



U.S. Citizenship
and Immigration
Services

H3

[Redacted]

FILE: [Redacted]

Office: MOSCOW

Date: SEP 16 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 PETITIONER:

[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 and to protect against
invasion of personal privacy

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DISCUSSION: The waiver was denied by the Officer-in-Charge, Moscow, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Kazakhstan who was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and and seeking readmission within 10 years of her last departure from the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to immigrate to the United States to reside with her husband and lawful permanent resident child.

The officer-in-charge found that, based on the evidence in the record, the applicant failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the Officer-in-Charge* (March 19, 2004).

On appeal, the applicant contends that she has established extreme hardship to her U.S. citizen spouse, and requests consideration of the hardship to her lawful permanent resident child. 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:

- (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 gain 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, 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.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(a)(9)(B)(v) 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 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 (BIA1999). 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 AAO notes that the record contains references to the hardship that the applicant's lawful permanent resident child would suffer if the applicant were refused admission. Section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship as to his or her U.S. citizen or lawful permanent resident spouse or parent. Congress excluded from consideration extreme hardship to an applicant's child. In the present case, the applicant's spouse is the only qualifying relative under the statute, and hardship to the applicant's child will not be considered.

The record reflects that the applicant was admitted to the United States on May 28, 2000, as the fiancée of a U.S. citizen pursuant to INA § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i), for the purposes of marrying the petitioning U.S. citizen, [REDACTED] (Steven), within 90 days. The applicant failed to marry the petitioner within 90 days and, in fact, on August 6, 2000, married another individual, [REDACTED] (no relation) [REDACTED]. The applicant stated in a sworn affidavit in support of the I-130, *Petition for Alien Relative*, filed on her behalf by [REDACTED] that she married [REDACTED] in part because, during her short time together with [REDACTED] after her entry, he treated her like a "slave," forced her into unwanted sexual activity, threw knives, owned guns, and caused her to be fearful for her safety and that of her daughter. *Affidavit of Tatyana Johnson* (August 21, 2000). For his part, Steven withdrew his fiancée petition, alleging immigration fraud on the part of the applicant. *Withdrawal of Relative Petition* (August 31, 2000). In October and November 2000, the applicant's relationship with her husband [REDACTED] soured, allegedly in part due to the applicant's request that [REDACTED] feign guilt to domestic violence charges so the applicant could adjust status in the United States, rather than overseas. [REDACTED] also withdrew his relative petition, alleging that the applicant committed immigration fraud and intended to file fraudulent spousal battery reports with the police. *Withdrawal of Relative Petition* (November 22, 2000). The applicant's marriage to [REDACTED] was terminated by divorce on December 22, 2000. The order of the Family Division, Second Judicial District Court of the State of Nevada, in and for the County of Washoe, stated that [REDACTED] "has been the victim of domestic violence during the marriage, and the victim of threats of false reports of domestic violence by [the applicant]

in order to keep legal immigration status.” Or. Granting Final Decree of Divorce 3 (December 22, 2000). Further, the court ordered that [REDACTED] was entitled to a permanent restraining order against the applicant enjoining her from threatening, injuring, harassing, or contacting Michael or his children.¹ *Id.*

Meanwhile, based on [REDACTED] allegations, the Investigations arm of Immigration and Naturalization Service (INS) (now the Bureau of Immigration and Customs Enforcement (ICE)), had prepared a Form I-213, *Record of Deportable/Inadmissible Alien*, on December 5, 2000. On December 14, 2000, INS took the applicant into custody and issued a Notice to Appear, charging her with deportability for remaining in the United States longer than permitted after admission as a nonimmigrant, under INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). She was released on her own recognizance pending a deportation hearing before an immigration judge.

