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



FILE:



Office: ROME, ITALY

Date: **MAR 05 2004**

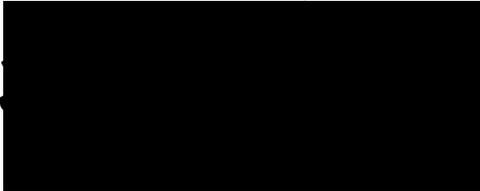
IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:



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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Rome, Italy and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Italy who was found by a Consular Officer to be inadmissible to the United States under 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 a period of one year or more. The applicant is the beneficiary of an approved Petition for Alien Relative and approved petition for a K-3 nonimmigrant visa filed on Form I-129F as the spouse of a U.S. citizen. He now 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 travel to the United States and reside with his 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 accordingly. *See District Director Decision* dated June 19, 2003.

The record reflects that the applicant was admitted to the United States as a non-immigrant visitor under the Visa Waiver Pilot Program on October 31, 1999, for a period of 90 days, expiring on January 29, 2000. The applicant remained in the United States beyond his authorized stay and finally departed in July 2002. He thus accrued unlawful presence in excess of one year making him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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 –

....

(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 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.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). After reviewing the IIRIRA amendments to the Act regarding fraud, misrepresentation and unlawful presence in the United States and after noting the increased impediments Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar, in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground of inadmissibility for unlawful presence after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

On appeal, counsel asserts that CIS failed to correctly adjudicate the applicant's waiver application. Counsel states that the district director adjudicated the waiver application under the standards applicable for an immigrant applicant that requires showing that extreme hardship would be imposed on a qualifying family member. Counsel further states that since the applicant applied for a nonimmigrant waiver the district director in making his decision should have considered the following:

- The risk of harm to society if the applicant is admitted;
- The seriousness of the applicant's prior violations;
- The person's reasons for wishing to enter the United States and
- There is no need to show a compelling reason for the visit.

Matter of Hranka, 16 I & N Dec. 491 (BIA 1978)

To support this assertion counsel submits excerpts from the Department of State Foreign Affairs Manual.

The regulation at 22 CFR § 41.81 discusses the eligibility for the issuance of a "K" visa and provides, in pertinent part:

Fiancé(e) or spouse of a U.S. citizen and derivative children.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

...

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, including the requirements of subsection (d).

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under subsections (a), (b) or (c) of this section as if the alien were an applicant for an immigrant visa, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

In addition, the regulation at 8 C.F.R. § 212.7 states:

a) General --

(1) Filing procedure --

(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

Based on the above the AAO finds counsel's assertions unpersuasive. The applicant is applying for a waiver under section 212(a)(9)(B)(v) of the Act and the district director correctly applied the standards applicable to an immigrant visa applicant.

As stated above, section 212(a)(9)(B)(v) of the Act provides that a 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 on a qualifying family member. 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).

In the present case, the applicant must demonstrate extreme hardship to his U.S. citizen spouse.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deemed 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.

On appeal, counsel asserts that CIS failed to correctly assess extreme hardship to the applicant's spouse (Ms. [REDACTED]). In support of this assertion, counsel submits a brief, a psychological evaluation, letters of recommendation from family and friends regarding the applicant's character, a report regarding the country conditions in Italy and an affidavit from Ms. [REDACTED] which was previously submitted to the American Embassy in Italy. In the brief counsel states that Ms. [REDACTED] would suffer emotionally and financially if her spouse's waiver application was not approved. Furthermore in the brief counsel states that it would be impossible for Ms. [REDACTED] to relocate to Italy in order to join her husband due to her medical condition. The psychological evaluation presented states that Ms. [REDACTED] suffers from Major Depressive Disorder, Panic Disorder without Agoraphobia, Body Dysmorphic Disorder and Eating Disorder. Ms. [REDACTED] disorders have existed for years (a)(9)(B)(v) and are related to events that occurred long before her involvement with the applicant. Ms. [REDACTED] attended the Neighborhood Counseling Clinic for weekly psychiatric visits, which she stopped when the psychiatrist resigned. Mr. [REDACTED] was prescribed anti-depressants but she was not compliant with the medication because she feared that the medication would harm her. Ms. [REDACTED] was advised recently by her primary care physician to seek psychiatric care and was prescribed medication. There is no indication in the appellate brief received that any further treatment was sought. The psychologist's evaluation does not mention if her condition can be treated in Italy if she decides to relocate.

In her affidavit, Ms. [REDACTED] states that she fears to move to Italy because she may not be eligible for medical benefits immediately and she will have difficulty communicating with medical providers. Furthermore Ms. [REDACTED] states that her living standard will decline in Italy because her husband could only be a subsistence farmer. Ms. [REDACTED] states that she will lose her job in the United States, lose the opportunity for higher education and will be forced to leave her family. In his brief counsel states that Ms. [REDACTED] had informed the applicant that she had no intention of residing in Italy and was unwilling to leave her family and in the United States.

There are no laws that require Ms. [REDACTED] leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

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 (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. The U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the all the factors presented, and the aggregated effect of those factors, indicates that the applicant's spouse would suffer hardship due to separation. The applicant has failed, however, to show that the qualifying relative would suffer extreme hardship over and above the normal social and economic disruptions involved if the applicant was not permitted to travel to the United States at this time. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

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 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.