



U.S. Citizenship
and Immigration
Services

13

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI DISTRICT OFFICE

Date:

OCT 21 2004

IN RE:

[REDACTED]

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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent disclosure of unclassified
information of personal privacy

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DISCUSSION: The waiver application was denied by the District Director, Miami. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The applicant is a native and citizen of the Czech Republic who was found 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 between September 1998 and April 2001, and seeking readmission within 10 years of her last departure from the United States in or about August 2001. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with her husband and lawful permanent resident child.

The district director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director* (August 2, 2002). The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO* (January 14, 2003).

On motion to reopen, counsel asserts that refusal to admit the applicant would result in extreme hardship to her spouse, primarily based on his poor health. *Applicant's Motion to Reopen/Reconsider* (February 13, 2003). Counsel also contends that USCIS committed an error by approving the applicant's request for advance parole when her departure from the United States would trigger the bar to admission under INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The regulations governing these proceedings, 8 C.F.R. § 103.5(a)(2), state, in pertinent part:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

In support of the motion, counsel submits affidavits and financial, educational, medical, and employment records. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(v) 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 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 U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

In the present application, the record indicates that the applicant was admitted to the United States on a visitor visa on March 2, 1998, authorized to remain until September 1, 1998. On April 3, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). In August 2002, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States. The AAO notes that the applicant overstayed the period of stay authorized by her visitor visa by remaining in the United States for over two years.

The proper filing of an affirmative application for adjustment of status has been designated 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 of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The applicant accrued unlawful presence from September 2, 1998, until April 3, 2001, the date the Form I-485 was properly filed. In applying to adjust her status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of her 2002 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 to the alien herself is not a permissible consideration under the statute.

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, 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).

Counsel asserts that the applicant's spouse [REDACTED] would face extreme hardship if he remains in the United States without the applicant. Medical records submitted with the instant motion indicate, [REDACTED] has had Diabetes [sic] for 13 years and it will continue to be a lifelong condition. . . . In March 1999 . . . [REDACTED] health began to deteriorate and I advised him to stop working." *Letter of Dr. Fred Williams, MD* (February 10, 2003). The doctor's letter contains no further details of the effects of diabetes on [REDACTED] health, which are not self-evident. Attached billing records note 16 "Massage Therapy" treatments and 20 "Expanded Exam" entries between January 2002 and January 2003. The record contains no treatment plan, assessment of needs, or prognosis. Applicant also stated in a more recent letter that her husband has also been diagnosed with high blood pressure and Parkinson's disease, had a minor heart attack in February 2004, and that his finger was amputated in 2003 due to gangrene. *Letter from the Applicant to the AAO* (March 29, 2004). Medical records are not attached to support her statements, although she provides the address for the Bay Medical Center in Panama City, Florida, from which, she notes, medical records can be requested. The AAO notes that, in proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. The AAO does not assume this burden for the applicant by requesting evidence in support of the application from third parties.

The record contains a letter from international education consultants stating that the applicant's qualifications from the Czech Republic are equivalent to "graduation from a college preparatory program at an accredited high school in the United States and graduation from a vocational program for Laboratory Assistants at an accredited high school in the United States." *Josef Silny & Associates* (June 4, 2001), at 2. There is also a letter of reference from a former employer in the Czech Republic, for whom she worked as a Health Laboratory Assistant. *Letter of Hospital and Emergency Services, District of Karvina* (undated). Counsel and the applicant assert that this training enables her to "administer the [insulin] shots and IV's that [her] husband needs." *Affidavit of Ivana Royce* (February 10, 2003); *Affidavit of Thomas Royce* (February 10, 2003).

The record shows [REDACTED] 2002 income consisted of unemployment compensation and social security benefits, for a total of \$11,701. The applicant's salary for the same period was \$23,933, or approximately 67% of the household's income.

[REDACTED] was born in the U.S. State of Florida. Form G-325, *Biographic Information* (March 1, 2001). [REDACTED] family ties in the United States, other than the applicant, include his half-brother, who lives in Louisiana, and the applicant's son, who lives with him and the applicant. *Affidavit of Thomas Royce, supra*. His mother died in 1996, and he has never met his father. *Id.* The record is silent as to his family ties outside

the United States, other than the applicant's older son, who appears to have remained in the Czech Republic after having been found ineligible for a relative petition by [REDACTED] because he was over age 18 at the time his mother married. See *Letter of Immigration and Naturalization Service, Jacksonville* (March 31, 2001). The record is also silent as to country conditions in the Czech Republic, and whether the applicant's husband would face extreme hardship if he relocated there.

It appears from the record that the applicant's husband faces, as do all spouses facing potential separation from a spouse, a difficult decision of whether remain in the United States or to relocate to the Czech Republic to reside with his spouse. Counsel does not establish extreme hardship to the applicant's spouse if he relocates with her to the Czech Republic or remains in the United States without her. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." See *Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965). Although the record shows that [REDACTED] suffers from a serious health condition, there is insufficient detail and independent corroboration in the record to make a determination that his diabetes and other asserted health conditions require the medical services of his wife, or that the impact of his illness on the potential loss of their unique relationship would result hardship that rises to the level of "extreme" as contemplated by the statute and case law. Additionally, although [REDACTED] income would decrease by some 67% in absence of the applicant, at the least until she could find employment overseas, there is nothing in the record to address the family's expenses so that an accurate evaluation of economic detriment can be made.

Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. 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, 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 facts and documentation in this case are not sufficient to establish that hardship faced by [REDACTED] would rise to the "extreme" level.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

The AAO notes that the advance parole document issued to the applicant states the following, outlined in a black box in the center of the notice:

Remarks: NOTICE TO APPLICANT: . . . If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under

section 212(a)(9)(B)(i) of the Act when you return to the United States to resume processing of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved.

The AAO therefore finds that proper notice was given to the applicant of the possibility that she would be found inadmissible to the United States upon her return, a risk that she knowingly assumed. The AAO also notes that the Form I-94, *Arrival/Departure Record*, which was issued to the applicant upon her admission to the United States, clearly indicates that her authorized stay expired on September 1, 1998. That the applicant remained in the United States well beyond the period of her authorized stay is not disputed. The AAO need not address whether or not the applicant knowingly or unknowingly accepted a risk of inadmissibility when she departed the United States intending to return pursuant to advance parole, or whether the approval of advance parole was advisable or contrary to policy. In any event, neither the statute nor regulations permit an exemption from inadmissibility or from the extreme hardship requirement under the circumstances. To create an exception to the statutory requirements where none exists in the plain language of the governing laws would be *ultra vires*, or beyond the authority of the AAO.

In proceedings for application for waiver of grounds of inadmissibility, 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 previous decisions of the district director and the AAO will not be disturbed.

ORDER: The motion is granted. The decision of January 14, 2003 dismissing the appeal is affirmed.