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U.S. Citizenship
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Services

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FILE:

Office: SAN FRANCISCO

Date: JUL 13 2006

IN RE:

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

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, San Francisco, California denied the waiver application, 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 the United Kingdom (U.K.) who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States by fraud or willful misrepresentation. The applicant is the spouse of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to reside in the United States with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated June 2, 2004.

The record reflects that, on February 15, 1997, the applicant married her U.S. citizen spouse, Anthony [REDACTED] (Mr. [REDACTED]) in Hastings, U.K. On February 21, 1997, the applicant entered the United States by presenting her U.K. passport and was admitted as a nonimmigrant under the Visa Waiver Pilot Program (VWPP) until May 20, 1997. On March 17, 1997, Mr. [REDACTED] filed a Petition for Alien Relative (Form I-130) on her behalf. On May 21, 1997, the Form I-130 was approved. On December 29, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. The record shows that the applicant appeared at Citizenship and Immigration Services' (CIS) San Francisco District Office on January 7, 2003. The applicant testified that, after her February 21, 1997 entry into the United States she had left and returned to the United States utilizing an Advance Parole on March 24, 1998. The applicant also testified that her last entry into the United States utilizing the Advance Parole occurred on December 29, 1998.

On April 4, 2003, the applicant filed the Form I-601 with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel contends that the district director erred in finding that the applicant is inadmissible pursuant to sections 212(a)(9)(B)(i)(I) and 212(a)(6)(C)(i) of the Act. *See Applicant's Brief*, dated July 15, 2004. Counsel, alternatively contends that the applicant's husband will experience extreme hardship if the applicant is denied the waiver. In support of his contentions, counsel submitted new affidavits from the applicant, Mr. [REDACTED] and his parents, medical documentation for Mr. [REDACTED] parents, financial records for the applicant and Mr. [REDACTED] a psychological report and country conditions reports for the U.K. The entire record was reviewed in rendering a decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such aliens' departure or removal is inadmissible.

The record indicates that the applicant entered the United States under the VWPP with authorization to remain in the country until May 20, 1997. On December 29, 1997, the applicant filed the Form I-485. The applicant subsequently used advance parole authorization to depart and reenter the United States. The applicant's last entry into the United States occurred on December 29, 1998.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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 May 20, 1997, the date of expiration of her nonimmigrant status, until December 29, 1997, the date on which she filed the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's Form I-485, so the applicant, as of today, is still seeking admission by virtue of adjustment under section 245 of the Act. The applicant's last departure occurred prior to December 29, 1998. It has been more than three years since the departure that made the inadmissibility issue arise in her application. A clear reading of the law reveals that the applicant is no longer inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

(1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application

of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The district director found that, because the applicant was married at the time of entry and she remained in the United States while filing for an immigrant visa petition, she was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. On appeal, counsel contends that the district director erred in finding that the applicant committed misrepresentation by entering the United States on February 21, 1997. Counsel contends that because border agents did not question the applicant upon entering the United States that, by simply presenting a valid passport for admittance as a nonimmigrant, she did not make an omission of fact or any misrepresentation regarding her immigrant/nonimmigrant intent and that, because she did not file the Form I-485 until after the Form I-130 was approved, the applicant still had the option of pursuing consular processing.

The Department of State developed the 30/60-day rule which applies when, “an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...Marrying and takes [sic] up permanent residence.” *Id.* at § 40.63 N4.7-1(3). Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, the record reflects that, at the time she last entered the United States, the applicant was married and she intended to remain in the United States. The applicant presented herself for admission as a nonimmigrant visitor to the United States on February 21, 1997, at which time she was an intending immigrant that willfully misrepresented herself as a nonimmigrant. Moreover, the applicant took up permanent residence with her husband immediately after her entry and her husband filed an immigrant visa petition on her behalf less than 30-days after her entry. Additionally, if the applicant did not have immigrant intent and intended to consular process she would have left the United States prior to the expiration of her authorized stay of 90 days. The AAO therefore finds that the applicant was an intending immigrant that willfully misrepresented herself as a nonimmigrant.

Counsel contends that the application should be remanded to the district director in order to give the applicant an opportunity to rebut the district director’s finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act because the district director did not give her an opportunity to rebut the finding before issuing a decision on the application. However, the applicant has been given an opportunity to rebut the finding of inadmissibility before the AAO.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. The AAO notes that any hardship to the applicant’s spouses’ parents is not hardship to a qualifying relative and will not be considered in this decision, except as it may affect the applicant’s spouse, the only qualifying relative.

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 at 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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).

The record reflects that Mr. [REDACTED] parents are both U.S. citizens. The applicant and her spouse have no children. The record reflects further that the applicant and Mr. [REDACTED] are in their 30's, Mr. [REDACTED] does not have any health concerns but his parents have some health concerns.

Counsel contends that Mr. [REDACTED] would suffer financial and emotional hardship if he were to remain in the United States without the applicant because he suffers from an anxiety disorder which will cause him to suffer emotional hardship so disturbingly painful that his sense of grief and loss will render him unable to function. Counsel also contends that the loss of the income generated by the applicant would create an untenable financial hardship for Mr. [REDACTED] which would lead to his bankruptcy. In his affidavits, Mr. [REDACTED] states that he is afraid he would be unable to lead a normal life without the applicant because the loss of his “cornerstone relationship” with her would destabilize his life and without the applicant’s income he would not be able to meet the household debts, especially since they bought a new house in 2004. He also states that he would have to support a second household for the applicant in the U.K. because it is unlikely the applicant would generate sufficient income to support her household. The psychological report indicates that Mr. [REDACTED] profile suggests that he may be experiencing an anxiety disorder and that he tends to be somewhat dependent in interpersonal relationships.

