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U.S. Department of Justice
Immigration and Naturalization Service

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

[REDACTED]

File: [REDACTED]

Office: ROME, ITALY (SHANNON)

Date: JAN 31 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), and under Section 212(i) of the Act, 8 U.S.C. 1182(i)

IN 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 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 that 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 Port Director, Shannon, Ireland, on behalf of 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 Ireland who was found by a consular officer to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having sought to procure admission into the United States by fraud or willful misrepresentation; and under section 212(a)(9)(B)(i)(II) of 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 is married to a United States citizen and seeks the above waiver in order to travel to the United States to reside with his spouse.

The port 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, counsel asserts that the applicant attempted to pursue his marriage-based immigrant visa application without the assistance of legal counsel and without an understanding of the required immigration laws and procedures. In support of the appeal, counsel submits documentation including a brief; affidavits from the applicant, his spouse, and his father-in-law; and medical reports indicating that the applicant's spouse and father-in-law suffer from depression.

The record reflects that the applicant applied for admission to the United States as a nonimmigrant visitor under the Visa Waiver Pilot Program (VWPP) on August 9, 2001 at the pre-flight facility in Shannon, Ireland, by presenting his Irish passport, a completed Form I-94W (VWPP application form), and a U.S. Customs declaration. The subject asserted that he had traveled to the United States twice previously for a period of three weeks each visit and had never overstayed his authorized periods of admission. However, a search of Service records revealed that the applicant had overstayed his authorized periods of admission on both occasions and that he had been unlawfully present in the United States from March 28, 1999 through December 28, 2000. He was determined to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for a period of more than one year, and under section 212(a)(6)(C)(I) for having sought to procure admission into the United States by willfully misrepresenting a material fact. His application for admission was denied.

After his refusal, the applicant's then-fiancee filed a petition on behalf of the applicant on November 8, 2001 to classify him as the fiance of a United States citizen. That petition was approved on November 26, 2001. The couple were subsequently married in Ireland on December 28, 2001. On January 28, 2002, the applicant's spouse



filed a petition to classify the applicant as the spouse of a United States citizen. The record indicates that the second petition for alien relative has not yet been adjudicated. 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:

* * *

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

* * *

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

* * *

(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(i) of the Act states:

ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

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.

It is noted that the requirements to establish extreme hardship in section 212(a)(9)(B)(v) waiver proceedings do not include a showing of hardship to the alien as did former cases involving suspension of deportation. Waiver proceedings under section 212(a)(9)(B)(v) 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).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for section 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

In Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals 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.

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. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991).

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.

On appeal, counsel states that the applicant initially entered the United States to visit his uncle on June 20, 1998 under the VWPP. On July 1, 1998, he obtained unauthorized employment, working full-time as a carpenter, and remained in the United States longer than the 90 days authorized under the VWPP. He returned to Ireland in November 1998 to visit his family for the holidays and again procured admission into the United States, on December 26, 1998, under the VWPP. At the time of his application for admission, the applicant told the immigration inspector that he was coming to the United States as a visitor when, in fact, he was returning to his unauthorized employment.

On March 17, 1999, the applicant met his current spouse and the couple developed a relationship. In furtherance of their future plans, the couple traveled to Ireland on December 29, 2000 and sought employment there while deciding where to get married and how to confront the applicant's immigration issues. After eight months in Ireland, the couple attempted to return to the United States and the applicant's admission was denied. The applicant's spouse filed a fiance petition on the applicant's behalf but after learning that it could take several months to obtain a fiance visa, the couple

married in Ireland as a faster method of obtaining an immigrant visa for the applicant. The couple was notified of the applicant's need for a waiver of inadmissibility and only after that application was denied did the couple seek the assistance of counsel.

On appeal, counsel submits affidavits and medical reports indicating that the applicant's spouse and father-in-law suffer from depression. The spouse has a history of depression dating back to 1994 for which she obtained therapy until December 2000, and took anti-depressant medication until 2001. In July 2002, she was referred for counselling by an Employee Assistance Program (EAP) provided by her employer due to an increasing sense of anxiety and depression. The spouse's counsellor reports that the spouse felt increasingly isolated and lonely in Ireland and psychologically torn between her relationship and love for her husband and her desire and need to live in the United States with her family and friends.

The affidavits and reports submitted on appeal also indicate that the applicant's father-in-law has been treated for symptoms of major depression since 1991. At the present time, he is doing well and continues to receive both pharmacotherapy and supportive psychotherapy. The father-in-law's therapist explains that separation of the spouse from her family in the United States for an extended period of time may have a very detrimental effect on his patient.

There are no laws that require the applicant's spouse to live abroad. 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."

While the medical conditions of the applicant's spouse and father-in-law are unfortunate, the record indicates that both are currently receiving treatment for their conditions. A review of the documentation in the record fails to establish the existence of hardship to the applicant's spouse (the only qualifying relative in this matter) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to travel to the United States to reside at this time. 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.