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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[Redacted]

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FILE: [Redacted] Office: NEWARK, NJ Date: **AUG 08 2006**

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Newark, New Jersey. 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 Nicaragua 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 her last departure from the United States. The applicant is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her husband and two United States citizen children.

The District Director found that the applicant was inadmissible based on section 212(a)(6)(A) as an alien present without admission or parole, section 212(a)(6)(B) for failure to attend a removal hearing, and section 212(a)(9)(C)(i)(I) as an alien unlawfully present after a previous immigration violation who enters or attempts to reenter the United States without being admitted. The District Director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Notification of the Service's Decision on the Applicant's Form-601 dated May 20, 2004.*

On appeal, counsel asserts that the applicant is not statutorily barred from seeking a waiver of the 10-year bar and requests that the applicant's case be remanded back to the District Director to determine if the applicant merits the exercise of a favorable discretion in her application for a waiver of the 10-year bar. *Form I-290B dated June 16, 2004.*

In support of these assertions, counsel submits a brief. Also included in the record is a letter written by the applicant's spouse Freddy Garrido dated January 22, 2004; the birth certificates for the applicant's two U.S. citizen children; the applicant's birth certificate, the income tax forms for 2000, 2001, and 2002 filed jointly on behalf of the applicant and her spouse; the naturalization certificate of the applicant's spouse dated April 12, 1985; the marriage certificate for the applicant and her spouse dated November 10, 1987; and the divorce certificate for the applicant's spouse dated October 6, 1981. The entire record was reviewed and considered in rendering a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States without inspection on or about June 14, 1985, at or near Hidalgo, Texas. On July 10, 1986 the applicant filed a Form I-589, Request for Asylum under the name [REDACTED]. See *Form I-589*. On April 11, 1989 the applicant's request for asylum was denied by the District Director in Miami, Florida. See *Denial of Request for Asylum dated April 11, 1989*. An Order to Show Cause and Notice of Hearing dated April 11, 1989 was issued to the applicant to appear before an immigration judge. See *Order to Show Cause dated April 11, 1989*. The applicant married a naturalized U.S. citizen on November 10, 1987. See *Marriage Certificate*. On November 14, 1996 the applicant received an approval notice for a Form I-130 petition. See *Form I-130 Approval Notice*. On April 15, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status. See *Form I-485*. The applicant received an 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 on August 16, 2003 at Miami, Florida and on November 14, 2003 at Newark, New Jersey. See *Form I-512 and Form I-94*.

Before addressing whether the applicant qualifies for a waiver of inadmissibility, it is necessary to address the District Director's findings of inadmissibility and counsel's assertions. The AAO finds that the District Director erred in finding the applicant inadmissible under section 212(a)(6)(A) as being present without admission or parole, as the applicant was paroled into the United States on August 16, 2003 and again on November 14, 2003. *See Form I-512 and Form I-94.* The District Director erred in finding the applicant inadmissible under section 212(a)(6)(B) for failure to attend a removal hearing. There is nothing in the record or in Citizenship and Immigration Services' electronic records to show that the Order to Show Cause was served upon the immigration court. Furthermore, there is no decision in the record by an immigration judge regarding the applicant's case. The AAO acknowledges counsel's assertion that section 212(a)(6)(B) does not apply because the applicant is not seeking admission into the United States, as she was paroled. The AAO finds that the applicant is seeking admission into the United States as evidenced by her filing for adjustment of status. Although the applicant is seeking admission into the United States, she is not inadmissible under section 212(a)(6)(B), as there was no removal hearing that she failed to attend. The District Director erred in finding the applicant inadmissible under section 212(a)(9)(C)(i)(I) as an alien who is unlawfully present after a previous immigration violation who enters or has attempted to reenter the United States without being admitted. After April 1, 1997, the date of enactment of unlawful presence provisions under the Act, the applicant was paroled into the United States. *See Form I-512 and Form I-94.* Therefore, this section does not apply to the applicant.

Section 212(a)(9)(B) is the only section relevant to the applicant's situation.

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.

....

(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.

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 Memo, Williams, Exec. Comm., 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 April 15, 2003, the date of her proper filing of the Form I-485. The AAO notes that the District Director erred in finding that the applicant had accrued over 18 years of unlawful presence, as the start of the accrual period is April 1, 1997 and not her entry date of June 14, 1985. *See Notification of the Service's Decision on the Applicant's Form-601 dated May 20, 2004.* In applying to adjust her status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of her August 2003 departure. If an adjustment applicant had 180 days or more of unlawful presence in the U.S. before filing an Application to Adjust Status, her return on an advanced parole will trigger the three or ten year bar. *Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act.068 (Nov. 26, 1997).* 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/herself 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 Bureau 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 family ties to 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.

In his brief, counsel did not address whether the applicant's U.S. citizen spouse would face extreme hardship if he relocated to Nicaragua or remained in the United States. The applicant's Form I-601 states that her two U.S. citizen children will suffer if they are separated from the applicant. *See Form I-601 dated January 23, 2004.* The record includes several tax statements filed jointly on behalf of the applicant and her spouse. *See Income Tax Returns for 2000, 2001, and 2002.* Nothing in the record establishes that the applicant's spouse is unable to address their financial responsibilities with his earnings. Further, the record fails to demonstrate that the applicant will be unable to contribute to her family's financial well-being from a location outside of the United States. The record also includes a letter from the applicant's spouse stating that he has been married to the applicant for 17 years and they have two children. *See Letter written by the Applicant's Spouse dated January 22, 2004.* The applicant's spouse says that the applicant is his right hand and that it will be impossible for him and his children to be without her. *Id.* The applicant's spouse does not elaborate on why it would be impossible to live without his wife, nor are there any additional documents in the record that

demonstrate the extreme hardship the applicant's spouse would suffer in Nicaragua or in the United States if his wife were removed.

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. The AAO recognizes that the applicant's husband will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of removal 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.