

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

APR 15 2008

IN RE:

Applicant:

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:

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 Director of the California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras 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. The applicant is married to a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Director, dated February 16, 2006.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that the applicant entered the United States without inspection in October 1989 and voluntarily departed from the country in 2004. For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence on April 1, 1997. From April 1, 1997 to April 8, 2003, the date when she filed the adjustment application, she accrued six years of unlawful presence. When the applicant voluntarily departed from the country and returned on advance

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

parole, she triggered the ten-year-bar. Consequently, the Director was correct in finding her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

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

- (v) Waiver. – The Attorney General [now Secretary, 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 waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant’s husband. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains letters, birth and marriage certificates, divorce decrees, income tax records, and other documents.

The letter by the applicant’s husband conveys that he has a heart condition, diabetes, and high blood pressure. He states that his wife reminds him to take his medication and is a source of comfort to him. He indicates that he cannot perform heavy physical exertion, and earns a living through his business.

Collectively, the letters dated October 3, 2005 and August 12, 2005 by [REDACTED], M.D., internal medicine, pulmonary medicine, convey that the applicant’s husband has adult onset diabetes mellitus, hypertension, chronic atrial fibrillation, kidney stones, gout, and hiatus hernia. [REDACTED] states that the applicant’s husband takes glucophage, coumadin, norvasc, digoxin, and aciphex for his conditions and requires a companion to take care of him.

The letter by [REDACTED], M.D., F.A.C.C., dated March 11, 2006, conveys that the applicant’s husband has congestive heart failure, atrial fibrillation, unstable angina, aicd (defibrillator) placement, coronary stents, congestive cardiomyopathy, and thoracic aortic aneurysm. He states that the applicant’s husband has chest pain with and without exertion, has palpitations, and often has shortness of breath and dizziness. [REDACTED] conveys that the applicant’s husband is limited in bending, pushing, and pulling and requires the applicant’s care in showering, dressing, cooking. [REDACTED] states that the applicant’s husband is permanently disabled.

The record shows that on January 17, 2006 the applicant’s husband had a cardiac rhythm management device implanted. It shows that he has been prescribed medications by [REDACTED] and [REDACTED]

The letter dated September 10, 2005 by [REDACTED] states that the applicant's husband is the president and operator of a landscape company. The income tax records for 2003 show the company as earning \$19,350.

On appeal, counsel states that the letter by [REDACTED] establishes extreme hardship to the applicant's husband. Counsel further states that the director failed to consider personal and emotional hardship in determining hardship.

The AAO has carefully considered all of the submitted evidence in rendering this decision.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's husband must be established in the event that he remains in the United States without the applicant, and in the alternative, that he joins the applicant to live in Honduras. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record establishes that the applicant's husband would experience extreme hardship if he were to remain in the United States without his wife.

The record shows that the applicant's husband has serious medical problems and requires care for daily tasks such as taking a shower, dressing, cooking, and cleaning. It shows that he has an implanted cardiac rhythm management device and takes medications. Based on these facts, the AAO finds that the applicant's husband would experience extreme hardship if he were to remain in the United States without having the care of his wife.

The record fails to establish that the applicant's husband would experience extreme hardship if he were to join her to live in Honduras.

The record reveals that the applicant's husband has serious medical problems. It reflects that he has an implant, takes medication, and is seen by [REDACTED] a cardiologist, and [REDACTED] who practices in internal medical and pulmonary medicine. However, no claim has been made or documentation submitted to establish that the applicant's husband would experience extreme hardship if he were to join his wife to live in Honduras.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

The applicant has established that her husband would experience extreme hardship if he were to remain in the United States without her. However, in the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship in the event that the applicant's husband were to join her to live in Honduras. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(i) of the Act, 8 U.S.C. § 1182(i).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant 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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.