



**HAB**

**U.S. Department of Justice**

**Immigration and Naturalization Service**

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

[REDACTED]

**MAY 17 2001**

File: [REDACTED] Office: ROME, ITALY

Date:

IN RE: Applicant: [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)

IN BEHALF OF APPLICANT:

[REDACTED]

**Public Copy**

Identifying 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

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

The applicant is a native and citizen of Italy who was found by a consular officer to be inadmissible to the United States under § 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 a period of one year or more. The applicant married a United States citizen in October 1999 and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to travel to the United States to reside with his spouse and step-children.

The officer in charge concluded 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 asserts that the decision of the district director is in error because extreme hardship was proven based on emotional and physical distress and psychological trauma to the applicant's family members due to separation. Counsel states that the laws were not made to create severe, extreme emotional hardship for American citizens and that extreme hardship can be different for different people. On appeal, counsel submits psychologists' reports of the applicant's spouse and step-son concerning the effects of separation from the applicant.

The record reflects that the applicant was admitted to the United States as a temporary visitor for a period of 90 days under the Visa Waiver Pilot Program (VWPP) in November 1993. He remained longer than authorized and did not depart the United States until June 1999.

Section 212(a) of the Act states:

CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-  
Except as otherwise provided in this Act, aliens who are inadmissible 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-

\* \* \*

(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 of inadmissibility for unlawful presence 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. 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.

On appeal, counsel states that although the applicant and his spouse have only been married since October 1999, they have been together since September 1997 and have lived together as a family since May 1998. The applicant's spouse has joint custody of her two children, ages seven and twelve, with her ex-husband who resides in the United States and will not permit the children to be taken out of the country. Counsel states that the applicant's spouse is not

emotionally prepared to move to Italy without the children.

There are no laws that require the applicant's spouse to leave the United States and live abroad. In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

On appeal, counsel submits an evaluation from a clinical psychologist dated September 18, 2000 concerning the applicant's youngest step-child. The evaluation indicates that the child is currently in second grade, is receiving primarily A's and B's in school and experiences no significant impairment in school. The child's natural parents were separated in August 1997 and divorced in 1999. In October 1999, the child's mother married the applicant. The psychologist reports that the child has a healthy bond with the applicant and continues to have a good relationship with his biological father. The psychologist also reports that the child has moderate anxiety and depressive features secondary to issues pertaining to abandonment due to his separation from the applicant.

In September 1999, the applicant's spouse was diagnosed with having both anxiety and depression as a result of separation from the applicant. On appeal, counsel also submits a supplemental psychological evaluation of the applicant's spouse dated September 17, 2000 indicating that her symptoms have worsened and that it has been necessary to refer her to a psychiatrist for medical evaluation.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). 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. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994).

A review of the factors presented, and the aggregate effect of those factors, indicates that the applicant's spouse is suffering hardship due to separation. The applicant has failed, however, to show that a qualifying relative is suffering, or would suffer, extreme hardship over and above the normal disruptions involved in the removal of a family member. Hardship to the applicant's stepson is not a consideration in § 212(a)(9)(B)(v) waiver proceedings. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing the favorable or unfavorable exercise of the Attorney General's discretion.



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 not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.