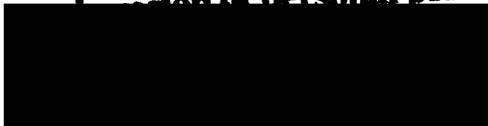


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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy



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

FILE# [Redacted]

Office: Athens

Date: APR 21 2003

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)

PUBLIC COPY

ON BEHALF OF APPLICANT: [Redacted]

INSTRUCTIONS:

This is the decision 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 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wieman, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Athens, Greece, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion will be dismissed, and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Yemen who was found to be inadmissible to the United States by a consular officer 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 a period of more than one year. The applicant was admitted to the United States in February 1995 as a nonimmigrant visitor with authorization to remain until August 1995. He remained until October 1998 without applying for or receiving an extension of temporary stay.

The applicant married a U.S. citizen in October 1998, and he is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The officer in charge determined that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The AAO affirmed that decision on appeal.

On motion, counsel submits a May 30, 2002, medical report regarding the applicant's daughter. The physician states that the three-year old child looks tiny for her age, has recurrent gastroenteritis, and has recurrent tonsillitis. The physician states that the child used to live overseas and came to this country 9 months ago. While overseas she was seen by a physician every week. The physician states that the child will be treated for her tonsillitis and continue treatment for allergies. Counsel contends that the present financial hardship and the hardship of separation including the psychological effect upon the child constitute extreme hardship.

The record reflects that the applicant's wife and daughter joined the applicant in Yemen six months after the daughter's birth in July 1999 and remained there until May 2001. The applicant told the consular officer under oath on December 9, 2001, that he had not seen his daughter since she was born, and that they (his wife and daughter) had been apart from each other for more than two years. The applicant's wife indicates that she and the daughter moved back to the United States due to the daughter's health problems in Yemen. The applicant's wife states that she now lives with her family and works to support her daughter.

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

(i) 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 section 244(e), prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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) 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 Secretary 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 (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.

It is noted that 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). 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-Gonzales*, 22 I&N Dec. 560 (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.

The Board noted in *Cervantes-Gonzalez* that the alien's wife knew that he was in deportation proceedings at the time they were married. The Board stated that this factor goes to the wife's expectations at the time they were wed. The alien's wife was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. The alien's wife was also aware that a move to Mexico would separate her from her family in the United States. The Board found this to undermine the alien's argument that his wife will suffer extreme hardship if he is deported. The Board then refers to *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), where 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.

The applicant in the present matter was out of status as of August 1995 and unlawfully present in the United States from April 1, 1997 to October 1998. It must be presumed that his wife was aware of that when they married in October 1998.

It is 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, supra*, 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 in February 1995 as a nonimmigrant visitor, he remained longer than authorized, and married his spouse in October 1998 while unlawfully present. 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.

The Board in *Cervantes-Gonzalez, supra*, also referred to *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), cert. denied 402 U.S. 983 (1971), where 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."

Although the applicant alleges financial hardship in this matter, the Board referred to *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), in which the court stated that the "extreme hardship

requirement of section 212(h)(2) of the Act was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy."

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.

There are no laws that require a United States citizen 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.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to the applicant's wife (the only qualifying relative) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to return to the United States. Though counsel has presented documents regarding the applicant's daughter's medical condition, children are not qualifying relatives in section 212(a)(9)(B)(v) proceedings. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion will be dismissed, and the order dismissing the appeal will be affirmed.

ORDER: The motion is dismissed. The order of October 15, 2002, dismissing the appeal is affirmed.