

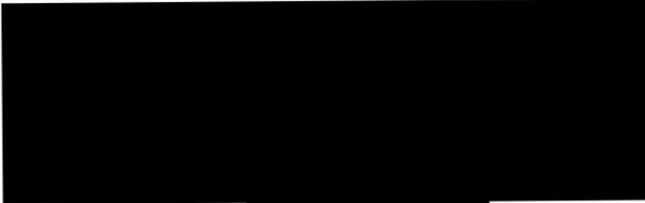


U.S. Citizenship
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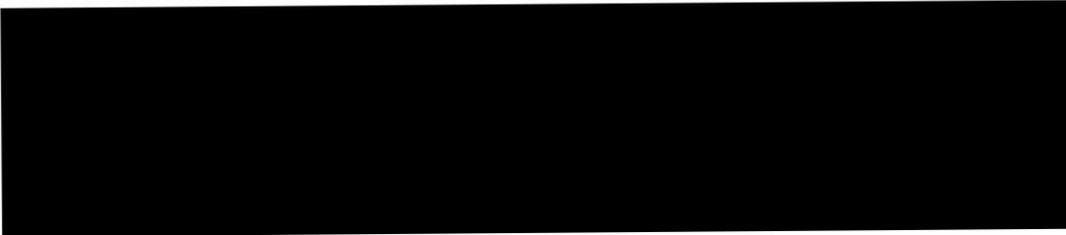
Applicant:



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:



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, Chief
Administrative Appeals Office

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

The applicant, [REDACTED] is a native and citizen of Ireland who is the beneficiary of an approved K-1 visa petition. [REDACTED] made an application for a “K-1” nonimmigrant visa, which was denied by the OIC as she found [REDACTED] inadmissible 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 more than one year. *Decision of the OIC, dated January 24, 2006.* Pursuant to section 212.7(a) of the Act, [REDACTED] applied for a waiver of inadmissibility by filing the Form I-601, which was denied by the OIC, finding [REDACTED] failed to establish extreme hardship to a qualifying relative. *Id.* [REDACTED] submitted a timely appeal.

Section 212(a)(9)(B) of the Act 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.

(v) Waiver.—The Attorney General [now 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 U.S. 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 would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien’s departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under

sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

Citizenship and Immigration Services (CIS) records reflect that [REDACTED] entered the United States in December 1997 under the Visa Waiver Pilot program (VWP) and was granted a 90-day authorized stay in the country. The records show that [REDACTED] remained in the United States for six years, that is, until May 2004, at which time his voluntary departure triggered the ten-year-bar. Consequently, the OIC was correct in finding him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

(a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant*. An applicant for an immigrant visa or “K” nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

There are regulations directly applying to inadmissibility waivers for K visa applicants. The Department of State regulation provides as follows:

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

...

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related CIS provision is 8 C.F.R. 212.7(a)(1), cited *supra*, specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1) (66 Fed. Reg. 42587, Aug. 14, 2001).

The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the CIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If CIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible. The Form I-601 process ensures that waivers for K-1 applicants will be scrutinized under the appropriate standard in recognition of their intent to immigrate to the United States. The OIC, therefore, correctly concluded that the standard for granting a waiver of inadmissibility stated in section 212(a)(9)(B)(v) of the Act governs the adjudication of the applicant's Form I-601.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not a consideration under the statute, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen fiancée, [REDACTED]. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains affidavits, letters, medical records, a naturalization certificate, e-mails, and other documents.

On appeal, counsel asserts that [REDACTED] has established extreme hardship as stated in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978) and *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA

1999), because she has a debilitating medical condition for which she needs treatment in the United States, and relies on the applicant's income. Counsel indicates that [REDACTED]'s family ties in the United States should not be underestimated in determining hardship. Counsel states that the OIC's reliance on *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984), is not appropriate as the children in that case did not suffer from an illness. Counsel, citing *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), and *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), states that extreme hardship was found in *Matter of Monreal* because compliance with the home country requirement would exacerbate a mental problem; and exceptional and extremely unusual hardship had been alluded to in *Matter of Mansour* on account of serious health issues. Counsel conveys that [REDACTED] has resided in the United States for over 16 years, since the age of 22.

