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: CALIFORNIA SERVICE CENTER Date: FEB 20 2008

IN RE: Applicant: [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 waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Dominican Republic 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 record indicates that the applicant is married to a United States citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her United States citizen spouse and children.

The Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's husband and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Director's Decision*, dated July 27, 2006.

On appeal, the applicant, through counsel, asserts that the applicant's husband "will be faced with one of three difficult choices that will result in extreme hardship to him." *Attachment to Form I-290B*, filed August 22, 2006.

The record includes, but is not limited to, counsel's brief, affidavits from the applicant's husband, a marriage certificate for the applicant's second marriage, birth certificates for the applicant's United States citizen children, a divorce certificate for the applicant's first marriage, and a letter from [redacted] regarding the applicant's children. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> 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 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 AAO notes that the record contains several references to the hardship that the applicant's United States citizen children would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(v) of the Act provides that a waiver, under section 212(a)(9)(B)(i)(II) of the Act, is applicable solely where the applicant establishes extreme hardship to her citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's children will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that the applicant entered the United States without inspection in October 1992. On December 16, 1993, the applicant married [redacted] in New York. On February 10, 1994, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On April 28, 1994, the applicant's Form I-130 was approved. Based on the applicant's Application to Register Permanent Residence or Adjust Status (Form I-485), the applicant departed the United States and reentered without inspection in January 1996. On November 15, 1996, the applicant and [redacted]' son, [redacted], was born in New York. On September 23, 1999, the applicant and [redacted] son, [redacted], was born in New York. On July 31, 2001, the applicant divorced [redacted] On November 13, 2001, the applicant and [redacted] married in New York. On March 25, 2003 [redacted] filed a Form I-130 on behalf of the applicant. On March 28, 2003, the applicant filed a Form I-485. On February 22, 2005, the applicant departed the United States on advance parole and reentered on March 8, 2005. On March 27, 2006, the applicant's Form I-130 was approved. On May 9, 2006, the applicant filed a Form I-601. On July 27, 2006, the Director denied the applicant's Form I-485 and Form I-601, finding the applicant accrued more than a year of unlawful presence and she failed to demonstrate extreme hardship to her United States citizen husband.

The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under IIRIRA, until March 28, 2003, the date the applicant's Form I-485 was filed. The applicant is attempting to seek admission into the United States within 10 years of her February 22, 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(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 citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant herself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

Counsel asserts that the applicant "is requesting this waiver because she went on advance parole to the Dominican Republic in February 2005. She is grandfathered into 245(i) because of a previous application." *Counsel's Brief,* filed September 27, 2006. The record establishes that on February 10, 1994, the applicant's first husband filed a Form I-130 on behalf of the applicant; however, the applicant is no longer married to her first husband therefore, that petition is no longer valid and she cannot gain any benefit from it. If she were still eligible for benefits related to the Form I-130 filed by her first husband, the applicant would be eligible under section 245(i) of the Act. The applicant's second husband filed a Form I-130 on behalf of the applicant on March 25, 2003; which does not afford her eligibility under section 245(i) of the Act. Furthermore, even if the previously filed Form I-130 was still viable, the applicant is still inadmissible under section 212(a)(9)(B) of the Act for her unlawful presence. While section 245(i) of the Act excuses illegal entry, it does not excuse unlawful presence under section 212(a)(9)(B) of the Act.

When the applicant departed the United States on advance parole, the second page of the Authorization for Parole of an Alien into the United States (Form I-512) on which she traveled clearly stated: "...If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the proceedings of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved." Clearly, the applicant was put on notice that if she departed the United States after 180 days of unlawful presence in the United States, she may be found inadmissible. The record establishes that the applicant entered the United States without inspection in October 1992 and/or January 1996; therefore, the applicant knew she was not legally present in the United States. The AAO finds the applicant is inadmissible under section 212(a)(9)(B)(II) of the Act because she was unlawfully present in the United States for one year or more, and is seeking admission within 10 years of her February 22, 2005, departure.

Counsel claims the applicant's husband will suffer extreme hardship if the applicant were removed to the Dominican Republic. *Counsel's Brief, supra.* The applicant's husband states the applicant "takes care of [their] home. She is responsible for allowing [him] to be the primary wage earner." *Affidavit from* [redacted], dated August 12, 2006. Counsel states the Director "gave no consideration to the hardships [the applicant's] children will suffer." *Counsel's Brief, supra.* The applicant's husband states his "children will have [a] difficult time adjusting to life in the Dominican Republic because they have grown up in this country and go to school here." *Affidavit from* [redacted] *supra.* As noted above, the applicant's children are not qualifying relatives for a waiver under section 212(a)(9)(B)(v) of the Act. Additionally, the applicant has

not demonstrated that her children, who are 8 and 11 years old, would have difficulties rising to the level of extreme hardship in adjusting to the culture of the Dominican Republic. Counsel states that if the applicant joins the applicant in the Dominican Republic, "he would have no way to financially support his family. It will be difficult for him to find a job in a third world country that he is not very familiar." *Counsel's Brief, supra.* The AAO notes that the applicant's husband speaks Spanish, which is spoken in the Dominican Republic, and the applicant has not established that her husband has no transferable skills that would aid him in obtaining a job in the Dominican Republic. Additionally, the AAO notes that the applicant's parents reside in the Dominican Republic and it has not been established that they could not help with caring for her children. *See Form G-325*, dated November 9, 2002. The applicant's husband states "a denial of [the applicant's] case will result in our family breaking up causing great harm to [their] children and [him] psychologically and emotionally." *Affidavit from* [redacted] *supra.* The AAO notes that there are no professional psychological evaluations for the AAO to review to determine if the applicant's husband is suffering from any depression or anxiety or whether any depression and anxiety is beyond that experienced by others in the same situation. The AAO finds that the applicant failed to establish that her husband would suffer extreme hardship if he joined the applicant in the Dominican Republic.

In addition, the applicant does not establish extreme hardship to her spouse if he remains in the United States, maintaining his employment. Counsel states "if [the applicant's husband] chooses to keep the children here in the United States he will be forced to raise these children alone. His wife is the primary caretaker of the children.... [The applicant's husband] will have to assume both roles, as a primary caretaker and only financial provider." *Counsel's Brief, supra.* The AAO finds that the applicant has not established that she will be unable to contribute to her family's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang,* 450 U.S. 139 (1981). Additionally, the AAO notes that it has not been established that the applicant's husband has no family that could help care for the children. As a United States citizen, the applicant's husband is not required to reside outside of the United States as a result of denial of the applicant's waiver request. The applicant's husband faces the decision of whether to remain in the United States or relocate to avoid separation. However, this is a factor that every case will present, and the BIA has held, "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." *Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965).

United States 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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. In *Hassan, supra,* the Ninth Circuit Court of Appeals 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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's husband 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.