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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



FILE # [Redacted]

Office: SAN FRANCISCO

Date:

APR 29 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)

ON BEHALF OF APPLICANT:



PUBLIC COPY

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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the order dismissing the appeal will be affirmed. The application will be denied.

The applicant is a native and citizen of Brazil who was found 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)(II), 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 citizen of the United States 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 adjust his status to that of a lawful permanent resident.

The district director concluded that the applicant had failed to show that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly. The AAO affirmed that decision on appeal.

On motion, counsel submits a brief dated August 19, 2002 arguing that the Bureau is estopped from applying the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) retroactively. Counsel also argues that the Bureau erred in not providing the applicant an opportunity to supplement his waiver application in view of the IIRIRA changes and amendments enacted after submission of the waiver application.

The record does not support counsel's assertion that the Bureau has retroactively applied the IIRIRA amendments in the applicant's case. The record also does not support counsel's assertion that the applicant submitted his waiver application prior to the enactment of IIRIRA.

The record reflects that the applicant was initially admitted to the United States as a nonimmigrant visitor on August 12, 1995 with authorization to remain until July 10, 1996. On July 18, 1996, the applicant married a citizen of the United States. On February 18, 1997, the applicant's spouse filed a petition for alien relative (on Form I-130) on his behalf and the applicant filed an application for adjustment of status to permanent residence (on Form I-485).

On April 1, 1997, IIRIRA became effective.

On September 23, 1997, the Service notified the applicant's spouse that she needed to appear for an interview regarding the Form I-130 visa petition filed on the applicant's behalf. That notice was returned to sender. The spouse failed to appear for the scheduled interview and the petition was denied on October 23, 1997 due to

abandonment.¹ On October 31, 1997, the applicant's adjustment of status application was also denied. The applicant's unlawful presence began on the date of the denial of his adjustment application.

On February 12, 1998, the applicant filed a motion to reopen and reconsider that denial. On May 26, 1998, the motion was denied.

On June 8, 1998, the applicant's spouse filed a second petition for alien relative on his behalf and the applicant filed a second application for adjustment of status to permanent residence. The applicant's unlawful presence ended upon the filing of his second application for adjustment of status.

The record, as it is presently constituted, reflects that the applicant was unlawfully present in the United States from October 31, 1997 to June 8, 1998, a period of more than 180 days but less than one year after the enactment of IIRIRA.

On December 10, 1998, the applicant submitted an application for advance parole (on Form I-131) in order to allow him to return to the United States after temporary foreign travel. That application was approved on December 11, 1998. The applicant subsequently departed the United States and returned in parole status on February 24, 1999.

The advance parole authorization issued to the applicant stated that it would allow him to resume his application for adjustment of status upon return, not that the application would be approved. It also specifically contained a warning that when resuming his application for adjustment of status, he may be found inadmissible to the United States for unlawful presence and may need to qualify for a waiver of inadmissibility in order for his adjustment application to be approved.

The applicant filed the instant application for waiver of inadmissibility on September 10, 1999, subsequent to the enactment of IIRIRA. The application was denied by the district director on September 18, 2001.

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

¹ The record clearly reflects that the applicant and his spouse changed their address after filing the initial I-130 petition and I-485 application and failed to inform the Service of that address change.

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.

* * *

(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.

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.

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-Gonzalez*, 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.

On motion, counsel submits a declaration from the applicant's spouse dated August 28, 2002 indicating that she is a native-born citizen of the United States, has no family outside of the United States, does not speak Portuguese, would be isolated in Brazil without friends or relatives to turn to for support, and that it would be a great hardship for her to adjust to life in that country. She further asserts that if forced to relocate to Brazil with her spouse, she would be unable to find employment and her spouse would be unable to provide sufficient financial support for the family without her U.S. income as a dental technician. She adds that she has medical conditions that require constant monitoring and medical interventions that are covered by her health insurance in the United States. No further information or documentary evidence concerning the spouse's medical condition is contained in the record.

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 is further noted that there are no laws that require the applicant's spouse to depart the United States and live abroad.

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). 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 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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has failed to meet that burden. Accordingly, the order dismissing the appeal will be affirmed. The application will be denied.

ORDER: The order of the AAO dated August 5, 2002 dismissing the appeal affirmed. The application is denied.