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U.S. Citizenship
and Immigration
Services

H3

[REDACTED]

FILE:

[REDACTED]

Office: MEXICO CITY, MEXICO

Date:

JUN 12 2007

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]

PHOTIC COPY

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 waiver application was denied by the District Director, Mexico City, Mexico and 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 Venezuela 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 ten years of his last departure from the United States. The applicant is the husband of a U.S. citizen and the father of two U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The district director found that the record failed to establish that the applicant's spouse would suffer hardship beyond that normally experienced as a result of the removal of a family member. He denied the application accordingly. *Decision of the District Director*, dated April 3, 2006.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) has failed to consider the evidence provided by the applicant or to offer any meaningful analysis of the hardship being experienced by the applicant's spouse. Counsel further asserts that CIS failed to exercise its discretion properly by neglecting to weight the positive and negative factors in this case. Finally, counsel points to CIS' failure to reconcile its denial of the Form I-601, Application for Waiver of Ground of Excludability, with its approval of the Form I-212, Application for Permission to Reapply for Admission After Deportation or Removal, previously filed by the applicant. *Form I-290B*, dated April 26, 2006 and *Attorney's Brief*, dated June 30, 2006.

The record indicates that the applicant was admitted to the United States on or about November 7, 1987 as a B-2 nonimmigrant. When his visa expired, the applicant remained in the United States. On July 13, 1988, he was approved for conditional permanent residence. His status was terminated on July 13, 1990 after he failed to appear for interview, as required by section 216(c)(1)(B) of the Act, 8 U.S.C., § 1186(c)(1), and, on June 19, 1991, an immigration judge ordered the removal of the applicant *in abstentia*. On March 6, 1998, the applicant married his current spouse, [REDACTED], who filed a Form I-130, Petition for Alien Relative, on his behalf. The Form I-130 was approved on July 29, 1998. Following the issuance of a Form I-205, Warrant of Removal/Deportation on March 24, 2004, the applicant was apprehended and removed from the United States. The Department of State consular officer in Caracas who conducted the applicant's immigrant visa interview found him to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act for having previously been ordered removed from the United States and under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for more than one year and seeking admission within ten years of removal. The AAO notes, however, that the applicant is not inadmissible under section 212(a)(9)(A)(ii) of the Act as the record contains an approved Form I-212 indicating that the applicant has been found eligible for an exception from that ground under section 212(a)(9)(A)(iii).

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

In the present case, the applicant whose lawful presence in the United States ended on July 13, 1990 accrued unlawful presence from the effective date of the unlawful presence provisions of the Act, April 1, 1997, until he was removed from the United States in March 2004, a period of approximately seven years. In applying for an immigrant visa, the applicant is seeking admission within 10 years of his 2004 removal from the United States and is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act.

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.

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 lawful permanent resident spouse and/or parent of the applicant. Hardship that the applicant or other family members experience as a result of separation is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it causes hardship to the applicant's spouse and/or parent. In the present case, the applicant's only qualifying relative is [REDACTED]

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)].

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 notes that extreme hardship to the applicant's spouse must be established if she resides in Venezuela or if she remains in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will now consider the relevant factors in the adjudication of this case.

The record on appeal contains a statement from [REDACTED] dated January 26, 2005 in which she reviews the applicant's immigration history and his unsuccessful efforts to comply with U.S. immigration law. She recounts her concerns regarding relocation to Venezuela, based on a trip there in late September and early October 2004 to visit the applicant. [REDACTED] indicates that she did not wear jewelry or take out her camera when in San Cristobal, the city where the applicant lives, because of the very high rate of crime and that the applicant has himself been the victim of thieves. [REDACTED] a registered nurse in the United States, also reports that she observed health care facilities while visiting the applicant and that she was surprised at how "backwards" the healthcare system and hospitals are in Venezuela. In relation to her son, she expresses concern that children in Venezuela require immunization against tuberculosis and malaria, as well as other diseases that were eradicated in the United States years ago. She also notes that public education in Venezuela is not comparable to that in the United States and that anti-American sentiments are expressed in the Venezuelan media. Of further concern to [REDACTED] is her and the applicant's ability to earn a living in Venezuela. She reports that the applicant has been unable to obtain employment since his return and that, as she has only a limited ability to speak Spanish, she would be unable to continue working as a nurse.

