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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VIENNA Date: JUL 07 2006

IN RE: [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]

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 Officer in Charge, Vienna, Austria, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Serbia who was found to be inadmissible to the United States pursuant to 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 more than 180 days but less than one year and seeking readmission within 3 years of her last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her husband.

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 for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer in Charge,* dated August 24, 2004.

The record shows that, on December 13, 2002, the applicant was admitted to the United States as a B-2 nonimmigrant until June 12, 2003. The applicant timely filed a Application to Extend/Change Nonimmigrant Status (Form I-539) on May 20, 2003. However, the Form I-539 was denied on July 16, 2003. On August 30, 2003, the applicant married her spouse, [redacted] a naturalized U.S. citizen. On February 3, 2004, the applicant returned to Serbia. [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant which was approved on March 15, 2004.

On June 30, 2004, the applicant filed the Form I-601 along with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel asserts that the applicant is not inadmissible because her unlawful presence was tolled for good cause and that, if she is inadmissible, she is eligible for a waiver because her family members would suffer extreme hardship. *Applicant's Brief,* dated September 28, 2004. In support of these assertions, counsel submitted the above-referenced brief, proof of [redacted] children's U.S. citizenship, family photographs, school records for [redacted] children, [redacted] tax returns, ticket receipts, phone records, country conditions information for Serbia and copies of documents previously provided. The entire record was reviewed and considered in rendering a decision on the 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-
> >
> > > (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.

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,
(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and
(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver. – The Attorney General [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 based the finding of inadmissibility under section 212(a)(9)(B)(i)(I) of the Act on the applicant's unlawful presence in the United States for more than 180 days, but less than one year. Counsel contends that because the applicant timely filed a non-frivolous application to extend her nonimmigrant status she is entitled to 120 days of "tolling time" under which she would not have accumulated unlawful presence until October 10, 2003. The AAO finds counsel's argument unpersuasive. As dictated by the plain language of the statute, the applicant's unlawful presence was only tolled until July 16, 2003, the day on which her extension of status application was denied. As such, the applicant accrued 202 days of unlawful presence between July 16, 2003 and February 3, 2004, the date on which she departed the United States. The AAO, therefore, finds that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act.

Counsel contends that the applicant is eligible for a waiver under section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255(d)(2)(B)(i) "for humanitarian reasons, to assure family unity, or when it is otherwise in the public interest." Section 245A(d)of the Act provides:

(2) Waiver of grounds for exclusion.-In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B)-

(A) Grounds of exclusion not applicable.-The provisions of paragraphs (5) and (7)(A) of section 212(a) shall not apply.

(B) Waiver of other grounds.-

> (i) In general.-Except as provided in clause (ii), the Attorney General may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.
>
> (ii) Grounds that may not be waived.-The following provisions of section 212(a) may not be waived by the Attorney General under clause (i):
>
> (I) Paragraphs (2)(A) and (2)(B) (relating to criminals).
>
> (II) Paragraph (2)(C) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.
>
> (III) Paragraph (3) (relating to security and related grounds).
>
> (IV) Paragraph (4) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence.
>
> (V) Subclause (IV) (prohibiting the waiver of section 212(a)(4)) shall not apply to an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act).

The AAO notes that counsel's argument references a subsection of the Act for aliens who are applicants for adjustment of status under the Legal Immigration Family Equity (LIFE) Act. The applicant is not applying for adjustment of status under the LIFE Act, and, as such, the applicant is not eligible for relief pursuant to section 245A(d)(2)(B)(i) of the Act.

Counsel contends that the officer in charge incorrectly applied the standard for a section 212(i) waiver of the Act which does not apply to the applicant's ground of inadmissibility. The AAO agrees that the officer in charge incorrectly cited section 212(i) of the Act, 8 U.S.C. § 1182(i), as the section of the Act under which the applicant was seeking a waiver. However, the AAO finds that the officer in charge's reference to section 212(i) of the Act was harmless since section 212(i) of the Act and section 212(a)(9)(B)(v) of the Act are both dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Counsel asserts that section 212(h) of the Act would be a more appropriate section than section 212(i) of the Act. However, section 212(h) of the Act includes hardship to the applicant's children, which section 212(a)(9)(B)(v) of the Act does not.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from 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. Hardship the alien herself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings.

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 at 565 (BIA 1999). 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. 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 reflects that the applicant's spouse, [redacted] is a native of Croatia who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 2004. [redacted] has a 15-year old son and a 12-year old daughter from a previous relationship, who are both U.S. citizens by birth. The record reflects further that the applicant is in her 20's, [redacted] is in his 40's, and [redacted] does not have any health concerns.

