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**U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CLEVELAND, OH

Date: **SEP 26 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]

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, Cleveland, Ohio. 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 Lithuania 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 U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to her U.S. citizen spouse and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated January 24, 2007.

On appeal, counsel asserts that the district director's decision is legally defective and based on conclusory assertions which are unsupported by legal precedent, and the denial fails to consider the manifest weight of the evidence presented. *Brief in Support of Appeal*, at 2-3. dated February 26, 2007.

The record includes, but is not limited to, counsel's brief, counsel's I-601 cover letter, a psychosocial evaluation of the applicant's spouse, medical records for the applicant's spouse's mother, a statement from the applicant's spouse's grandparents, a statement from the applicant and her spouse, and a statement from the applicant's spouse's brother and sister-in-law. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States on June 6, 2002 as a J1 exchange student. The applicant subsequently filed Form I-539, Application to Extend/Change Nonimmigrant Status, in order to change from J1 exchange visitor status to F1 student status. This application was denied on January 4, 2004. On February 27, 2005, the applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status. On August 18, 2005, the applicant departed the United States with an advance parole document and she was paroled back into the United States on October 3, 2005. The applicant's Form I-485 was denied on February 2, 2006. The applicant filed another Form I-485 on August 29, 2006 and this application was denied on January 24, 2007.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of authorized stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002. The applicant accrued unlawful presence from January 4, 2004, the date her change of status application was denied, until February 27, 2005, the date of her proper filing of the first Form I-485. In applying to adjust her status to that of lawful permanent resident, the applicant is seeking admission within 10 years of her departure from the United States on August 18, 2005. Therefore, the applicant is 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 and seeking admission (i.e. adjustment of status) within 10 years of her last departure.

The applicant was found admissible under Section 212(a)(9)(B)(i)(II) of the Act which 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.

The relevant waiver provision is located in section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act provides:

(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.

Counsel asserts that the district director's denial is unsupported by applicable authority and the district director failed to state the factual basis for the denial. *Brief in Support of Appeal*, at 2. The AAO will adjudicate the applicant's case based on relevant case law and the facts of the record presented.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from violation of 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. 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 non-exhaustive list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors are applicable to section 212(a)(9)(B)(v) waiver proceedings and include the presence of 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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Lithuania or in the event that he resides in the United States, as there is no requirement to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event of relocation to Lithuania. Counsel states that the applicant's spouse's entire nuclear family, his parents, siblings and grandparents all legally reside in the United States, and his mental health suffers tremendously from the mere prospect of not providing support for his family. *Brief in Support of Appeal*, at 5-6. Counsel asserts that the applicant's spouse is extremely close to his family and he would have to abandon his family. *I-601 Cover Letter*, at 4-5, dated August 28, 2006. Counsel states that the applicant's spouse's mother suffered a stroke in 2001, she is limited in her physical activities and the applicant's spouse is present at her house everyday to assist her with day-to-day activities. *Id.* The record includes medical records for the applicant's spouse's mother which indicates health problems. The applicant's spouse's grandparents state that the applicant's spouse helps with their day-to-day activities and he reminds them when to pick up and take their medicine. *Statement from* [REDACTED], dated August 1, 2006. The applicant's spouse's brother and sister-in-law detail the involvement of the applicant's spouse in their children's' lives. *Statement from* [REDACTED] [REDACTED] undated August 1, 2006.

The record reflects that the applicant's spouse was born in Lithuania and he resided there until approximately the age of 14. See *Psychosocial Evaluation*, at 1, undated. There is no evidence that he is not familiar with the language and culture. The record indicates that the applicant's parents reside in Lithuania. *Statement from the Applicant and Applicant's Spouse*, at 1, undated. The record reflects that the applicant's spouse returned to Lithuania to attend medical school and he stated it was not safe to live there due to bad feelings between ethnic populations. *Id.* at 2. The record does not include country condition information for Lithuania nor is there substantiating evidence that the applicant's spouse would be unsafe in Lithuania.

Counsel states that the applicant's spouse has invested six years into intense study and preparation to rise through the ranks of financial consultant levels, and he is faced with the ruin of his professional endeavors if he lives in Lithuania. *I-601 Cover Letter*, at 5. Counsel contends that financial consultant positions in Lithuania are rare due to the impoverished marketplace. *Id.* The record does not include any evidence to support counsel's claim of the lack of financial consultant positions in Lithuania. The assertion of counsel does not constitute evidence. *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). In addition, there is no indication that the applicant and/or her spouse could not obtain other means of employment while in Lithuania.

The record reflects that the applicant's spouse would face difficulty upon relocation to Lithuania, particularly in regard to separation from his family. However, considering that he is a native of Lithuania, speaks the language, has resided there previously and has relatives on his wife's side to assist with the adjustment, the record does not evidence extreme hardship to the applicant's spouse in the event of relocation to Lithuania.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel states that the turmoil surrounding the applicant's immigration status and the concomitant physical effects on her spouse have forced her spouse to leave his employment with the Hantz Group. *Brief in Support of Appeal*, at 5. The AAO notes that there is no substantiating evidence of this claim. The applicant's spouse's psychosocial evaluation reflects a loss of appetite, sleeplessness, inability to concentrate and reduced work performance, anxiety and depressed mood, and psychological hardship should his wife be removed. *Psychosocial Evaluation*, at 3. The finding of the psychosocial evaluation was that, "The Mental Status Exam did not reveal significant levels of dysfunction other than those symptoms associated with depression and anxiety." *Id.* The AAO acknowledges the important role of a clinical psychologist, however, the submitted report is based on a one-time meeting and there is no mention of a follow-up appointment, proposed therapy or treatment for the applicant's spouse. The applicant and her spouse detail their strong emotional ties, state that separation is not allowed in their religion and state that separation would bring them emotional, psychological, social and economic hardship. *Statement from the Applicant and Applicant's Spouse*, at 1-2. The AAO notes that separation entails inherent emotional stress and financial and logistical problems which are common to those involved in the situation. A thorough review of the record does not reflect extreme hardship to the applicant's spouse should he remain in the United States without the applicant.

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.

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 she 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.