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

PUBLIC COPY

H3

[REDACTED]

FILE:

[REDACTED]

Office: Miami, Florida

Date:

OCT 02 2008

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.

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, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Czech Republic who was found to be inadmissible to the United States under 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 one year or more. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant initially entered the United States as a B2 visitor for pleasure on November 16, 2003 with authorization to remain in the United States until May 14, 2004. On May 6, 2005 she attempted through her attorney to file an application for adjustment of status (Form I-485), but the application was rejected and returned due to insufficient information on an underlying application for employment authorization (Form I-765). The applications were properly filed on June 6, 2005. On September 5, 2005, the applicant departed the United States, and she reentered the country on September 20, 2005 with an advance parole document. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States with her spouse.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the District Director* dated August 24, 2006.

On appeal, counsel asserts that the applicant was rendered inadmissible for unlawful presence and failed to submit documentation establishing extreme hardship to her husband due to ineffective assistance of her former counsel. *See letter from counsel* dated August 14, 2008. Counsel further requests that new evidence submitted with the appeal documenting extreme physical and psychological hardship to the applicant's husband be considered by U.S. Citizenship and Immigration Services ("CIS"). Counsel states that the applicant's husband suffers from a severe intestinal disease that is exacerbated by stress and anxiety. *See Brief in Support of Appeal* at 3. Counsel further claims that the applicant's husband is suffering from severe depression. *Brief* at 4. In support of these assertions counsel submitted affidavits from the applicant and her husband and letters from two physicians and a psychologist describing the applicant's husband's medical and psychological conditions. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (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 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 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 citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant’s husband. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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. The BIA has further stated:

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).

In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS, supra*, the court further held 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. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a twenty-seven year-old native and citizen of the Czech Republic. She arrived in the United States on November 16, 2003 as a B2 visitor for pleasure with authorization to remain in the United States until May 14, 2004. Through her former counsel she filed an application for adjustment of status (Form I-485) on June 5, 2005. The applicant departed the United States on September 5, 2005 and re-entered with advance parole on September 20, 2005. The record further reflects that the applicant married her husband, a thirty-eight year-old native of South Africa and citizen of the United States, on May 5, 2005, and they reside together in Miami Beach, Florida.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of 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 May 15, 2004 until June 5, 2005, the date of her proper filing of Form I-485. The applicant is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more. Pursuant to section 212(a)(9)(B)(i)(II) of the Act, the applicant is barred from again seeking admission within ten years of the date of her departure on September 5, 2005.

The AAO notes that the applicant’s former counsel attempted to submit her application for adjustment of status on May 6, 2005, but it was rejected because of missing information on the underlying application for work authorization (I-765). The applicant claims that it was due to this error that she accrued more than one year of unlawful presence, and further states that former counsel did not inform her of the error before she obtained her advance parole document and departed the United States. The AAO further notes that a written opinion prepared in response to a complaint filed by the applicant against her former attorney describes the misconduct by the applicant’s former attorney. Although former counsel’s misconduct appears to have caused the applicant to unwittingly trigger the ten-year bar to admission by departing the United States with advance parole, she is still inadmissible under section 212(a)(9)(B)(i)(II) of the Act. These circumstances can be taken into consideration when determining whether the applicant merits a waiver as an exercise of discretion, but extreme hardship to a qualifying relative must first be established.

Counsel asserts that the applicant’s husband suffers from Crohn’s disease, a serous intestinal disorder that can be debilitating. *Brief* at 3. A letter prepared by [REDACTED], a physician who is treating the applicant’s husband for this disease, states,

I have told Dr. [REDACTED] that Crohn's disease needs to be managed medically because if not, the disease may continue to worsen and result in significant morbidity. . . . As well as medical therapy, it is important that he remove all stressors from his life, and treat his depression. It is necessary that his emotional well-being be maintained in order to combat the disease of Crohn's. . . . I have told him that if we cannot control his Crohn's disease, he may get the sequelae of such including fistulous disease between loops of bowel or kidney, malnutrition, kidney stones, and kidney infections. *Letter from [REDACTED] at 2.*