Financial records indicate that, in 2002, Mr. [REDACTED] salary was \$46,192 while the applicant’s salary was \$17, 199. There is no evidence in the record that the applicant would be unable to secure sufficient income to support herself in the U.K. Additionally, the record reflects that the applicant has family members in the U.K., such as her parents, who may be able to provide her with financial or physical assistance which would ease Mr. [REDACTED]’s financial responsibilities. The record shows that, even without assistance from the applicant or other family members, Mr. [REDACTED] has, in the past, earned sufficient income to exceed the poverty

guidelines for his family. *Federal Poverty Guidelines*, <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>. While it is unfortunate that Mr. [REDACTED] may have to lower his standard of living, such economic loss, even when combined with the emotional hardship discussed below, does not constitute extreme hardship.

The psychological report was based on one meeting with Mr. [REDACTED] and states that there was no evidence of a psychotic thought process or suicidal or homicidal ideation. While the report states that Mr. [REDACTED] does have a tendency to be somewhat dependent in interpersonal relationships, it does not indicate that Mr. [REDACTED] would be unable to function as a result of the loss of the applicant or that his reaction would be greater than that of those similarly situated. The report indicates that Mr. [REDACTED] has not received psychological treatment or evaluation other than during the one meeting used to compile the report and does not indicate that he requires on-going treatment. The report can, therefore, be given little weight. Additionally, the AAO notes that Mr. [REDACTED] did not state he had abnormal psychological problems until after the Form I-601 was denied and there was no mention of any psychological problems in the affidavit, which Mr. [REDACTED] submitted with the Form I-601. There is no evidence in the record to suggest that Mr. [REDACTED] suffers from a physical or mental illness that would cause him to suffer hardship beyond that commonly suffered by aliens and families upon deportation. Moreover, according to the record, Mr. [REDACTED] has family members to support him emotionally in the absence of the applicant. While the hardships Mr. [REDACTED] faces are unfortunate, the hardships faced by him with regard to adjusting to a lower income and separation from the applicant, are what would normally be expected when an alien spouse is deported to a foreign country.

Counsel contends that Mr. [REDACTED] would face extreme hardship if he relocated to the U.K. in order to remain with the applicant because he has no ties to the U.K., would be separated from his family in the United States and would be unable to care for his parents who are experiencing multiple medical issues, he would struggle to make ends meet and would abandon his career and retirement. In his affidavits, Mr. [REDACTED] states his father is a long time diabetic who suffered a stroke and has limited mobility while his mother suffers from arthritis which severely limits the use of her right arm. Mr. [REDACTED] hope was that his parents would move in with him where he could care for them financially, emotionally and physically. He states that he would suffer hardship because he would be unable to care for his parents if he were in the U.K. Mr. [REDACTED] states that he would have to abandon his pursuit of a Master's degree and a California Multiple Subjects Clear Credential certification. He states he would be unable to secure a job that pays a reasonable salary while he pays for, enrolls in and studies at a college to obtain a teaching credential and that it would be expensive to reside in the U.K. Mr. [REDACTED] states he would have to pay a prepayment penalty if he sold his house in the United States and that he would lose his retirement and not be eligible for retirement in the U.K. until he was 74 years old.

The AAO notes that Mr. [REDACTED] property no longer has a prepayment penalty since it has been more than 24 months since the purchase of the property and Mr. [REDACTED] indicated in his affidavit that he would complete his Master's degree and certification in 2005. The country conditions reports submitted by counsel do not support Mr. [REDACTED] assertions. The country conditions reports indicate that the U.K. is ranked as the 16th most expensive place to live while the United States is ranked as the 13th most expensive place to live in the world. The country conditions reports indicate that, as an Overseas Trained Teacher (OTT), Mr. [REDACTED] is eligible to work for up to four years without gaining Qualified Teacher Status (QTS) and that in practice many schools make up the difference between unqualified and qualified teacher pay rates. Moreover,

Mr. [REDACTED] may apply for QTS assessment without further training and, if further training is required, training is limited to no more than one year during which time a trainee receives a generous salary and is eligible to receive stipends to cover training expenses. The retirement scheme in the U.K. is complicated as to how payments are calculated and an individual may retire as early as age 60. The country conditions reports indicate that the retirement benefits in the U.K. are much more generous than those received in the United States. The record reflects that the applicant has family members in the U.K., such as her parents, who may be able to assist the applicant and Mr. [REDACTED] financially, physically and emotionally.

There is no evidence in the record to suggest that Mr. [REDACTED]'s parents now reside with Mr. [REDACTED] or that he currently provides them with any assistance. The record reflects that Mr. [REDACTED] has other grown siblings in the United States who may be able to provide his parents with financial and emotional support in his absence thereby easing Mr. [REDACTED]'s inability to provide assistance to his parents. The medical documentation submitted does not indicate that Mr. [REDACTED]'s mother is unable to care for his father without assistance. As discussed above, there is no evidence that Mr. [REDACTED] suffers from a physical or mental illness that would cause him to experience emotional or physical hardship beyond that normally expected with separation from family in the United States.

While the hardships Mr. [REDACTED] faces are unfortunate, the hardships faced by him with regard to adjusting to a lower standard of living, separation from friends and family and adjusting to a new country, are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Finally, the AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, he would not experience extreme hardship if he remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that Mr. [REDACTED] will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are

generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(i) of the Act, 8 U.S.C. § 1186(i). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. **Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.**

ORDER: The appeal is dismissed.