U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: SAN FRANCISCO Date: JUL 18 2006

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco. 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 Yemen 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 his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to remain in the United States and reside with his U.S. citizen wife.

The district director found that, based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen wife. The application was denied accordingly. *Decision of the District Director*, dated January 29, 2004.

On appeal, counsel for the applicant asserts that the applicant's wife will suffer emotional and economic hardship should the applicant be prohibited from remaining in the United States. *Brief in Support of Appeal*, dated July 21, 2005.

The record contains a brief from counsel in support of the appeal; a brief from the applicant's prior counsel in support of the appeal; letters from the applicant's friends; a letter regarding the applicant's wife's treatment for substance dependency; copies of approval notices for Form I-130 immigrant petitions on behalf of the applicant's children; a copy of the applicant's marriage certificate; documentation of conditions in Yemen; statements from the applicant and his wife; a letter from the applicant's landlord; copies of tax documents for the applicant's wife; a copy of the applicant's birth certificate; documentation verifying the applicant's wife's employment; a copy of the applicant's wife's birth certificate, and; documentation relating to the applicant's entries to and exits from the United States. 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.-
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> > (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.

In the present matter, the record indicates that the applicant was admitted to the United States on November 30, 1996 as a B-2 visitor for pleasure. He was authorized to stay until May 29, 1997. On January 5, 1999, he filed a Form I-485, Application to Register Permanent Residence or Adjust Status. His application was denied on June 16, 2000 due to his failure to appear for an adjustment interview. He filed a second Form I-485 application on November 7, 2000. On January 24, 2001, the applicant filed an application for advance parole. He departed the United States and was paroled back into the country on September 1, 2001. Based on the foregoing, the applicant accrued unlawful presence in the United States from May 30, 1997, the date his B-2 status expired, until January 5, 1999, the date he filed his first Form I-485 application. The applicant further accrued unlawful status from June 16, 2000, the date his first Form I-485 application was denied, until November 7, 2000, the date he filed his second Form I-485 application. Accordingly, the applicant accrued a total of approximately two years of unlawful presence in the United States.[1] The applicant was deemed inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant does not contest his inadmissibility on appeal.

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 himself experiences upon being found inadmissible is irrelevant to section 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 section 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;

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[1] The district director noted that the applicant was unlawfully present in the United States "for the last seven years." *Decision of the District Director,* dated January 29, 2004. However, upon the filing of a bona fide Form I-485 application, unlawful presence ceases to accrue. As nothing in the record shows that the applicant's Form I-485 applications were not bona fide, his unlawful presence ceased during the pendency of those applications. Accordingly, he was not continuously unlawfully present since his B-2 status expired on May 30, 1997.

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.

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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's wife would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The record reflects that the applicant is from Yemen. The applicant states that his wife and son intend to relocate to Yemen with him if his waiver application is denied. *Statement from Applicant*, dated July 27, 2005. The applicant states that his wife and stepson will experience extreme hardship if they relocate there due to poor conditions in the country and their status as foreigners. *Id.* The applicant indicates that he is from South Yemen, and that people from the south are not treated well. *Id.* He explains that women face danger and difficulty in Yemen. *Id.* The applicant provides that his wife will not receive adequate health care in Yemen, as she requires treatment for high blood pressure, methadone maintenance, psychological and nutritional counseling, and treatment for depression and migraines. *Id.* The applicant states that his wife will worry about their son, who will be unable to attend school or speak the local language. *Id.* The applicant indicated that both his wife and son will be isolated in Yemen. *Id.*

The applicant's wife states that she and her son will follow the applicant to Yemen if he is deported. *Statement from Applicant's Wife*, dated July 28, 2005. She provides that the applicant is the only father her son has known. *Id.* She indicates that she will not receive adequate medical care in Yemen. *Id.* She further provides that she will worry about her son should they relocate there. *Id.* The applicant's wife indicates that she will endure emotional hardship due to separation from her father, brother, and friends in the United States. *Id.* In her prior statement, the applicant's wife explained that she had (chemical) dependency and financial problems before she met the applicant. *Statement from Applicant's Wife in Support of Form I-601 Application*, submitted on January 23, 2002. The applicant's wife stated that, after they were married, she was no longer on welfare. *Id.* She further stated that the applicant helped her "from depending on any foreign stimulus." *Id.* She indicated that the applicant supports her emotionally, financially, and socially. *Id.* She provided that her son may have had to live with someone else if it weren't for the applicant's support. *Id.* The applicant's wife stated that she may lose her job if the applicant departs, and she may not be able to meet her and her son's economic needs which may require her to obtain public assistance. *Id.*