Counsel asserts that [redacted]s children would suffer extreme hardship if they were to remain in the United States without the applicant or if they were to return to Serbia in order to remain with the applicant. The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), removed hardship to an alien's children as a factor in assessing hardship waivers under section 212(a)(9)(B)(v) of the Act. It is noted that Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Thus, hardship to [redacted] U.S. citizen children will not be considered in this decision, except as it may affect their father, the only qualifying relative.

Counsel asserts [redacted] would suffer extreme hardship if he were to remain in the United States without the applicant. Counsel contends that, in purchasing a house in February 2004, [redacted] relied upon the applicant's future income, which resulted in his commitment to a mortgage that is beyond his means as a sole provider. Counsel also contends that [redacted] is self-employed and that his frequent travel to other countries to reunite with the applicant has significantly affected his business and depleted his resources. in his affidavit, states "we have now been separated, for almost eight months . . . I have traveled to Europe already three times to spend time with my wife, which impacts my business and financial situation due to the fact that I am self employed and my business is greatly affected when I am not present . . . I do not want to be away from person I love and has become great part of my life . . . now I am alone in a large house, which I will not be able to afford for much longer without second income . . . I am afraid we may loose (sic) the house . . . [redacted] has and actually still has a female condition . . . condition is curable, but still exists. Doctors in Serbia are not able to help, so I need her back in States as soon as possible to continue treatment."

There is no evidence in the record, besides [redacted] affidavit, to suggest that due to his multiple visits with the applicant during 2004, [redacted]s business income was decreased or that such a decrease resulted in an inability to support himself and the children. There is no evidence in the record to suggest that [redacted] owns a house or that he is unable to meet the household costs without the applicant. Financial records indicate that, in 2003, [redacted] business income was $115,295. The record shows that, even without assistance from the applicant, [redacted] has, in the past, earned sufficient income to exceed the poverty guidelines for his family. *Federal Poverty Guidelines,* http://aspe.hhs.gov/poverty/figures-fed-reg.shtml.

The medical documentation in the record indicates that the applicant was under the care of a gynecologist while she was in the United States. However, the medical documentation does not indicate the diagnosis or prognosis for the applicant. Moreover, there is no evidence in the record to suggest that the applicant would be unable to obtain sufficient care in Serbia such that [redacted]s concerns for her wellbeing would be beyond those commonly suffered by aliens and families upon deportation. There is no evidence in the record to suggest that [redacted] suffers from a physical or mental illness that would cause him to suffer hardship beyond that commonly suffered by aliens and families upon deportation. While it is unfortunate that [redacted] would essentially become a single parent and professional childcare may be expensive and may not equate to the care of the applicant, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Moreover, the record reflects that [redacted]s children do not permanently reside with [redacted] since the children's mother has physical custody of the children and [redacted] has joint legal custody of the children with reasonable visitation.

Counsel contends that would face extreme hardship if he relocated to Serbia in order to remain with the applicant because of the lack of employment opportunities in Serbia and, as a Croatian and a Catholic, he would suffer discrimination and hardship. There is no evidence that [redacted] would be unable to obtain any employment in Serbia. The record reflects that the applicant has family members in Serbia who may be able to provide support to the applicant and [redacted] both financially and emotionally. While the record contains evidence that there were several incidents of societal violence and discrimination against minorities and religious minorities in 2003, current country conditions reports indicate that the government does not discriminate or commit human rights abuses against minorities or impede religious practices. *United States Department of State Country Reports on Human Rights Practices, Serbia, 2005,* http://www.state.gov/g/drl/rls/hrrpt/2005/61673.htm; *Department of State International Religious Freedom Report, Serbia, 2005,* www.state.gov/g/drl/rls/irf/2005/51578.htm. Additionally, current country conditions reports indicate that the societal discrimination against minorities and religious minorities have decreased and there is no evidence that these are widespread. The AAO notes that [redacted] has visited the applicant on several occasions and the record does not contain any evidence that he has experienced any problems during his visits. Moreover, in his affidavit, [redacted] does not make any claim that he would suffer extreme hardship should he reside in Serbia with the applicant. While the hardships [redacted] faces are unfortunate, the hardships he faces with regard to adjusting to the economy and separation from friends and family, are what would normally be expected with any spouse accompanying an alien to a foreign country. Finally, the AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, he would not experience extreme hardship if he remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [redacted] will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. 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). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under section 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 she merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.