The letters from the Social Welfare Local Office in Ireland indicate that [REDACTED] and [REDACTED] submitted claims for unemployment assistance. The February 17, 2006 letter written on behalf of Mr. [REDACTED] certifies that he has signed for "unemployment assistance at this office from 27/5/04 to date." The letter concerning [REDACTED] certifies that she claimed unemployment assistance for July 12, 2004 to September 25, 2004, March 23, 2005 to May 3, 2005, May 20, 2005 to July 5, 2005, and September 26, 2005 to date. It states that [REDACTED] was not entitled to receive disability benefits.

The affidavit by [REDACTED] states that in August 2003 she was diagnosed with Hashimoto's Thyroiditis and with chronic fatigue syndrome (CFS). [REDACTED] states that many practitioners believe there is overlap with CFS and fibromyalgia syndrome (FMS). [REDACTED] states that she has been unable to work full-time due to her illness and she relies on [REDACTED] for emotional and fiscal support. Ms. [REDACTED] conveys that living in Ireland permanently would have a detrimental impact on her health and well-being. She states that she has good relationships with physicians in the United States, that treatment for her particular illness is better in the United States, and that there is only one doctor in Ireland who prescribes her medication. [REDACTED] states that her friend, an alternative medical practitioner in New York, has been treating her. [REDACTED] states that she needs to be present in the United States to conclude a divorce settlement. [REDACTED] states that she would like to open a restaurant with a friend in Woodside, New York. [REDACTED] indicates that she has friends, an uncle and aunt, and possessions in the United States.

[REDACTED] affidavit is similar in content to that of [REDACTED]. In addition, [REDACTED] states that he and [REDACTED] have been together since May 2001, living together in July 2002. He states that he is a self-employed painter and decorator and [REDACTED] would like to study a food-writing course in New York.

The submitted medical records convey that [REDACTED] is being treated for a hypothyroid; however, they do not indicate that she has CFS and FMS. The document signed by [REDACTED], dated January 8, 2002, states that [REDACTED] was to undergo further testing to determine whether she has CFS.

The affidavit by [REDACTED], the alternative medical practitioner, states that she has been treating Ms. [REDACTED] with Reiki sessions.

The letter by [REDACTED] divorce attorney indicates that her presence is needed to enforce the terms of a divorce agreement.

The affidavit by [REDACTED] indicates that she and [REDACTED] would like to have a restaurant business.

The affidavit by [REDACTED] discusses her friendship with [REDACTED] and [REDACTED] health issues and career goals.

The affidavit by [REDACTED] aunt and uncle, who live in the United States, convey they are in frequent contact with her.

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s fiancée must be established in the event that she joins the applicant; and in the alternative, that she remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record fails to establish that the applicant’s fiancée would endure extreme hardship if she remains in the United States without him.

[REDACTED] claims that while she and [REDACTED] were together in the United States she relied on him for financial support. Except for the lease agreement, the record does not contain documentation of Mr. [REDACTED] and [REDACTED]’s monthly income and household expenses; consequently, the record fails to show that [REDACTED] relied on [REDACTED]’s income to meet monthly household expenses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

is very concerned about separation from her fiancé. Courts in the United States have stated that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA’s finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary’s lawful permanent resident wife and two U.S. citizen children are separated from him. As stated in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt and that courts have upheld orders of the BIA that resulted in the separation of aliens from members of their families.

The record conveys that [REDACTED] is very concerned about separation from her fiancé. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of [REDACTED] if she decides to return to the United States and remain in the country without the applicant, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship experienced by [REDACTED] is unusual or beyond that which is normally to be expected upon removal. See *Hassan, Shooshtary, Perez, and Sullivan, supra*.

The present record is sufficient to establish that [REDACTED] would experience extreme hardship if she continued to live with the applicant in Ireland.

The letters from the Social Welfare Local Office in Ireland establish that [REDACTED] and [REDACTED] have been unable to obtain employment in Ireland since 2004. In *Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th Cir. 1981) the court states that “[a]lthough economic detriment, without more, does not amount to extreme hardship,” “[t]here is a qualitative difference between ‘mere economic detriment’ and complete inability to find employment.” Because the record suggests that the applicant and [REDACTED] have been unable to find employment in Ireland since 2004, the AAO finds that [REDACTED] would experience extreme hardship if she continues to live with [REDACTED] in Ireland.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their

totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

The record establishes that [REDACTED] would experience extreme hardship if she were to continue living with the applicant in Ireland. However, the record fails to support a finding of significant hardships over and above the normal economic and social disruptions involved in removal so as to warrant a finding of extreme hardship in the event that [REDACTED] were to remain in the United States without the applicant. Having carefully considered each of the **hardship factors** raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.