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

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[redacted]

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FILE: [redacted] Office: SAN FRANCISCO Date: JUL 26 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 District Director, San Francisco, California, denied the waiver application. 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 China 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. The applicant is married to a naturalized United States citizen and she seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The district director 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 District Director,* dated May 28, 2004.

On appeal, counsel contends that the applicant's spouse would suffer extreme hardship. *Applicant's Brief,* dated July 20, 2004. On appeal, counsel submitted the above-referenced brief, an affidavit from the applicant's spouse, a copy of the first page of the applicant's 2003 Tax Return and copies of documents previously provided. The entire record was reviewed and considered in rendering a decision.

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.
> >
> > (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.

In the present application, the record indicates that the applicant entered the United States on May 20, 2001 with a B-2 nonimmigrant visa valid until November 16, 2001. On October 9, 2001, the applicant filed an Application for Extension of Nonimmigrant Status (Form I-539) with Citizenship and Immigration Services (CIS). On November 6, 2002, CIS denied the Form I-539. On February 8, 2003, the applicant married [redacted], a naturalized U.S. citizen. On June 18, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on behalf of the applicant by [redacted] Based on her pending Form I-485, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States on October 19, 2003. The applicant has not departed the United States since that entry.

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 March 16, 2002, the last day of the 120-day tolling for good cause during the pending of her Form I-539, until June 18, 2003, the date on which she filed the Form I-485. In applying to adjust her status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of her October 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) 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. *Supra.* 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 [redacted] is a native of Hong Kong who became a lawful permanent resident in 1969 and a naturalized U.S. citizen in 1974. The applicant and [redacted] do not have any children together. The applicant is in her 40's, [redacted] is in his 60's and [redacted] has some health concerns.

Counsel contends that [redacted] would suffer extreme hardship if he were to remain in the United States without the applicant because, in May 2001, he was forced into retirement and the applicant is his sole source of income since he has exhausted his unemployment benefits. Counsel also asserts that [redacted] is ill and requires the assistance of the applicant in taking him to regular doctor's visits. Counsel also asserts that if the applicant is not admitted to the United States her education in the English language will be disrupted and her chance of making a decent living to support herself and [redacted] would be lost. [redacted] in his affidavit, states his wife is very much a help to him and he relies on her because of his age and poor health condition over the last two years and because he would be alone and desperate with no one to talk to without her. He also states that he was laid-off in May 2001 and he has exhausted all of his unemployment benefits and lost his medical and dental coverage.

The AAO notes that counsel and [redacted] affidavit conflict with prior testimony and the Biographical Information (Form G-325) in which [redacted] indicated he was employed until May 2002. There is no evidence, besides [redacted] affidavit, that [redacted] was released from his position or that he is unable to obtain alternative employment in his chosen profession either due to lack of availability of positions or ill health. There is no evidence in the record, besides [redacted] affidavit, to suggest that [redacted] is unable to obtain *any* employment in the United States or that his unemployment benefits have expired. While it is unfortunate that [redacted] have to lower his standard of living, such economic loss, even when combined with the emotional hardship discussed below, does not constitute extreme hardship.

There is no evidence in the record, besides [redacted] affidavit, 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.

Counsel and [redacted] do not assert that [redacted] would suffer extreme hardship if he accompanied the applicant to China. The AAO is, therefore, unable to find that [redacted] would experience hardship should he choose to join the applicant in China. Additionally, the AAO notes that, as a citizen of the United States, 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(a)(9)(B)(v) 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).

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 an 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.