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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

[redacted]

FILE: [redacted] Office: Panama City Date: MAR 12 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: [redacted]

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 which 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 Officer in Charge, Panama City, Panama, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant is a native and citizen of Venezuela who was admitted to the United States on August 22, 2000, and authorized to remain until February 21, 2001. She remained longer than authorized. The applicant engaged in employment without Bureau authorization and allowed her daughter to attend local public schools, all without requesting or receiving a Bureau authorized change or extension of nonimmigrant status. The applicant was apprehended at Miami International Airport attempting to pick up her child, [redacted] who was arriving from Caracas. A Notice to Appear was served on her on January 7, 2002. The applicant was granted voluntary departure, and she left the United States on January 7, 2002.

The applicant was found to be inadmissible to the United States by a consular officer 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 1 year. The applicant married a U.S. citizen on February 13, 2002, in Venezuela, and she is the beneficiary of an approved Petition for Alien Fiancé(e), seeking admission as a K-3 nonimmigrant. The applicant seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

It is noted that the applicant was unlawfully present in the United States from February 22, 2001, when her authorized nonimmigrant stay expired, until she voluntarily departed the United States on February 7, 2002, 11 months later. This fact is also specifically noted on the Consulate's OF 221 recommending the waiver on humanitarian grounds.

The officer in charge reviewed documentation relating to the applicant's interview with a consular officer including, her husband's statement that their separation has caused him both financial and emotional hardship, and he cannot move to Venezuela because he does not speak the language. The officer in charge 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 states that the Bureau failed to consider congressional intent of the provisions of such waivers to avoid family separation and honor the U.S. citizen's fundamental right to marriage. Counsel discusses the applicant's step-child and the fact that court ordered visitation rights require her husband to make child support and other payments. Counsel also submits reports of the continued unrest and violence in Venezuela which reduces the possibility of the applicant's husband being able to visit her there because many U.S. citizens are being advised to leave the country.

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-
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> > (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,...is inadmissible.
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> (v) The Secretary, Department of Homeland Security, 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 Secretary 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, etc., it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and the unlawful presence of aliens in the United States.

The Board of Immigration Appeals (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 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 recently 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 *Peres 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 had been unlawfully present in the United States from February 22, 2001, when her authorized nonimmigrant stay expired, until she voluntarily departed the United States on February 7, 2002, a period of 11 months. It must be presumed that her husband shared that knowledge when they married on February 13, 2002.

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 or removal 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, including the financial and emotional hardships, the political situation in Venezuela, the fact that the applicant is pregnant and has remained abroad since her voluntary departure, now establishes 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 return to the United States.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions, and procedures as he may by regulations prescribe.

The favorable factors in this matter include the applicant's family ties, the absence of a criminal record, and the fact that she is not relying on after-acquired equities for her status because she voluntarily departed the United States before marrying a United States citizen. The unfavorable factors include her remaining longer than authorized and her engaging in unauthorized employment.

It is concluded that the applicant has demonstrated the favorable factors outweigh the unfavorable ones in this matter. 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The decision of the officer in charge is withdrawn, and the application is approved.