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U.S. Citizenship
and Immigration
Services

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[REDACTED]

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FILE:

Office: ATHENS, GREECE

Date:

JUL 01 2008

IN RE:

Applicant:

[REDACTED]

APPLICATION:

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Officer in Charge, Athens, Greece. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form I-601 application will be denied.

The record reflects that the applicant is a native and citizen of Turkey. The applicant was found to be inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(B)(i)(II), for having procured admission into the United States by fraud or willfully misrepresenting a material fact, and for having been unlawfully present in the United States for one year or more, and seeking admission within ten years of departure or removal from the United States. The applicant presently seeks a waiver of his grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v).

The officer in charge found the applicant had failed to establish that a qualifying family member would suffer extreme hardship if the applicant were refused admission into the United States. The applicant's Form I-601 was denied accordingly.

Through counsel, the applicant concedes his inadmissibility under section 212(a)(9)(B)(ii) of the Act for unlawful presence in the United States. The applicant asserts, however, that he is not inadmissible under section 212(a)(6)(C)(i) of the Act. Through counsel, the applicant asserts that as a Turkish citizen, he was eligible to travel under the Transit Without Visa (TWOV) program, which permits aliens traveling between foreign countries to make a stopover in the United States without presenting a passport or visa. The applicant asserts that upon arrival in the United States, he used his legitimate name and passport and announced his intention to seek political asylum. The applicant asserts that he did not procure or attempt to procure a visa or other documentation through fraud or willful misrepresentation of a material fact, and he asserts that he did not misrepresent himself or make fraudulent claims to a U.S. government official. The applicant concludes that he is therefore not inadmissible under section 212(a)(6)(C)(i) of the Act. Addressing the issue of extreme hardship, the applicant indicates, through counsel, that medical documents, psychological assessments, financial records, and affidavit statements establish that the applicant's wife would suffer extreme hardship if the applicant were denied admission into the United States.

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

[A]ny 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.

In the present matter, the record indicates that the applicant was paroled into the United States in January 2001, in order to pursue an asylum claim. The applicant's asylum claim was denied by an immigration judge on January 24, 2002, and the applicant was ordered removed. The record reflects that the applicant did not depart the United States at that time. The applicant was subsequently removed from the United States on November 17, 2004. The applicant has been outside of the United States since that date.

“[D]eparture from the United States triggers the 10-year inadmissibility period specified in section 212(a)(9)(B)(i)(II) . . . if that departure was preceded by a period of unlawful presence of at least 1 year. . . . [T]he departure which triggers inadmissibility . . . must fall at the end of a qualifying period of unlawful presence. . . . An alien unlawfully present for 1 year or more who voluntarily departs is barred from admission for 10 years.

See In re Rodarte-Roman, 23 I&N Dec. 905, 908 (BIA 2006.) In the present matter, the applicant was unlawfully present in the United States for more than one year between April 2003 when the Board of Immigration Appeals dismissed the appeal of his removal order, and his removal from the United States in November 2004. The applicant is seeking admission less than ten years after his November 17, 2004 removal from the United States. He is therefore subject to section 212(a)(9)(B)(i)(II) of the Act inadmissibility provisions.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant traveled to the United States under the TWOV program in January 2001. The AAO notes that the TWOV program was designed to facilitate international travel, and permitted:

[A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed “in immediate and continuous transit” through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980)

Referring to the Board of Immigration Appeals (Board) decisions, *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), *Matter of D-L-&A-M*, 20 I&N Dec. 409 (BIA 1991), *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984), and *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961), the applicant asserts, through counsel, that he is not inadmissible under section 212(a)(6)(C)(i) of the Act because he did not procure or attempt to procure a visa or other documentation through fraud or willful misrepresentation of a material fact, and he did not misrepresent himself or make fraudulent claims to a U.S. government official.

The AAO finds that the applicant’s assertions are not persuasive. The AAO notes that *Matter of Y-G-*, and *Matter of L-L-*, *supra*, were not TWOV-related case. The AAO notes further that *Matter of D-L- &A-M-*, *supra*, states specifically at 412, that it applies outside of the TWOV context:

In *Shirdel*, we did not reach the issue of when aliens other than those in the TRWOV [TWOV] status will be found excludable for seeking entry by fraud or misrepresentation. We now hold that, *outside of the TRWOV context addressed in Shirdel*, an alien is not excludable under

section 212(a)(19) of the Act for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.

