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

H3

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX, AZ

Date: JAN 31 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada 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 citizen of the United States and is the daughter of U.S. citizen parents. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and parents.

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 for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated December 18, 2003.

The record reflects that, on June 30, 1986, the applicant was admitted to the United States as an L-2 nonimmigrant. The applicant's L-2 nonimmigrant status expired on September 13, 1989. On October 15, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. On February 4, 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 return to the United States on March 2, 2002. The applicant has not departed the United States since that date.

On July 24, 2003, the applicant filed the Form I-601 along with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel asserts that the applicant should not be punished for detrimentally relying on the issuance of an advanced parole and that the applicant's father would suffer extreme hardship if she were removed from the United States. *Applicant's Brief*, dated February 10, 2004.

In support of these assertions, counsel submitted the referenced brief and copies of documentation previously provided. The entire record was reviewed and considered in rendering a decision in this case.

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 district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admission to being unlawfully present in the United States from April 1, 1997, the date of enactment of the unlawful presence provisions of section 212(a)(9)(B)(i) of the Act, until October 15, 1999, the date on which she filed the Form I-485. Counsel does not contest the district director's determination of inadmissibility.

Counsel asserts on appeal, that the applicant should be granted a waiver because she relied upon the legal advice of a private immigration services provider, which failed to warn her of the risks involved in traveling outside the United States. He submits a copy of an addendum given to the applicant by the organization that states that Canadians admitted as visitors are visa and documentarily exempt and therefore do not accrue unlawful presence until immigration has determined that a status violation has occurred. However, the addendum to which counsel points as the basis for the applicant's reliance clearly indicates that Canadians admitted as an L-1 or in another nonimmigrant category that is documented with an I-94 entry card do accrue unlawful presence. The applicant was aware, as indicated by the Form I-130, Form I-485 and supporting documentation, that she was admitted as an L-2 nonimmigrant, a status that is documented with a Form I-94, Arrival/Departure Record. Moreover, reliance upon incorrect advice is not a basis upon which a waiver of the section 212(a)(9)(B)(v) grounds of inadmissibility may be granted.

Counsel also asserts on appeal that, pursuant to a November 26, 1997, Immigration and Naturalization Service (now Citizenship and Immigration Services, CIS) memorandum, the applicant should not have been issued an advance parole if she was to be subjected to the three or ten year bars for unlawful presence. He further states that the granting of advanced parole to the applicant meant that the Service had determined that the applicant would likely qualify for a waiver of her inadmissibility.

The AAO finds that the November 26, 1997, Memorandum, "Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days," by Paul Virtue, Acting Executive Associate Commissioner (Memo) referred to by counsel, made clear that a Service grant of advanced parole status did not confer any waiver of inadmissibility benefits upon the alien. The memo further clarified that an alien who became inadmissible due to his or her departure from the United States had to file the Form I-601, and upon adjudication of that waiver application, had to establish extreme hardship to a qualifying relative, in accordance with applicable legal standards.

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 herself experiences upon deportation is not considered in section 212(a)(9)(B)(v) waiver proceedings.

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. 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 August 14, 1999, the applicant married her U.S. citizen husband, [REDACTED] (Mr. [REDACTED]). The applicant and Mr. [REDACTED] do not have any children. The applicant's father, [REDACTED] (Mr. [REDACTED]), is a native of Canada who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 1995. The applicant's mother, J [REDACTED]n (Ms. [REDACTED]), is a native of Canada who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 1996. The record indicates that the applicant is in her 30's, Mr. [REDACTED] is in his 40's, Mr. and Ms. [REDACTED] are in their 60's and Mr. [REDACTED] Mr. [REDACTED] and Ms. [REDACTED] may have some health concerns.

Counsel contends that Mr. [REDACTED] would suffer extreme hardship if the applicant is removed from the United States. Mr. [REDACTED] suffers from coronary artery disease, which caused a myocardial infarction in 1993, resulting in large apical infarct and left ventricular dysfunction. Medical documentation establishes that Mr. [REDACTED] heart pumps blood at 40% of a normal hearts' capacity and that he has experienced palpitations and severe angina attacks that required additional medical treatment due to the applicant's current immigration situation. Due to his health problems, Mr. [REDACTED] activities outside the home are limited and he is able to support himself and his wife by working from his home as an arbitrator for the American Arbitration Association. Counsel submitted medical documentation establishing that Mr. [REDACTED] angina and palpitations are induced by the frequent episodes of stress and anxiety he has recently experienced in regard to the

applicant's immigration status. Counsel also submits medical documentation, a psychological report and family affidavits, establishing that the applicant, as a registered physical therapist, has been instrumental in the rehabilitation process of Mr. [REDACTED] and in maximizing his cardiac capacity. The psychological report indicates that Ms. [REDACTED] is capable of basic household activities, such as cleaning and cooking, but is limited in her ability to care for her husband in other ways due to significant mental health issues. The applicant, therefore, has been designated as the caregiver for Mr. and Ms. [REDACTED]. Mr. [REDACTED], in his affidavit, indicates that his cardiac problems are such that neither he nor his cardiologist can speculate on how much longer he will live and that he wants to be able to spend the time he has left with the applicant. He also states that, due to his health problems, travel to Canada is not a plausible option. There is no documentation of country conditions in the record.

If he remained in the United States, Mr. [REDACTED] would face trying to maintain alone a household and assisting his wife, as well as trying to combat his own physical problems, without the trained care provided by his physical therapist daughter. Mr. [REDACTED] physical limitations appear to prevent him from mitigating the effects of separation by visiting the applicant. Moreover, the stress and anxiety resulting from his separation from the applicant may induce further health problems. While there is no evidence in the record to suggest that Mr. [REDACTED] would be unable to receive medical treatment for his health problems in Canada, the stress and anxiety of the move to Canada and the reestablishment of his life in Canada may induce further palpitations and angina. Additionally, Mr. [REDACTED] prospects for adequate employment in Canada are limited in light of his physical limitations. Should Mr. Austin remain in the United States, the economic hardship he faces is not uncommon to aliens and families upon removal, especially in light of Mr. [REDACTED] ability to earn income sufficient to support the family. However, the hardship Mr. [REDACTED] faces whether he remains in the United States or returns to Canada with the applicant is substantially greater than that which aliens and families would face upon removal. A finding of extreme physical hardship is the inevitable conclusion of the combined force of the submitted medical documentation and affidavits. A discounting of the extreme hardship Mr. [REDACTED] would face in either the United States or Canada if his daughter were refused admission is, therefore, not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that Mr. [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the unlawful presence for which the applicant seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's father if she were refused admission, the applicant's spouse and parents' significant ties to the United States and the applicant's otherwise clear background.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.