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U.S. Citizenship
and Immigration
Services

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JUL 06 2005

FILE:  Office: MOSCOW, RUSSIA Date:

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Moscow, Russia. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Ukraine who was found to be inadmissible to the United States pursuant to 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 more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant is married to a United States citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the Officer-in-Charge*, not dated.

On appeal, the applicant's spouse asserts that without the applicant, he has been depressed, has resigned from his job and needs the applicant to care for him and his children. *Form I-290B*, dated July 19, 2004.

In support of these assertions, the applicant's spouse submits a letter of resignation and a letter from his daughter. The file also includes a psychiatrist's letter and statements from the applicant's spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States on July 16, 2000 on a K-1 fiancée visa with authorization to remain in the United States until October 15, 2000. The applicant did not marry her fiancée and started to accrue unlawful presence as of October 16, 2000. The applicant subsequently married her current spouse on January 30, 2001 and filed a relative petition and application to adjust status on May 11, 2001. *See Form I-485, Application to Register Permanent Resident or Adjust Status*, dated May 11, 2001. The applicant was interviewed on August 12, 2003 in regard to these applications and the application to adjust status was withdrawn. *See id.* The applicant departed the United States on September 15, 2003. *See Copy of plane tickets.*

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002. The applicant accrued unlawful presence from October 16, 2000 until May 11, 2001 and from August 13, 2003 until September 15, 2003. The applicant was unlawfully present in the United States for more than 180 days, but less than one year.

The applicant was found admissible under Section 212(a)(9)(B)(i)(II) of the Act which provides, in pertinent part:

(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 or removal from the United States, is inadmissible.

....

The correct provision under which the applicant is inadmissible is **Section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I)**, which provides, in pertinent part:

(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 . . . 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.

The applicant would therefore be inadmissible to the United States for three years from the date of her departure on September 15, 2003, not ten years as initially determined. The applicant is currently seeking admission based on an approved K-3 spousal petition within three years of her departure from the United States. There is a waiver of the three year bar to admission which is located at section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Section 212(a)(9)(B)(v) of the Act provides:

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 [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.

The officer-in-charge mentioned section 212(i) of the Act as the relevant waiver provision, however, the correct waiver provision is section 212(a)(9)(B)(v) of the Act.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from violation of section 212(a)(9)(B)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or

lawfully resident spouse or parent of the applicant. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors are applicable to section 212(a)(9)(B)(v) waiver proceedings and include the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; 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; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The record does not reflect any lawful permanent resident or United States citizen family ties to the United States other than the qualifying relative's two daughters. The status of the qualifying relative's two sons is not mentioned in the record. The applicant's spouse has not mentioned any family ties or lack of family ties outside of the United States, specifically in the Ukraine. The applicant's spouse has not mentioned the conditions of the country to which he would relocate and the extent of his ties to that country. The applicant's spouse has vaguely referenced the financial impact of departure from the United States by stating, "I cannot ...move there permanently...I must work to support my wife and baby, as my wife cannot work and afford daycare for our baby at the same time." *Affidavit from* [REDACTED] dated May 12, 2005. The applicant's spouse has also submitted a letter from a psychiatrist that states, "By history it looks like this patient has developed anxious and depressive symptoms in response to unexpected separation from wife and daughter due to immigration laws." *Psychiatric Report from* [REDACTED] dated July 28, 2004. However, there is no evidence that the applicant's spouse cannot receive treatment in the applicant's country.

The record reflects that the applicant's spouse is enduring emotional hardship based on separation from his wife, however, the record does not establish extreme hardship to the spouse in the event the applicant is refused admission to the United States. Extreme hardship must be shown to the applicant's spouse if he relocates to the Ukraine or if he remains in the United States, as there is no requirement to reside outside of the United States as a result of denial of the applicant's waiver request

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that 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. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if

he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.