(Emphasis added.) *Matter of Shirdel, supra* at 36, held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or a material misrepresentation. The decision specifically states that, “[t]he fraud was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum.”

In *Ymeri v. Ashcroft*, 387 F.3d 12, FN 4 (1st Cir. 2004) the U.S. First Circuit Court of Appeals (First Circuit) distinguishes itself from the *Matter of Shirdel*, decision, noting that section 212(a)(19) of the former Act is the predecessor to section 212(a)(6)(C)(i) of the Act. The First Circuit states that section 212(a)(6)(C)(i) of the Act refers to “admission” rather than “entry,” and that the present statute covers aliens who seek an admission or other benefits provided under this chapter. The court held that:

The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an “entry.”

The First Circuit Court held further in *U.S. v. Kavazanjian*, 623 F.2d 730, 732 (1st Cir. 1980) that:

[T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country’s border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

Id. at paragraph [6] and [7].

[W]e think an alien’s assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United states before again departing. *See Reyes v. Neely*, 228 F.2d 609, 611 (5th Cir. 1956), (“A misrepresentation may be made as effectively by conduct as by words”)

Id. at FN15.

In the present matter, the record establishes that the applicant traveled to the United States under the TWOV program. The evidence in the record establishes further that the applicant intended to remain in the United States, and that he did not intend to travel to his final destination (Costa Rica.) Based on the above rulings, the AAO finds that the applicant thereby committed a fraud on the United States, and that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides in pertinent part that:

(1) The Attorney General [now Secretary, Department of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(9)(B)(v) of the Act provides that:

[T]he Attorney General [now Secretary, Department of Homeland Security, "Secretary"] has sole discretion to waive clause [212(a)(9)(B)](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 married a U.S. citizen on June 20, 2005, in Turkey. The applicant's wife is a qualifying family member for section 212(a)(9)(B)(v) and section 212(i) of the Act, extreme hardship waiver purposes. It is noted that U.S. citizen and lawful permanent resident children are not qualifying relatives under either section 212(a)(9)(B)(v) or 212(i) of the Act. Any hardship claim pertaining to the applicant's stepson may therefore only be considered to the extent that it causes hardship to the applicant's wife.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (Board) deemed the following factors to be relevant in determining extreme hardship to a qualifying relative:

[T]he 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.

The Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994), that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." "Extreme hardship" has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996.) Court decisions have repeatedly held that the common results of deportation or exclusion [now removal or inadmissibility] are insufficient to prove extreme hardship. *Perez v. INS, supra*. See also, *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991.)

The AAO notes that the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation (removal) proceedings, and with knowledge that the alien might be deported. *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992.)

In the present matter, the record reflects that the applicant was ordered removed from the United States on January 24, 2002. The applicant did not depart the United States and he was removed to Turkey on November 17, 2004. The applicant and his wife (██████████) were married in Turkey on June 20, 2005, after the applicant was removed from the United States. Any hardship pertaining to ██████████'s separation from the applicant will therefore be accorded diminished weight.

The record contains the following evidence relating to the applicant's extreme hardship claim:

January 27, 2006, and March 27, 2007, affidavits signed by ██████████ stating that she and the applicant married in Turkey in June 2005, and that they met in the United States and began dating three years before their marriage. ██████████ indicates that she has a good job at a bank and that she earns about \$39,000 a year. She indicates that she bought a townhouse in October 2005, in anticipation of the applicant's return to the United States, and she states that she is unable to make the house payments alone and that her mother helps her to make the payments. ██████████ states that she also has approximately \$18,000 in credit card debt which is difficult to make payments on. ██████████ indicates that she married the applicant because she loves him and can't live without him. She indicates that she has trouble sleeping and communicating with people and that she finds it difficult to get through the day without the applicant near. ██████████ indicates that the applicant is also like a father-figure to her twelve-year-old son, and she indicates that her son misses the applicant. She states that she cannot move to Turkey because she has spent her entire adult life in the United States, and her home is here. She states that it would also be very difficult for her son if she took him away from his school and friends in the United States.

A House Deed reflecting that ██████████ and ██████████ (██████████'s mother) purchased a home together on September 23, 2005.