The record contains a letter from a Maintenance Counselor of BAART Addiction Research and Treatment, Inc. confirming that the applicant's wife is on a daily methadone program which includes counseling and daily dosages of methadone. *Letter from Maintenance Counselor of* [redacted], dated August 1, 2005. The maintenance counselor expresses that the applicant's wife would suffer extreme hardship if she is not able to receive methadone under a physician's care and supervision. *Id.*

On appeal, counsel contends that the applicant's wife will endure extreme hardship if she relocates to Yemen, as she would be in "a foreign country well-known for its hostile country conditions where she does not know the language or customs, where she will not find adequate health care for her chronic health ailments, and where she will have to give up her job, her family ties, and her friends in the [United States.]" *Brief in Support of Appeal*, dated July 21, 2005. Counsel indicates that the applicant's wife would endure the concern for her son's welfare in Yemen. *Id.* Counsel states that the applicant's wife would face economic hardship in Yemen if the applicant "is taken again into custody by the Yemeni military." *Id.*

Counsel highlights that the applicant has not committed fraud or misrepresentation that could serve as a negative factor in his case. *Id.* Counsel further asserts that the applicant's marriage does not constitute an after-acquired equity, as his marriage did not occur after deportation or removal. *Id.*

The applicant's prior counsel asserted that the district director applied an erroneous interpretation of law, as the district director failed to balance positive and negative factors in rendering a decision on the applicant's waiver application. *Brief from Applicant's Former Counsel*, dated February 20, 2004.

Upon review, the applicant has not established that a qualifying relative will experience extreme hardship if he is prohibited from remaining in the United States. The evidence of record contains explanations of hardships that the applicant's son will endure if the applicant departs. However, hardship to the applicant's son is not a relevant concern in the present matter. Section 212(a)(9)(B)(v) of the Act. While the AAO acknowledges that the applicant's son will bear significant consequences if separated from the applicant or if he relocates to Yemen, only hardship to the applicant's wife may be properly considered in this section 212(a)(9)(B)(v) waiver proceeding.

Direct hardship to an applicant's child is not relevant in waiver proceedings under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. As is possible in the present case, when a qualifying relative is left alone in the United States to care for an applicant's child, it is reasonable to expect that the child hardship due to separation from the applicant will create emotional hardship for the qualifying relative. Further, when and applicant's child and wife are compelled to relocate to a foreign country where the child will experience substantial hardship, it is understood that hardship to the child will create emotional hardship for the applicant's wife. Thus, the AAO will assess hardship to the applicant's son to the extent that it will impact the applicant's wife.

The AAO agrees that relocation to Yemen constitutes significant hardship to the applicant's wife. The record contains documentation to support that conditions are poor in Yemen, and as a female and U.S. citizen who does not speak the local language, the applicant's wife would face difficult circumstances including a lack of

employment opportunities, discrimination, and a threat of physical harm. The AAO acknowledges that the applicant's son would face similar hardship, and such hardship would necessarily impact the applicant's wife's emotional state. The applicant's wife would likely have difficulty continuing her treatment for substance dependency, and she would experience the emotional difficulty of separation from her family members and friends in the United States. However, despite the fact that the applicant's wife asserts that she will relocate to Yemen if the applicant's waiver application is denied, the applicant has not established that his wife has no choice but to move to Yemen, or that his wife will experience extreme hardship if she remains in the United States.

The applicant's wife explained that she shares a close relationship with the applicant, and that he has been instrumental in helping her gain emotional and physical health, thus she indicates that she will experience emotional hardship if they are separated. She stated that the applicant serves as a father for her son, and it is understood that she would endure emotional consequences if her son no longer enjoys the applicant's presence. However, the applicant has not submitted sufficient evidence to show that his wife will suffer emotional effects that go beyond those commonly experienced by the family members of those deemed inadmissible.

The AAO acknowledges that the applicant's wife is undergoing treatment for chemical dependency. Such fact reflects that the applicant's wife is recovering from serious health risks. Yet, the record does not clearly show the applicant's contribution to his wife's recovery and related emotional state. While the applicant provided four letters from his and his wife's friends, none of the authors report having a relationship with the applicant's wife prior to marrying the applicant, and thus they do not reflect the difference the applicant has made in his wife's emotional state. The record lacks other evidence that sheds light on the applicant's wife's emotional state, such as an evaluation from a mental health professional. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the Board of Immigration Appeals 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 wife will endure emotional hardship as a result of separation from the applicant. However, the applicant has not shown that her situation rises to the level of extreme hardship.

