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U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

[redacted]

FILE: [redacted] Office: BANGKOK DISTRICT OFFICE Date: SEP 2 9 2004

IN RE: [redacted]

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

ON BEHALF OF APPLLICANT: Self-represented

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 District Director, Bangkok. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of New Zealand, who was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for unlawful presence in the United States for a period exceeding one year, from August 1999 to November 1999, and again from May 2000 to November 2001. The record reflects that the applicant is the spouse of a U.S. Citizen, Cindy Mahuta. The applicant seeks a waiver of inadmissibility in order to return to the United States to reside with his spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated April 9, 2003. The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO*, dated August 8, 2003.

On motion to reopen, the applicant asserts that there are changed facts in the application including the worsening of the health of the applicant's mother-in-law, the resulting impact on the family's business, and the loss of applicant's unborn child by miscarriage. *Respondent's Motion to Reopen* (October 3, 2003).

In support of these assertions, the applicant submits a brief, sworn statements, an accountant's statement, doctors' letters and medical bills, medical insurance statements, and a chiropractor's statement. The entire record was considered in rendering this decision.

The regulations governing these proceedings, 8 C.F.R. § 103.5(a)(2), state in pertinent part:

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(3) (2002) states in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Section 212(a)(9)(B)(v) 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—
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> . . .
>
> (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). Hardship to the alien herself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawful permanent resident spouse or parent of the applicant.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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).

The record shows that the applicant's mother was diagnosed with carpal tunnel disease in both arms, affecting her ability to work. *Letter of James C. Lilley, MD* (September 19, 2003). A statement from the accountant to the family business (a thrift store) indicates that the business has suffered a downturn, does not make sufficient profit to pay staff or required benefits to non-family employees and, since no employees are on the payroll, the owners (the applicant's mother- and father-in-law) have "full responsibility for day-to-day-operations." *Letter from Robert W. Bonds, CPA* (September 22, 2003); *see also IRS Schedule C, Profit or Loss from Business* (1999-2002). The applicant's mother-in-law states that the family business is the only household income other than Social Security payments, and that she and her husband are in their 60's and would be unable to obtain gainful employment. *Letter of Jackie Hanlon* (September 22, 2003). The evidence submitted with the instant motion reflects that the family business of the applicant's wife has operated at a loss at least since 1999, several years before the applicant's wife travelled to New Zealand. In addition, even assuming that additional hardship would result from the inability to employ the applicant's wife in the family business, the record does not establish that the hardship to the family business and her parents would constitute an extreme hardship to the applicant's wife, who is the only qualifying relative under the statute, and therefore the only hardship that may be considered.

The record shows that the applicant's wife suffered a miscarriage in or near October 2003, and that their "only realistic option for pregnancy as a couple would be to come through for a further ICSI treatment cycle." *Letter of Martin Sowter, MD* (October 9, 2003). "ICSI" is not defined but, from the context, reasonably appears to be fertility treatment. The record also shows that the applicant's wife has been diagnosed with a hernia, and may have a gastric ulcer. *Letter of Scott P. Wustenberg, Body Tune Chiropractic* (September 23, 2003). It has also been established that the applicant's wife is experiencing stress and anxiety.

The applicant's wife faces, as do all spouses facing potential separation from a spouse, a difficult decision of whether to return to the United States or to take up permanent residence in New Zealand to reside with her spouse. The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's wife would not face hardship rising to the level of "extreme" if she either remains in New Zealand or if she returns to the United States and the applicant is refused admission. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965). Rather, the record demonstrates that, whether or not she returns to the United States, she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is refused admission to the United States.

Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that

separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). The facts and documentation in this case do not establish hardship rising to the level of "extreme" as envisioned by the statute and case law.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the previous decisions of the district director and the AAO will not be disturbed.

ORDER: The motion is granted. The decision of August 8, 2003 dismissing the appeal is affirmed.