During the pendency of the deportation proceedings, and six days after the divorce from [REDACTED] was final, the applicant married [REDACTED] the original petitioner for her fiancée visa, on December 28, 2000. Steven filed an I-130, *Petition for Alien Relative*, on applicant’s behalf on January 22, 2001. On February 14, 2001, the applicant failed to appear for her removal hearing and the immigration judge ordered her removed *in absentia*. On March 9, 2001, a Motion to Reopen the immigration court proceedings was granted. Amid extensive discussions between the INS counsel, the applicant’s attorney, and the immigration judge regarding whether she was eligible to apply for adjustment, the applicant filed her application for adjustment of status based on the approved I-130 on August 16, 2001. On August 23, 2001, the immigration judge denied her application and ordered her deported, finding that the law did not permit her adjustment in the United States because she had married the petitioner after the expiration of the the 90-day time limit after her entry under INA § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i). The applicant timely appealed the order, but withdrew the appeal on July 11, 2002, in order to depart the United States and seek re-entry from abroad.

On May 14, 2003, the applicant applied overseas for an immigrant visa, as the spouse of a U.S. citizen, and was denied pursuant to INA § 212(a)(9)(A)(II), 8 U.S.C. § 1182(a)(9)(A)(II), for being an alien who “departed the United States while an order of removal was outstanding, and who seeks readmission within 10 years of such alien’s departure or removal . . .” The applicant filed a Form I-212, *Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal* (I-212) and a Form I-601, *Application for Waiver of Ground of Inadmissibility*, pursuant to INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). Both the I-212 and I-601 applications were denied on March 19, 2004. A decision on the appeal of the denial of the I-212, which is also before the AAO, is issued concurrently with the instant appeal decision.

Each of the *Cervantes* factors, cited above, is reviewed in turn. First examined are the U.S. citizen or lawful permanent resident family ties in the United States of the U.S. citizen spouse (Steven). The record reflects that Steven was born and raised in the United States, and has one U.S. citizen daughter from a prior marriage, aged 7. In October 2002, the applicant’s daughter immigrated to the United States as a lawful permanent

¹ The fact, raised by counsel, that the applicant waived her appearance in the divorce proceedings and that the divorce judgement was entered as a default after her failure to respond is irrelevant. The decision not to participate in those proceedings was the applicant’s alone. The AAO is entitled to rely on the judge’s order as legally sufficient and factually supported.

resident, based on her status as the beneficiary of an I-130 filed by Steven, and has been residing with him in Nevada. She is 16 years old. For purposes of this analysis, the applicant's daughter is considered a part of Steven's family. Other than the applicant, Steven does not have family ties outside the United States.

Next considered are country conditions where the qualifying relative would relocate. Although the applicant was born in Kazakhstan, all indications in the record are that she is living in Russia. See *Wells Fargo Account History* (showing all overseas ATM withdrawals from within Russia); *PennyTalk Call History* (showing all international long distance calls to Russia); *Oral Decision of the Immigration Judge* (August 23, 2001) (ordering the applicant deported to Russia); *Form I-94, Departure Record* (May 28, 2000) (showing country of citizenship as Russia). Counsel submitted background statements regarding anti-American terrorist groups operating in Kazakhstan, and alleges conditions of high unemployment, poor access to medical care, and "restrictive to Americans." *Brief in Support of Appeal of Denial of Waiver*, at 8, *U.S. Department of State Consular Information Sheet* (April 1, 2003). However, because even the applicant does not appear to be residing in Kazakhstan, there is no indication that the applicant would relocate to Kazakhstan. Therefore, hardship to the applicant's husband if he relocated to Kazakhstan does not appear relevant, and is therefore not considered. The applicant apparently told his pastor that he considered relocating to Russia with the children, but is concerned that his youngest daughter from a prior marriage, aged 7, would suffer an educational setback. *Letter of Reverend Ariel L. Arias* (April 2, 2004). Counsel has not submitted any country conditions or other documentation to support a finding that the applicant's step-daughter could not learn to assimilate into the local schools within a reasonable period of time or other circumstances in support of a finding that the extent of the setback would be such as to rise to the level of extreme hardship to [REDACTED]

