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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEGUCIGALPA, HONDURAS Date: DEC 09 2008

IN RE: Applicant: [REDACTED]

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway
for
John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Officer in Charge, Tegucigalpa, Honduras. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form I-601 will be denied.

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) and section 212(a)(6)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II) and 1182(a)(6)(B). The applicant seeks a waiver of her ground of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The officer in charge determined the applicant had established that a qualifying family member would suffer extreme hardship if the applicant were denied admission into the United States. The applicant's Form I-601 was denied, however, based on a finding that under section 212(a)(6)(B) of the Act, the applicant was statutorily inadmissible to the United States for five years (until April 2010), due to her failure to appear at her immigration court hearing in May 1999.

On appeal the applicant asserts, through counsel, that her five-year statutory inadmissibility under section 212(a)(6)(B) of the Act is not covered by, or relevant to, her Form I-601 application, and that it cannot be used as a basis for denying her Form I-601. The applicant asserts that extreme hardship to a qualifying relative has been established in her case. She indicates that a Form I-601 approval has no expiration date, and may be used by her in the future, and she asks that her Form I-601 be approved accordingly.

Section 212(a)(9)(B)(i) of the Act provides, in pertinent part, that:

[A]ny alien (other than an alien lawfully admitted for permanent residence) who –

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- (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.

In the present matter, the record reflects that the applicant entered the United States unlawfully on September 5, 1988. She was detained by U.S. immigration authorities, and she was served with a Notice to Appear (NTA) on September 6, 1998, for an immigration court hearing to be held in April 1999. The applicant did not appear for her immigration court hearing. The record reflects that the applicant subsequently applied for Temporary Protected Status (TPS) on June 12, 1999. Her TPS status was approved on March 29, 2001, and was valid until July 5, 2001. The applicant returned to Honduras on April 2005, and she has remained outside of the country since that time.

[D]eparture from the United States triggers the 10-year inadmissibility period specified in section 212(a)(9)(B)(i)(II) . . . if that departure was preceded by a period of unlawful presence of at least 1 year. . . . [T]he departure which triggers inadmissibility . . . must fall at the end of a qualifying period of unlawful presence. . . . An alien unlawfully present for 1 year or more who voluntarily departs is barred from admission for 10 years. *In re Rodarte-Roman*, 23 I&N Dec. 905, 908 (BIA 2006.)

The record reflects that the applicant was unlawfully present in the United States for more than one year between July 5, 2001 and April 2005. She is seeking admission less than ten years after her departure from the United States. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

[T]he Attorney General [now Secretary, Department of Homeland Security, "Secretary"] has sole discretion to waive clause [212(a)(9)(B)](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 record reflects that the applicant's husband is a U.S. citizen. He is therefore a qualifying family member for waiver of inadmissibility purposes under section 212(a)(9)(B)(v) of the Act.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (Board) deemed the following factors to be relevant in determining extreme hardship to a qualifying relative:

[T]he 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.

The Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994) that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." "Extreme hardship" has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996.) Court decisions have consistently held that the common results of deportation are insufficient to prove extreme hardship. *Perez v. INS, supra*. See also, *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991.)

A Section 212(a)(9)(B)(v) of the Act waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, USCIS then assesses whether an exercise of discretion is warranted.

In the present matter, the officer in charge assessed the applicant's Form I-601 hardship claim and determined, in a decision dated May 16, 2006, that the applicant's husband would experience extreme hardship if the applicant were denied admission into the United States. The officer in

charge nevertheless denied the applicant's Form I-601 in the exercise of discretion, based on a finding that she is statutorily inadmissible to the United States for five years from the date of her last departure, or until April 2010, pursuant to section 212(a)(6)(B) of the Act.

Section 212(a)(6)(B) of the Act states in pertinent part:

(B) Failure to attend removal proceeding. -Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

The five-year bar to admission into the United States is a mandatory bar under section 212(a)(6)(B) of the Act. There is no waiver of inadmissibility available under the provision.

In the present matter the applicant was served with an NTA on September 6, 1998, for an immigration court hearing to be held in April 1999. The applicant did not appear at her immigration court hearing. She has not asserted any cause for her failure to appear. She is therefore statutorily barred from admission into the U.S. for five years from the date of her last departure from the United States.

The applicant asserts, through counsel, that her five-year statutory inadmissibility under section 212(a)(6)(B) of the Act is not covered by, or relevant to, her Form I-601 application, and that it cannot be used as a basis for denying her Form I-601. The AAO agrees that the applicant's inadmissibility under section 212(a)(6)(B) of the Act is not covered, or waivable by a Form I-601 waiver of inadmissibility. The AAO finds, however, that the applicant's statutory inadmissibility until April 2010, pursuant to section 212(a)(6)(B) of the Act can properly be used by the officer in charge as a basis for denying the applicant's Form I-601.

The regulation at 8 C.F.R. § 212.7(a)(1)(i) provides, in pertinent part:

An applicant for an immigrant visa . . . who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

In the present matter, the applicant is not presently admissible to the United States except for the grounds for which a waiver is sought. Because the applicant is ineligible to receive an immigrant visa on account of continuing inadmissibility under section 212(a)(6)(B) of the Act, the visa application was properly denied. Accordingly, the filing and transmission of the waiver application to U.S. Citizenship and Immigration Services was premature and no purpose would be served in granting the applicant's Form I-601.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis of denial

of her Form I-601 waiver of inadmissibility. The appeal will therefore be dismissed and the Form I-601 will be denied.

ORDER: The appeal is dismissed. The application is denied.