In support of [REDACTED] observations about life in Venezuela, counsel submits country conditions information in the form of recent articles from *The Economist*, the section on Venezuela from the U.S. Department of State Reports on Human Rights Practices – 2005, and Amnesty International and Human Rights Watch reports and articles from 2005. Counsel contends that [REDACTED] inability to work as a nurse in Venezuela, the violence

and political oppression there, the potential health risks for [REDACTED] son and her inability to provide him with the same educational opportunities as in the United States would have a devastating effect on her.

In her statement, [REDACTED] also asserts that as the nurse in her family, she has evolved into the daughter who is responsible for taking care of her aging parents on a daily basis and that the new home she and the applicant purchased in 2002 is located around the corner from them. She states her belief that, of her siblings, she is closest to her parents and that she welcomes the responsibility of caring for them.

None of the difficulties or disruptions that would face [REDACTED] upon relocation, as established by the record, rise individually to the level of extreme hardship. The AAO concludes, however, that their cumulative impact on [REDACTED], particularly in light of her limited ability to speak Spanish, supports a finding that she would face extreme hardship if she relocated to Venezuela to live with the applicant.

The second part of the analysis requires the applicant to prove that [REDACTED] would suffer extreme hardship if she remains in the United States without the applicant. In her statement, [REDACTED] indicates that in the applicant's absence she is unable to deal with the various pressures on her – the daily responsibilities related to her parents, the rearing of her infant son, the running of her home, and her employment obligations – and has sought help from a mental health professional. In support of [REDACTED] claim, the record contains an undated psychological evaluation from [REDACTED], a licensed psychologist, who states that he interviewed Ms. [REDACTED] on October 25, November 10 and November 16, 2004. [REDACTED] reports that the removal of the applicant was devastating for [REDACTED] and that she is dealing with depression, sleeplessness, separation anxiety, money issues and no day care for her infant son. He further indicates that it is his opinion that Ms. [REDACTED] is suffering from Post Traumatic Stress Disorder (PTSD) and all of its symptoms as a result of her current situation. [REDACTED] reports, has put the interests of her child first and decided to remain in the United States without the applicant and has begun to have physical symptoms of depression as a result of her decision. He also notes that [REDACTED] has taken out a home equity loan to pay her mortgage and health care, and that on November 16, 2004, she quit her job because she had no one to take care of her son and to spend more time assisting her ailing father. The AAO notes that counsel has advised that [REDACTED] father died on June 3, 2007.

While the input of any mental health professional is respected and valuable, the AAO notes that the submitted evaluation fails to provide the type of detailed analysis that normally reflects an established relationship between a patient and a therapist, thereby diminishing its value to a determination of extreme hardship. Although Mr. [REDACTED] states that it is his opinion that [REDACTED] is suffering from PTSD and all of its symptoms as a result of her separation from the applicant, he fails to offer any discussion of the reasoning on which he bases this conclusion or to identify the symptoms of PTSD to which he refers. [REDACTED] also states that [REDACTED] has "started to have physical symptoms of depression" as a result of her decision to remain in the United States without the applicant. Again, however, he fails to indicate the physical symptoms to which he refers or their effect on [REDACTED] ability to perform her daily activities. Although [REDACTED] states that [REDACTED] has had a difficult life, he does not indicate how or whether her past experiences have affected her ability to deal with her separation from the applicant. Moreover, while [REDACTED] reports that [REDACTED] left her employment to care for her son and her father, he does not indicate what effect this action is likely to have on her emotional state. The AAO also notes that [REDACTED]s evaluation offers no prognosis for [REDACTED] related to his diagnoses of PTSD and depression. Neither does he indicate what courses of treatment, if any, would assist [REDACTED] in dealing with PTSD or her depression.

