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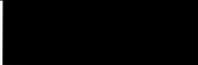


U.S. Citizenship  
and Immigration  
Services



43

FILE:



Office: PANAMA CITY

Date:

NOV 01 2008

IN RE:



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

ON BEHALF OF APPLICANT: Self-represented

## 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Officer in Charge, Panama City, Panama, 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 Colombia 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 seeking admission within 10 years of having been unlawfully present in the United States for more than one year. The applicant is the spouse and mother of U.S. citizens. She 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 reside in the United States with her spouse and child.

The acting officer in charge 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 Acting Officer in Charge*, dated April 6, 2005.

The record shows that the applicant appeared at the U.S. Embassy in Bogota, Colombia. The applicant testified that she had traveled back and forth between the United States and Colombia since July 1996, residing in the United States past the date of expiration of her authorized stay on a number of occasions, but that she did not have the passport on which she had traveled to the United States. The applicant also testified that, in 2003, she had been removed from the United States after she was refused admission to the United States in July 2002.

On October 18, 2004, 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, the applicant contends that she deserves to be granted the waiver because of her husband and child. *See Form I-290B*, dated May 5, 2005. On appeal, the applicant indicated she would submit a brief or additional documentation within 30 days. However, the applicant failed to submit a brief or additional documentation at any time. The entire record was reviewed in rendering a decision in this case.

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 . . . 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 alien's departure or removal, or
- (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 [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.

In the present application, the Form I-601 indicates that the applicant traveled to and remained in the United States from July 25, 1996 until July 28, 1997, from April 11, 1998 until July 18, 1999, from February 8, 2000 until December 2, 2000 and from February 4, 2002 until May 5, 2002. The district director found that the applicant was 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. However, Citizenship and Immigration Services' (CIS) electronic records indicate that the applicant was admitted as a nonimmigrant in valid status from August 7, 1999 until February 6, 2000, from March 14, 2001 until September 13, 2002 and from August 3, 2001 until February 2, 2002. The applicant testified that on each occasion she traveled to the United States she was admitted as a nonimmigrant visitor. Each time the applicant was admitted to the United States, CIS records indicate she was admitted for a period of 6 months.

The Executive Associate Commissioner in regard to accruing unlawful presence for the purposes of section 212(a)(9)(B) of the Act:

(2) Counting of Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the period of stay authorized by the Attorney General is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants.

(A) Nonimmigrant admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the period of admission authorized by the Service expires, as noted on the arrival document issued at the port-of-entry.

*Memorandum by Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, dated March 3, 2000 ("3/3/00 Pearson memo").*

Instructions issued by the Acting Executive Associate Commissioner state, in pertinent part:

Under the modified interpretation, unlawful presence with respect to a nonimmigrant includes only periods of stay in the United States beyond the date noted on Form I-94, Arrival/Departure Record. Unlawful presence does not begin to run from the date of a status violation (including unauthorized employment). Unlawful presence for a nonimmigrant may begin to accrue before the expiration date noted on the I-94,

however, in two circumstances: (1) when an immigration judge makes a determination of a status violation in exclusion, deportation or removal proceedings; or (2) when the Service makes such a determination during the course of adjudicating a benefit application.

*Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Field Operations, dated September 19, 1997.*

Moreover, instructions from the Acting Executive Associate Commissioner state:

Unlike section 212(a)(9)(C)(i)(I) of the Act . . . the periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate. For example, section 212(a)(9)(B)(i)(I) of the Act would not apply to an alien who made two prior visits to the United States, accrued 4 months of unlawful presence during each visit, and is now applying for a nonimmigrant visa to make a third visit to the United States. This is because each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(I) of the Act, and in this example no single period of unlawful presence exceeded 180 days.

*Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Field Operations, dated June 17, 1997.*

The record contains no evidence that there was a determination of a status violation, by an immigration judge or the Service, prior to the applicant's attempt to procure admission in July 2002. The AAO finds that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until July 28, 1997, from October 12, 1998 until July 18, 1999, and from August 8, 2000 until December 2, 2000. Therefore, the longest period of unlawful presence the applicant may have accrued after any of her authorized stays would be 279 days and she is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. However, the applicant, by her own admission, did accrue more than 180 days but less than one year of unlawful presence from October 12, 1998 until July 18, 1999, and is inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I). Pursuant to section 212(a)(9)(B)(i)(I), the applicant is barred from again seeking admission within three years of the date of the departure that made the inadmissibility issue arise.