A letter from [REDACTED] who is treating the applicant's husband for major depression, states that he has had "significant turmoil in his life with difficulty functioning" since problems with the applicant's immigration status arose, and the fact that she now faces potential deportation "has significantly and adversely affected [REDACTED]'s ability to function as a Physician." *Letter from [REDACTED] dated September 18, 2006, at 1.* The letter further states that the applicant's husband suffers from Crohn's disease, which causes various gastrointestinal symptoms and can lead to "serious complications requiring hospitalization and the need for surgery." *Id.* Dr. [REDACTED] states that emotional stress is "a major contributing factor to frequent exacerbations of Crohn's disease." *Id.*

A psychological evaluation prepared by [REDACTED] states that the applicant's husband is suffering from an episode of "clinically significant Major Depression" and is experiencing symptoms including anxiety, social isolation and withdrawal, and depressed mood and affect. *See evaluation from Dr. [REDACTED] dated September 18, 2006.* the evaluation further states,

Dr. [REDACTED] also is quite depressed at the possibility of his wife being deported. . . . There is evidence of intense frustration and reported hopelessness that if his wife gets deported that he will have to leave his career, his family and friends, and move to Czech Republic. . . . Dr. [REDACTED] is also quite distraught, and significantly distressed concerning the potential harm that will ensue if his wife [REDACTED] is deported and he leaves his elderly parents, [REDACTED] and [REDACTED] to live in Europe with his wife. His father, [REDACTED] is quite ill and in fragile medical condition. . . . His mother, [REDACTED] has had a stroke, and in addition is diagnosed with heart failure. . . *See evaluation from [REDACTED] at 3.*

The applicant states in her affidavit that she was prevented from establishing extreme hardship to her husband because her former attorney did not inform her of this requirement. *See Affidavit of [REDACTED] dated September 21, 2006.* She further states that her husband "suffers from Crohn's disease and medical records could have easily proven this condition and hardship." The applicant's husband states that he has been depressed, anxious and very worried about his wife's situation and that due to stress and depression brought on by the threat of the applicant's deportation, his Crohn's disease "is the worst it has ever been." *Affidavit of [REDACTED] dated September 21, 2006.* The psychological evaluation submitted with the appeal states,

He reports that he loves his wife very much and just prior to this situation unfolding they were planning on starting a family. Dr. [REDACTED] states that he has never been in love before he met his wife and that their relationship is "the best thing that could ever have happened to me." *Evaluation by [REDACTED]*

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The letter from the applicant's husband's physician establishes that he has a chronic medical condition that is exacerbated by stress and anxiety and can have serious consequences if not brought under control. The letters from the two mental health professionals indicate that the applicant's spouse has been diagnosed with depression and indicate that as a result of anxiety over the applicant's immigration status, her husband has suffered from symptoms of depression and anxiety that can also exacerbate his medical condition. It appears that the effects of the depression the applicant's husband is experiencing combined with his medical condition are more serious than the type of hardship a family member would normally suffer when faced with his spouse's deportation or exclusion. When considered in aggregate, the physical and emotional hardship to the applicant's husband should he remain in the United States without the applicant constitutes extreme hardship. This finding is largely based on evidence submitted with the appeal that indicates that he suffers from major depression and anxiety as well as Crohn's disease. It appears that separation from the applicant, combined with the physical hardship resulting from stress brought on by this situation, would cause the applicant's husband great emotional distress and would jeopardize his health. Further, as noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

The psychological evaluation submitted in support of the appeal states that the applicant's husband is distraught over the possibility of leaving his career, family, and friends if he relocates to the Czech Republic with the applicant. No evidence was submitted concerning the ability of the applicant's husband to find employment or practice medicine in the Czech Republic or otherwise document conditions there. Further, although the evaluation of the applicant's husband states that he is "extremely distressed" over the prospect of leaving his parents because of their age and medical conditions, no evidence was submitted to document that his parents reside in the United States, describe any medical conditions they suffer from, or establish that the applicant's husband is involved in overseeing their care. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 evidence on the record, the emotional hardship and other difficulties that the applicant's husband would suffer if he relocated to the Czech Republic appear to be the type of hardships that family members would normally suffer as a result of deportation or exclusion. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996) (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship).

In this case, the record does not contain sufficient evidence to show that the qualifying relative would suffer hardship if he relocated to the Czech Republic that would rise beyond the common results of removal or

inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.