Counsel on appeal asserts that [REDACTED]'s decision to quit her nursing job was, in part, based on her depression as a result of her separation from the applicant. However, the evaluation prepared by [REDACTED] does not indicate that [REDACTED] decision to leave her nursing job was the result of depression, but rather that she made the decision based on her inability to find anyone to care for her son and her desire to spend more time helping her father. Further, although counsel contends that [REDACTED] has significant responsibilities to her parents, the record fails to describe these responsibilities or to document the health concerns affecting [REDACTED] parents. Without supporting documentary evidence, the assertions of counsel will not meet the applicant's burden of proof in this proceeding. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also reports that [REDACTED] has been forced to obtain a home equity loan to make her mortgage payments. While the AAO notes that [REDACTED] also indicates that [REDACTED] is no longer working, has obtained a home equity loan to pay for her mortgage and has money issues, it does not find the record to offer sufficient evidence to establish that [REDACTED] financial situation is one of extreme hardship. The applicant has submitted no financial evidence, including proof of [REDACTED]'s home equity loan, which supports such a conclusion. The record's documentation of [REDACTED] monthly mortgage payment and quarterly property tax payments does not establish her financial situation. The AAO also notes that the record fails to demonstrate that [REDACTED]'s circumstances prevent her from seeking or obtaining employment that would allow her to support herself and her son. Returning to work as a single parent would require [REDACTED] to obtain childcare for her son. Although such care might not be of the quality that she now provides, this type of hardship is common when individuals must find ways to care for their children following the removal of a spouse. While the AAO notes that [REDACTED] evaluation indicates that [REDACTED] decision to quit her nursing job was, in part, based on her inability to find childcare, the record offers no proof that childcare is unavailable to [REDACTED] or that it was a factor in her resignation, e.g., a letter of resignation from [REDACTED] indicating her inability to obtain childcare. Moreover, there is no documentation in the record that establishes [REDACTED] has ended her nursing employment. Going on record without supporting documentary evidence is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the record before it, the AAO does not find the applicant to have established that she would face extreme hardship if the applicant's waiver request were denied and she remained in the United States. Accordingly, the applicant has failed to establish statutory eligibility for a waiver under section 212(a)(9)(B)(v) of the Act.

On appeal, counsel also contends that CIS erred when it failed to balance the positive and negative aspects of the applicant's case in its exercise of discretion. He points to the findings in *Matter of Mendez*, 21 I&N Dec. 296, 299-300 (BIA 1996) and *Dragon v. INS* 748 D.2d 1304, 1306 (9th Cir. 1984) as proof that in exercising its discretion, CIS must weigh the unfavorable factors in a case with an applicant's equities.

Although the issuance of a waiver under section 212(a)(9)(B)(v) is discretionary in nature, the exercise of this discretion is part of a two-step process in which the weighing of the positive and negative factors in an applicant's case is undertaken only when that applicant has met the statutory requirement of establishing extreme hardship to a qualifying relative. The applicant in the present case has failed to demonstrate that the denial of the Form I-601 would result in extreme hardship to [REDACTED] and is, therefore, statutorily ineligible for relief under

212(a)(9)(B)(v). Accordingly, the AAO will not consider the favorable and unfavorable factors in his case as no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

The AAO notes the concerns raised by counsel regarding CIS' failure to reconcile its denial of the Form I-601 with its prior approval of the Form I-212 filed by the applicant. Counsel contends that the equities in the applicant's case are stronger now than when the Form I-212 was approved in 1998. While the AAO does not dispute counsel's assertion regarding the applicant's equities, it notes that the requirements imposed on him in a Form I-601 adjudication under section 212(a)(9)(B)(v) of the Act are significantly different than those in a determination related to a Form I-212 waiver.

Under section 212(a)(9)(B)(v), an applicant, as just discussed, must establish extreme hardship to a qualifying relative prior to the exercise of discretion. There is no such requirement for receiving permission to reapply for admission under section 212(a)(9)(A)(iii). That adjudication is entirely discretionary. Through submission of a Form I-212, an applicant must establish that the positive factors in his or her case outweigh the negative factors. In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In the present case, the denial of the Form I-601 results from the applicant's failure to establish extreme hardship, i.e., his statutory ineligibility for a waiver under section 212(a)(9)(B)(v) of the Act, not from the exercise of discretion just described. Counsel is, therefore, mistaken in concluding that the favorable exercise of discretion that resulted in the approval of the Form I-212 previously filed by the applicant establishes the denial of the present case as an abuse 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.