U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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**PUBLIC COPY**

[redacted]

FILE: [redacted] Office: PORT AU PRINCE, HAITI Date: MAR 16 2010

IN RE: Applicant: [redacted]

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

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.

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, Port Au Prince, Haiti, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Haiti. The applicant 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 record reflects that the applicant is the spouse of a U.S. citizen. The applicant was admitted to the United States on October 24, 2003, and remained beyond the period of stay authorized. She departed the United States on October 23, 2008. The applicant seeks a waiver of inadmissibility in order to return to the United States to rejoin her U.S. citizen husband.

The field office director denied the application finding that the applicant had failed to establish that her U.S. citizen spouse would face extreme hardship should she be denied admission. On appeal, the applicant, through counsel, maintains that the applicant's spouse is facing extreme financial and emotional hardship. *See* Applicant's Appeal Brief.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), 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 field office director found the applicant inadmissible on the basis of her unlawful presence in the United States. The record reflects, and the applicant does not dispute, that she remained in the United States beyond her authorized period of stay and did not depart until October 23, 2008. The applicant thus accrued unlawful presence in the United States for a period of more than one year and

is subject to a 10 year bar to admission. The AAO finds that the applicant is inadmissible as charged. The question remains whether she is eligible for a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 212(a)(9)(B)(v).

A waiver under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant herself is not a permissible consideration under the statute.

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, 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).

The applicant's spouse, [redacted], is a 54-year-old U.S. citizen. He and the applicant were married in 2005. He states that he suffers from diabetes, high blood pressure, high cholesterol and a stomach ulcer. He was recently hospitalized for an acute medical condition. The applicant's spouse also claims that he is working two full-time jobs and that his separation from the applicant is causing severe financial hardship. Further, he claims that his separation from the applicant is causing emotional hardship. Lastly, the applicant's spouse states that he would face extreme hardship should he choose to relocate to Haiti.

The Department of Homeland Security (DHS) Secretary, Janet Napolitano, has determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti is warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010. As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009 the U.S. Department of State noted the extensive damage to the country

after four hurricanes struck in August and September 2008 and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti,* January 28, 2009. Based on the designation of TPS for Haitians and the disastrous conditions which have compounded an already unstable environment, and which will affect the country and people of Haiti for years to come, the AAO finds that requiring the applicant's spouse to join the applicant in Haiti would result in extreme hardship.

For the same reasons, the AAO finds that the applicant's spouse would also experience extreme hardship were he to remain in the United States without the applicant. This finding is based on the extreme emotional harm the applicant's spouse will experience due to concern about the applicant's well-being and safety in Haiti, a concern that is beyond the common results of removal or inadmissibility.

The AAO thus finds that the applicant has established that her spouse faces extreme hardship due to her inadmissibility as required under sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factor in this case is the applicant's unlawful presence in the United States for over one year.

The positive factors in this case include the applicant's lack of a criminal record; her prior nursing education in the United States; her close relationship with her U.S. citizen husband and stepson; and that the applicant's husband would endure extreme hardship should the applicant be refused admission to the United States.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factor.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9) 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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.