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U.S. Department of Justice

Immigration and Naturalization Service

Releasing data covered to prevent clearly unwarranted invasion of personal privacy OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [REDACTED] Office: MIAMI, FLORIDA

Date: **JAN 03 2002**

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:



Public Copy

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, Director
Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found by the acting district director to be inadmissible to the United States under section 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 180 days but less than one year. The applicant is married to a United States citizen and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to remain in the United States and reside with his spouse.

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

On appeal, the applicant's spouse states that she is suffering with a heart complaint and that her life would be at risk if she were forced to relocate to Jamaica to remain with her husband. She also states that she would suffer extreme and unusual hardship if she remained in the United States separated from her husband.

The record reflects that the applicant initially entered the United States as a visitor for pleasure on or about February 17, 1986. He remained longer than authorized and was unlawfully present in the United States from April 1, 1997, the date the calculation for unlawful presence begins, until May 28, 1999 when he filed an application for adjustment of status to lawful permanent residence. In April 2000, the applicant departed and returned to the United States with parole authorization.

It should be noted that although the district director found the applicant ineligible for admission into the United States due to an unlawful presence of more than 180 days but less than one year, the record indicates that his unlawful presence was for a period of one year or more. He therefore appears inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. 1182(a)(9)(B)(i)(II), not under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. 1182(a)(9)(B)(i)(I), as noted in the district director's denial of the application.

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-

(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). 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.

On appeal, counsel has cited case law relating to the issue of "extreme hardship" as that term applied in matters involving suspension of deportation under section 244 of the Act, 8 U.S.C. 1254, prior to its amendment by IIRIRA, and recodification under section 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." Matter of Piltch, 21 I&N Dec. 677 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). In Matter of Marin, 16 I&N Dec. 581 (BIA 1978), the Board stated that, for the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. See also Matter of Mendez, 21 I&N Dec. 296 (BIA 1996). In those matters, the alien was seeking relief from removal.

Although the former application for suspension of deportation and the present and past applications for waiver of grounds of inadmissibility require a showing of "extreme hardship," the parameters for applying such hardship are somewhat narrower in waiver of grounds of inadmissibility application proceedings. The requirements to establish extreme hardship in the present waiver proceedings under section 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 section 212(i) of the Act, 8 U.S.C. 1182(i).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under section 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 submits a brief stating that the applicant's spouse was born in the United States and has lived here all of her life. The spouse's entire family resides in this country and she has no such family ties in Jamaica. Counsel states that if the spouse were forced to live in Jamaica, she would be removed from the emotional support she receives from her family.

The applicant's spouse states that she suffers from a heart condition and needs her husband to be with her in the United States for emotional and financial support. While the record contains evidence that the applicant visited physicians on eleven occasions between November 1998 and May 2001, there is no evidence contained in the record to establish that she has a significant condition of health for which medical treatment is unavailable in Jamaica. In fact, a diagnostic report contained in the file dated April 21, 1999 indicates that no acute cardiopulmonary disease is seen and a report dated November 18, 1999 indicates that a bilateral mammogram was normal.

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 court 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.

It should be noted that there are no laws that require the applicant's spouse to leave the United States and live abroad. Further, 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). 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."

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to the applicant's spouse (the only qualifying relative) caused by separation that reaches the level of extreme as envisioned by



Congress if the applicant is not allowed to remain in the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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. 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.