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 Application for Immigrant Visa and Alien Registration (Form DS-230), so the applicant, as of today, is still seeking admission by virtue of her immigrant visa application. The applicant's departure causing the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act occurred on July 18, 1999. It has been more than three years since the departure that made the inadmissibility issue arise in her application. The AAO notes that the acting officer in charge erred in finding the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act because, at the time the Form I-601 was adjudicated, it had been three years since the applicant's departure that caused her inadmissibility. A clear

reading of the law reveals that the applicant is no longer inadmissible pursuant to section 212(a)(9)(B)(i) of the Act.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The record reflects that, on July 9, 2002, the applicant applied for admission to the United States at the Miami, Florida, Port of Entry. The applicant presented her Colombian passport with the U.S. nonimmigrant visa that she had previously utilized to enter the United States and overstay her authorized admissions. The record reflects, and the applicant testified, that her passport contained stamps in it that were not issued by Colombian authorities. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and charged with attempted fraudulent entry and attempted entry as an immigrant without valid documentation. On July 24, 2002, the applicant was placed in proceedings before an immigration judge after she claimed a fear of returning to Colombia. The applicant filed an asylum application before the immigration court. On April 29, 2003, the immigration judge denied the applicant's application for asylum, withholding of removal and convention against torture and pretermitted the applicant's application for voluntary departure. The AAO notes that, in her affidavit, the applicant claims she was granted asylum and voluntary departure, but the record reflects that both of those applications were denied. The immigration judge, therefore, ordered the applicant removed from the United States. On May 9, 2003, the applicant was removed from the United States and returned to Colombia. The AAO therefore finds that the applicant attempted to procure admission to the United States by misrepresentation of a material fact or by fraud by presenting a passport that contained fraudulent Colombian reentry stamps in 2002 and is inadmissible under section 212(a)(6)(C) 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.

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. It is noted that Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Thus, hardship to the applicant's U.S. citizen daughter 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, Id.* at 565. 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, on June 14, 2003, the applicant married her spouse, [REDACTED] who is a U.S. citizen by birth. The applicant has a six-year old daughter who is a U.S. citizen by birth. The record reflects further that the applicant and [REDACTED] are in their 20's, and there is no evidence that [REDACTED] has any health concerns.

The applicant and [REDACTED] in their affidavits, assert that [REDACTED] would suffer extreme hardship if the applicant were denied admission to the United States because [REDACTED] would be stressed and his work capacity would be diminished.

There is no evidence in the record to suggest that [REDACTED] would be unable to earn sufficient income to support himself and his family through employment in the United States. There is no evidence in the record to suggest that [REDACTED] suffers from a physical or mental illness that would cause him to be unable to perform daily activities, job duties, or that would diminish his ability to work. The record reflects that the applicant is employed in Colombia, providing an income which may ease [REDACTED] financial burdens. The record also reflects that the applicant has family, such as her parents, who reside in Colombia and may be able to provide physical and financial assistance to the applicant, thereby easing [REDACTED] financial burden. While it is unfortunate that, if the applicant's daughter accompanies [REDACTED] to the United States, he would essentially become a single parent and professional childcare may be an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. The record does not support a finding of financial loss that would result in an extreme hardship to [REDACTED] if he had to support himself and his family without additional income from the applicant, even when combined with the emotional hardship described below.

There is no evidence to suggest that [REDACTED] suffers from a physical or mental illness that would cause him hardship that is beyond those commonly suffered by aliens and families upon deportation. While it is unfortunate that, if the applicant's daughter remains in Colombia with the applicant, [REDACTED] would be separated from the applicant and her daughter, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation.

The applicant and [REDACTED] in their affidavits, contend that [REDACTED] would suffer extreme hardship if were to remain in Colombia with the applicant because there is a lack of work and stability in Colombia and the family would not have the employment and education opportunities it would have in the United States. There is no evidence in the record to suggest that [REDACTED] suffers from a physical or mental illness for which he would be unable to receive treatment in Colombia. The record reflects that the applicant is currently employed in Colombia and there is no evidence to suggest that [REDACTED] would be unable to find any employment in Colombia. Moreover, the record indicates that the applicant has family members in Colombia who may be able to provide financial, physical and emotional assistance. While the hardships faced by Mr. [REDACTED] with regard to adjusting to a lower standard of living, separation from friends and family, a new culture, economy and environment and the loss opportunities available in the United States are unfortunate, they are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Additionally, the AAO notes that, even if the applicant had established [REDACTED] would suffer extreme hardship by remaining with the applicant in Colombia, 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, [REDACTED] 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 [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 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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.