The applicant's wife asserts that she will experience economic hardship if the applicant departs the United States. She stated that she would lose her job, and she would be unable to meet her and her son's economic needs. However, the record does not show that the applicant's wife depends on his financial assistance in the United States. The record lacks evidence to show that the applicant works or to reflect his income or assets. The record further contains no documentation to show that the applicant provides economic contributions to

his wife. Conversely, the applicant submitted tax and employment information for his wife to show that she has held her current job since May 15, 2001 at a rate of $8.28 per hour, and she earned $18,171 in 2002. *Applicant's Wife's Employment Verification Letter from* [redacted], dated August 27, 2003; *Applicant's Wife's 2002 IRS Form 1040A, Individual Income Tax Return.* Thus, the applicant's wife earns an income above the 2006 poverty line for a family of two,[2] evaluated as $13,200. *See Form I-864P, Poverty Guidelines.* The applicant's wife has not explained why she would lose her job if the applicant departs, and the record does not support such an assertion. Accordingly, the applicant has not shown that his wife will be unable to meet her financial needs in his absence.

The record contains references to the applicant's wife's health, including the fact that she receives treatment for high blood pressure, methadone maintenance, psychological and nutritional counseling, and treatment for depression and migraines. However, while the record contains a brief letter showing that she is undergoing a program for substance dependency, the records lacks evidence of treatment for other conditions. Further, the applicant has not asserted or established that his wife's medical treatment requires his financial support, his daily assistance, or that she receives health insurance through his employment. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Accordingly, the applicant has not shown that his departure will have a significant impact on his wife's physical health or ability to obtain medical care.

Counsel asserts that the district director erred in finding that the applicant's marriage constitutes an after-acquired equity. However, in section 212(i) waiver proceedings an applicant must first establish that a qualifying relative will suffer extreme hardship. Section 212(i) of the Act. Once extreme hardship is established, Citizenship and Immigration Services (CIS) must evaluate positive and negative factors in order to determine whether the applicant warrants a favorable exercise of discretion. *Id.* As the applicant is in fact married to a U.S citizen, hardship to his wife must be, and has been, fully considered, irrespective of the timing or duration of his marriage. Whether the applicant's marriage constitutes an after-acquired equity is only relevant to a balancing of positive and negative factors in the course of exercising discretion. In the present matter, as the applicant has not established that a qualifying relative will suffer extreme hardship, CIS lacks discretion to approve the waiver application, and there is no need to balance the equities of the applicant's situation. Accordingly, whether his marriage is an after-acquired equity has no material bearing on the director's or the AAO's decision, and the issue need not be discussed further.

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[2] The applicant submits copies of approval notices for Form I-130 immigrant petitions on behalf of his four children, and counsel implies that that the applicant's wife will suffer additional financial hardship if her stepchildren come to reside with her in the United States. However, the approval of a Form I-130 immigrant petition does not, by itself, allow an individual to enter or reside in the United States. The applicant has not shown that his children have received immigrant visas, or that they have been approved to adjust their status from within the United States. Thus, the AAO cannot determine if they will in fact be permitted to reside in the United States. A waiver application may not be approved based on speculation of future eligibility or after the applicant becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO will not approve the applicant's waiver request based on speculation that his children may enter the United States and create additional financial burden for his wife.

Counsel further asserts that the applicant has not committed fraud or misrepresentation that could serve as a negative factor in his case. *Id.* The AAO observes that the applicant has been deemed inadmissible due to unlawful presence under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act. The record contains no indication that the applicant has committed fraud or misrepresentation. The district director cited *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996), indicating that Citizenship and Immigration Services (CIS) "has authority to consider any and all negative factors, including the respondent's initial fraud." *Decision of the District Director* at 3, dated January 29, 2004. While it was inaccurate to imply that the applicant has committed fraud, *INS v. Yueh-Shaio Yang* serves as precedent to support that CIS may properly consider any wrongful acts committed by an applicant that led to a determination that he is inadmissible. In the present matter, the applicant transgressed immigration law by remaining in the United States beyond his approved stay, and such violation of U.S. law may be deemed a negative factor in this case. However, as discussed above, the applicant has failed to show extreme hardship to a qualifying relative, and thus no purpose would be served in balancing positive and negative factors to determine whether he merits a favorable exercise of discretion.

The applicant's prior counsel asserted that the district director applied an erroneous interpretation of law, as the district director failed to balance positive and negative factors in rendering a decision on the applicant's waiver application. *Brief from Applicant's Former Counsel*, dated February 20, 2004. Again, as discussed above, an applicant must first show extreme hardship to a qualifying relative before CIS may properly reach an analysis of positive and negative factors. As the district director found that the applicant failed to show extreme hardship to his wife, there was no need for the district director to balance positive and negative factors.

All hardships to the applicant's wife have been considered separately and in aggregate. While the applicant's wife would experience significant hardship if she relocated to Yemen, the applicant has not shown that she has no choice but to do so. The applicant has not established that his wife would suffer extreme hardship if she remains in the United States. Based on the foregoing, the instances of hardship that will be experienced by the applicant's wife should the applicant be prohibited from remaining in the United States do not rise to the level of extreme hardship. Thus, the applicant is statutorily ineligible for relief.

In proceedings for 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.