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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: AUG 24 2005

IN RE: [redacted]

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

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. 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 Sweden who was found to be inadmissible to the United States pursuant to § 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 applicant is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her husband and child.

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. On appeal, counsel asserts that the applicant's application for an advance parole document should not have been granted, in light of the fact that her departure from the United States would trigger the unlawful presence bar. Counsel also states that the district director committed several errors of fact in his decision. Counsel asserts that the district director did not give due consideration to all the hardship factors present in the instant case, and that the applicant's husband would suffer extreme emotional and financial hardship whether he remains in the United States or returns to his native Sweden. 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-
> >
> > . . . .
> >
> > (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 applicant entered the United States as a visitor under the visa waiver program on January 23, 2001. She was authorized to remain in this country until April 22, 2001. On March 30, 2001, the applicant married her husband, who at that time was a lawful permanent resident and who filed a petition for alien relative for the applicant on April 24, 2001. The applicant's husband subsequently became a U.S. citizen, and the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on August 15, 2002. On August 20, 2002, the applicant was issued an 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.

Counsel points out an error on the part of the district director, who wrote that the applicant was unlawfully present in the United States from October 21, 2001 until August 15, 2002. Counsel contends that if the applicant were unlawfully present in the United States for less then one year, she would be barred from reentering the country for three years rather than ten, as per the section of law cited by the district director. The AAO agrees that October 21, 2001 is an incorrect start date for the applicant's unlawful presence, since her authorized stay expired on April 22, 2001. The applicant was unlawfully present from April 23, 2001 until August 15, 2002, a period over one year; therefore, the district director was correct in applying the ten-year bar.

The AAO notes that in his brief submitted with the waiver application, counsel asserted that the applicant's husband's filing of a petition for her on March 30, 2001 tolled her unlawful presence for 120 days, per § 212(a)(9)(B)(iv) of the Act. This is factually and legally incorrect. First, the petition for alien relative was filed on April 24, 2001, after the applicant's status expired. Second, the filing of a petition for alien relative does not constitute an application for change or extension of status, which is the application that tolls unlawful presence under § 212(a)(9)(B)(iv). It is clear that the applicant's unlawful presence began when her authorized stay under the visa waiver program expired.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under § 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 April 23, 2001 until August 15, 2002, the date of her filing of 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 September 2002 departure from the United States. The applicant is, therefore, inadmissible to the United States under § 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) should not have granted the applicant's advance parole, given that she had been unlawfully present for over a year. The AAO notes, however, that the applicant signed an attachment to the advance parole application explaining that if she had been unlawfully present for over 180 days, she would have to qualify for a waiver of inadmissibility in order to reenter the United States. Therefore, the AAO considers that the applicant was advised of this possibility prior to her departure from the United States.

A § 212(a)(9)(B)(v) waiver of the bar to admission resulting from § 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 § 212(a)(9)(B)(v) waiver proceedings. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act. These 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's spouse would face extreme hardship if he returned to Sweden, since he would not be able to work there as a pilot under his American license. In his affidavit submitted with the waiver application, the applicant's husband wrote that the job market in the aviation industry in Sweden is weak, and it would be difficult for him to work in his field in that country. He also noted that he would be forced to pay back thousands of dollars his current employer paid for his pilot training, and he stated that he would have to attend pilot training in Sweden, which is expensive. The AAO notes that the U.S. 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). Furthermore, inability to find a job in one's chosen field does not necessarily constitute extreme hardship.

The applicant wrote in her affidavit that if her husband returns to Sweden, he will be unemployed, and she will have to work at two jobs and send their child to daycare. She stated that this situation will cause her husband to suffer emotional hardship. There is no evidence that the applicant's husband would be unable to find suitable employment in Sweden, albeit not as a pilot. The AAO finds the circumstances her husband would face in his native Sweden to be typical of concerns expressed by similarly situated spouses. The record contains no evidence leading to the conclusion that a return to Sweden would cause the applicant's husband to experience extreme hardship.

The record also fails to establish extreme hardship to the applicant's spouse if he remains in the United States. 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. Counsel states that the applicant's spouse would experience financial hardship as a result of separation from the applicant, because he would be unable to maintain two households. The record reflects that the applicant was a teacher in Sweden, and there is no evidence that she would be unable to work in her own country in her career field, contributing to her family's finances.

The applicant and her husband wrote in their affidavits that if they are separated, preoccupation with the applicant's well-being will detract from her husband's ability to concentrate and to properly pilot an aircraft. The applicant and her husband both expressed concern for the safety of the other crewmembers and the passengers. The record contains no psychological evidence in support of this claim.

U.S. 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, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), 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. *Hassan v. INS, supra,* 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. The AAO recognizes that the applicant's husband will endure hardship as a result of separation from the applicant. However, his situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of 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 application for waiver of grounds of inadmissibility under § 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* § 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.