Copies of credit card bills, some in ██████████'s name, and some in ██████████ and ██████████'s names.

Federal Tax returns and wage statements reflecting ██████████'s employment and earnings.

A letter signed by ██████████'s mother, stating that ██████████ is sad and unhappy due to her separation from the applicant, and stating that she supports her daughter financially.

A letter signed by ██████████'s son stating that he loves the applicant very much and wants him to live in the United States.

A February 15, 2008 letter from an otolaryngologist stating that ██████████ requires surgery to treat an enlarged nodular hypertrophy condition involving her entire thyroid gland. The record indicates that she was scheduled for surgery on April 10, 2008, and that she required approximately three weeks to recuperate.

A January 23, 2006, Psychological Report signed by ██████████, reflecting that Ms. ██████████ was referred to him by her attorney, and that he interviewed ██████████ on January 21,

2006. On the basis of the interview, [REDACTED] determined that [REDACTED] suffers from an Adjustment Disorder with Mixed Anxiety and Depressed Mood, as a result of living separate and apart from her husband. [REDACTED] states that, "her symptoms include sleep disturbance, poor appetite, weight loss, difficulty focusing and concentrating, persistent sadness, crying spells, loss of sexual libido, and chronic anxiety. . . ."

A September 20, 2007, Psychological Assessment by [REDACTED], Psy.D., reflecting that he interviewed [REDACTED] on September 11, 2007. On the basis of this interview, [REDACTED] determined that [REDACTED] suffers from a Major Depressive Disorder, Single Episode, Severe Without Psychotic Features, as a result of her separation from her husband and the stress of her legal efforts to have him return. Her symptoms included appearing depressed and moderately anxious, problems with sleep and appetite, irritability, and finding little enjoyment in her life.

A December 5, 2007, letter from [REDACTED] stating that [REDACTED] remains under his care and that her next appointment is on December 18, 2007. He states that [REDACTED] was prescribed an anti-depressant in late November, 2007, but that she notices no significant improvement from the medication.

The AAO finds, upon review of the totality of the evidence, that the applicant has failed to establish his wife would suffer hardship beyond that normally experienced upon removal of a family member, if she remains in the U.S. without the applicant, or if she moves to Turkey to be with the applicant.

The AAO finds that the psychological and medical evidence contained in the record fails to demonstrate that [REDACTED] would suffer from medical or emotional hardship beyond that normally experienced upon separation from a family member. The medical evidence reflects that [REDACTED]'s thyroid condition was treatable, and there is no indication that the condition would worsen due to her separation from the applicant or that her situation would improve if the applicant were present. The 2006 and 2007 psychological reports also fail to establish that [REDACTED] suffers from emotional effects that go beyond that normally experienced upon separation from a family member. Moreover, the evidence in the record reflects that [REDACTED] is gainfully employed and that her mother is a co-owner of their home and shares financial responsibility for house payments and many of the credit card bill payments. The evidence fails to demonstrate that the applicant has provided for the applicant's spouse financially in the past. The AAO notes further that, "[t]he 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.)

The applicant has also failed to establish that his wife would suffer extreme hardship if he were denied admission into the United States and [REDACTED] moved with her son to Turkey. The AAO notes that Ms. [REDACTED] was born in Turkey, and that she lived there until she was approximately seventeen years old. The record contains no evidence to establish that the applicant or [REDACTED] would be unable to find work in Turkey. The applicant additionally failed to establish that his family would not have educational or medical access in Turkey. The U.S. Ninth Circuit Court of Appeals held in *Shooshtary v. INS*, 39 F.3d 1049, 1051, (9th Cir. 1994) that the, "extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy." It has additionally been held that, hardship involving a lower standard of living, difficulties of readjustment to a different culture

and environment and reduced job opportunities, has not been found to rise to the level of extreme hardship. *See Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986.) Furthermore, “[t]he 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.” *Shooshtary v. INS*, *supra*.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Because the applicant failed to establish that his wife would suffer extreme hardship if he is denied admission into the United States, the AAO finds that it is unnecessary to address whether discretion should be exercised in the present matter.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to meet his burden of proof in the present matter. The appeal will therefore be dismissed and the application denied.

ORDER: The appeal is dismissed. The application is denied.