As to the financial impact of the bar to admission, counsel submitted several pages of [REDACTED] bank account history, which show the applicant regularly withdrawing money from his account during February and March of 2004 using an Automated Teller Machine in Russia. Also submitted are bills showing \$80-90 monthly telephone expenses from January to March 2004, a pay stub showing a health insurance cost of \$270.95, of which \$147 is claimed to be for the benefit of the applicant. A handwritten note in counsel's submission indicates that phone, insurance, and living expenses supporting the applicant amount to \$537 per month. [REDACTED] pay stub shows a year-to-date gross income of \$12,427.74 as of March 12, 2004, or an average of approximately \$4,970 per month. Assuming Steven takes home about 62% of his pay, as he did on the one pay stub provided, and subtracting the \$147 insurance cost from the \$537 monthly expenses deducted directly from his pay, the expenses related to his wife amount to about 13% of his take-home pay. There is no indication of whether the applicant works or contributes to expenses in any way, or any reasons she cannot do so. The financial impact appears to be commonly expected, reasonable costs of separation of spouses. These expenses amount to a sacrifice, but do not rise to the level of an extreme hardship. Although there are allegations that "cashing out" his state retirement and selling his home in the event of relocation to Russia would also contribute to the hardship, there is no documentation of these items, or a sufficiently detailed statement of the potential impact. The AAO acknowledges the financial and other difficulties Steven faces raising two children alone and working at a job that is apparently sixty miles away. The letter from his pastor indicates he has quit night school due to the burdens. *Letter of Reverend Ariel L. Arias, supra*. However, the applicant's husband was a single father and worked at the same job prior to their engagement or marriage. The hardships of single fatherhood may be slightly amplified, but in large part already existed prior to marriage with the applicant.

In support of the impact on [REDACTED] health, counsel submits a medical screening for depression, dated March 29, 2004, a medication prescription slip, the business card of his employer's employee assistance coordinator, and letters from his employer and a co-worker associating recent difficulties with separation from his wife. The medical screening indicates that [REDACTED] has been depressed since his wife was "deported" to Russia. *West Hills Hospital/Willow Springs Center Integrated Assessment*, at 1. The assessment also indicates that he is a recovering alcoholic with 14 years sober, and is active Alcoholics Anonymous. *Id.* The preliminary diagnosis was "Maj. Depression, Recurrent." *Id.* at 6. The disposition of his assessment was to refer him to "community resources" including employee assistance program and a crisis line. *Id.* at 7. He was not referred for outpatient services such as the Counseling Center or psychiatric care. He was prescribed the antidepressant Lexapro, with a planned follow-up 5 weeks. His depression does not appear to be a long-term or significant health condition. Rather, it appears to be a common emotional result of separation from his spouse and single fatherhood.

The applicant and her husband lived together in marital union for approximately six months prior to her decision to abandon the appeal of her deportation order and depart the United States. The circumstances surrounding the applicant's marriage are, at the least, unusual. In the record are accusations of fraud committed by the applicant, claims of spousal abuse perpetrated on and by the applicant, and allegations of fraud or criminal exploitation by third parties. It is not necessary for purposes of this decision to analyze the circumstances surrounding her marriage because, even assuming the *bona fides* of the marriage, viewing the totality of the circumstances as presented in the record and considering the *Cervantes* factors alone as well as in the aggregate, the applicant has failed to establish that the refusal of her admission would result in extreme hardship to a qualifying relative.

If [REDACTED] were to join the applicant in Russia, the record establishes that he would experience the common inconveniences and difficulties of relocation, not rising to the level of extreme hardship. Therefore, the applicant's spouse faces, as all spouses facing deportation or refusal of admission of a spouse, the decision of whether to remain in the United States or relocate to Russia. 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).

The record also does not establish extreme hardship to [REDACTED] if he remains in the United States without the applicant. As stated above, the trials of single fatherhood presented in this case are typical and commonly expected in cases of separation from one's spouse and, in many respects, pre-existed this relationship. Similarly, the financial and medical issues raised by the applicant are also in proportion to what is expected under the circumstances, and do not rise to the level of "extreme." 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), *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).

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. Because we find that the applicant has not established extreme hardship to a qualifying relative, we do not reach the question of whether she would merit a favorable exercise 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.