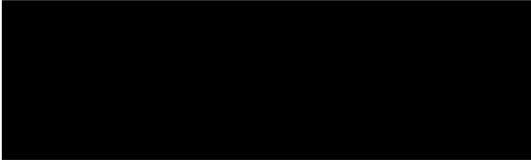




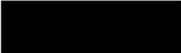
U.S. Department of Justice  
Immigration and Naturalization Service

~~CONFIDENTIAL~~  
H 4

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



PUBLIC COPY

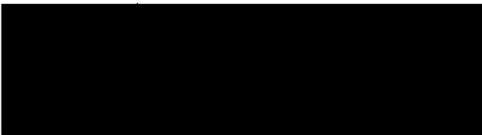
FILE:  Office: Rome

Date: FEB 26 2001

IN RE: Applicant: 

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

IN BEHALF OF APPLICANT:



Identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Rome, Italy, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of Italy who was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than one year. The applicant was admitted to the United States on January 1, 1998 as a nonimmigrant visitor for pleasure. The applicant remained longer than authorized and failed to apply for or to obtain an extension of temporary stay. He married a United States citizen in September 1999 and accepted employment without Service authorization. The applicant is the beneficiary of an approved petition for alien relative. The applicant seeks the above waiver in order to return to the United States and reside with his spouse.

The acting district director determined that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly.

On appeal, counsel discusses the following issues: the U.S. citizen spouse's ties in the United States; the impact of her departure from the United States; her acceptance to a U.S. nursing degree program, which includes financial aid and scholarships; her present state of depression; her lack of ties in Italy; the emotional and cultural conditions that would impact her in Italy; her lack of knowledge of the Italian language; the failure of the Service to advise them about the applicant's possible eligibility under § 245(i) of the Act; the failure of the Service to consider his wife's complete medical history; and the failure of the Service to consider all relevant factors relating to extreme hardship individually and cumulatively.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(9) ALIENS PREVIOUSLY REMOVED.-

(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the

United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

(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 from the United States, is inadmissible.

(v) WAIVER.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); United States v. Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground inadmissibility for unlawful presence (entry without inspection) after April 1, 1997, it is concluded that Congress has placed a

high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) 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; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter was admitted to the United States for a temporary period in January 1998, remained longer than authorized, obtained unauthorized employment and married his spouse in September 1999. He now seeks relief based on that after-acquired equity. However, as previously

noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

A review of the record, including the medical reports regarding the applicant's wife which were submitted on appeal, discloses that the U.S. citizen spouse would forego her nursing career if she joined the applicant in Italy, the financial burden upon her if she remained in the United States alone, and her health difficulties in general. When considered in its totality, the record now establishes the existence of hardship to the applicant's wife (the only qualifying relative) caused by separation, financial, health and emotional problems that cumulatively reach the level of extreme as envisioned by Congress if the applicant is not allowed to return to the United States.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

The favorable factors include the absence of a criminal record, the applicant's family ties, the applicant's offer of employment, and the approved petition for alien relative. The unfavorable factors are the applicant's remaining longer than authorized and his employment without Service authorization. Therefore it is concluded that the applicant has now demonstrated that the favorable factors outweigh the unfavorable ones in this matter.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained and the application is approved.