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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

OCT 10 2008

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

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 "R. P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the Form I-601, Application for Waiver of Ground of Excludability under Sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a 39-year-old native of the Dominican Republic and citizen of Italy and the Dominican Republic. She is the spouse of a United States citizen. The couple has one United States citizen child. The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on her behalf by her spouse. She presently seeks a waiver of inadmissibility in order to remain in the United States and adjust her status to lawful permanent resident.

The director determined that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). In a separate decision, the director found that the applicant was ineligible for a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1181(i). The applicant's application for adjustment of status was denied.

On appeal, the applicant, through counsel, maintains that the director erred in finding that the denial of a waiver would not result in extreme hardship to her spouse. Specifically, the applicant notes her daughter's age and learning disabilities, the circumstances surrounding her departure and reentry to the United States, her husband's employment, the family's financial circumstances, and the fact that the couple has been together for over 10 years. *See Applicant's Appeal Brief.*

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), provides:

In general.—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.

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.

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

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

The director found the applicant to be inadmissible on the basis of her unlawful presence in the United States, and on the basis of her misrepresentation during her visa-waiver admission in 2002. The applicant departed the United States in 2001 after having been present without authorization for over one year. In so doing, she triggered the unlawful presence inadmissibility bar. The applicant misrepresented herself as a temporary visitor in 2002. The AAO therefore finds that the applicant is inadmissible as charged. The question remains whether she is eligible for a waiver under sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(a)(9)(B)(v), and 212(i) of the Act, 8 U.S.C. § 1182(i).

A waiver under section 212(a)(9)(B)(v) or 212(i) of the Act 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. Hardship to the applicant’s U.S. citizen daughter is also not a permissible consideration under the statute, except as it impacts the applicant’s spouse.

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 native of the Dominican Republic and citizen of the United States. He has resided in the United States since 1989. The applicant and her spouse have been together since 1995, and were married in 2003. They have one U.S. citizen daughter, born on October 16, 1995. The applicant maintains that should her waiver application be denied, her spouse would face extreme hardship. The applicant states that her spouse is employed as a customer service representative for Comcast, and that he is fully responsible financially for her and her daughter. The applicant's spouse's schedule would not permit the applicant to care for his daughter after school or help with homework. The record indicates that the applicant's daughter has a learning disability that requires an individualized educational program (which is provided by the state). The applicant claims that her daughter would not find an equivalent educational program in the Dominican Republic, nor would she be able to adjust socially to life in the Dominican Republic. The applicant states that her daughter's difficulties would result in hardship upon her father, the applicant's spouse. The applicant's spouse would also face hardship due to the separation from his spouse. The applicant's spouse states that he would be unlikely to relocate to the Dominican Republic given that he has resided in the United States for nearly 20 years, and is well-employed and well-adjusted. The applicant's spouse's parents and siblings all reside legally in the United States. The record does not contain evidence regarding family or community ties in the Dominican Republic.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's spouse would face extreme hardship if the applicant is denied the waiver. The AAO notes that hardship resulting from a family's separation is common to all individuals in the applicant's circumstances and does not, by itself, rise to the level of "extreme." See *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating 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. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances"). When considering the family's separation in addition to the other factors, such as the applicant's child's learning disability or the family's economic situation, the circumstances faced by the applicant's spouse appear different. The applicant's spouse has family and community ties in the United States, but none in the Dominican Republic. The applicant's spouse is a high-school graduate, with steady employment and benefits. He has been able to provide for his family, and to ensure that his daughter receives adequate care and education to meet her special needs. The family's separation would result not only in emotional trauma for the applicant's spouse, but also in economic hardship and difficulties caring for her special needs child. In sum, the record indicates that the applicant's spouse would face more than the unfortunate, but expected, disruptions, inconveniences, and difficulties that arise whenever a family member is removed from the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) or 212(i) of the Act, the burden of proving eligibility rests with the applicant. 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.