised by counsel to demonstrate extreme hardship are the emotional and psychological hardship that the applicant's spouse would experience on account of being separated from her husband if she elected not to join him, and alternatively, if she did elect to accompany her spouse, the emotional hardship she would suffer due to being separated from her aging parents, particularly her mother who survived a near fatal heat attack with her assistance. It appears clear from the record that the spouse has a close relationship with her parents and has played a role in her mother's recovery. She would certainly experience emotional hardship due to a separation from her parents. However, there is insufficient evidence to demonstrate that the hardship could be characterized as extreme, as opposed to the normal hardship that would result from such a separation. Furthermore, the spouse's hardship on account of the separation from her parents is something within her control as there is nothing that compels her to leave the United States to accompany her husband to the United Kingdom. The spouse's affidavit assets that she would suffer emotional and psychological hardship if she were to remain in the United States due to the absence of her husband who she states has helped her through her recent difficulties and pulled her out of the periodic depression she has suffered due to increasing job dissatisfaction. While the AAO recognizes that the spouse will understandably experience emotional hardship, there is nothing to indicate that her emotional difficulties would be extreme or that occasional bouts of depression she suffers are anything other than normal depression that people experience due to every day difficulties, or that her depression is of such a nature that it requires medical treatment. We note as well that the spouse has an extended network of family and friends in the United States who appear supportive and who would likely be able to ease the spouse's difficulties resulting from separation from the applicant. Moreover, the spouse's emotional hardship could be eased by periodic visits to her spouse in the United Kingdom, and based on their close relationship, the couple would almost certainly maintain contact with each other.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang,* 450 U.S. 139 (1981). The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant. However, her situation, if she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.