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

**U.S. Citizenship
and Immigration
Services**

H₂



FILE:

Office: LONDON, ENGLAND

Date: **AUG 11 2009**

IN RE: Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, London, England, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant, [REDACTED], is a native and citizen of England whose Petition for Alien Fiancé(e) was approved on August 15, 2006. She made an application for a "K-1" nonimmigrant visa as the fiancée of a U.S. citizen pursuant to section 101(a)(15)(K)(i) of the Immigration and Nationality Act (the Act).

In connection with the application for a K-1 nonimmigrant visa, the field officer director determined that [REDACTED] was inadmissible to the United States under 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 under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation.

[REDACTED] sought a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), and 212(i), 8 U.S.C. § 1182(i), of the Act. The field officer director concluded that [REDACTED] had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated May 8, 2007.

In a letter dated May 18, 2007, and submitted on appeal, the applicant states that her fiancé is missing out on four months of their son's life due to her entering the United States illegally. The birth certificate accompanying the applicant's letter conveys that the applicant and her fiancé have a son born on January 27, 2007.

The AAO will first address the finding of inadmissibility for unlawful presence.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.¹

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* Memo, note 1.

The record reflects that the applicant was admitted into the United States under the Visa Waiver Program (VWP) on May 22, 1999 with an authorized period of stay until August 21, 1999; on November 14, 2001 with an authorized period of stay until February 12, 2002; and September 1, 2002 with an authorized period of stay until December 1, 2002; on August 7, 2003 with an authorized period of stay until November 5, 2003, although she remained until November 11, 2005; and on November 29, 2005 with an authorized period of stay until June 6, 2006, and she overstayed for four months. Based upon the record, the applicant accrued two years of unlawful presence, from November 5, 2003 to November 11, 2005, and triggered the ten-year-bar when she left the United States, rendering her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). That section provides that:

(v) Waiver. – The Attorney General [now Secretary, 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.

¹ Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

The AAO will now consider the finding of inadmissibility for seeking admission into the United States by fraud or willful misrepresentation.

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

- (i) 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 gained admission to the United States through the VWP on five separate occasions and misrepresented to the inspecting officer at the port of entry her true intention of coming to the United States, which was to live and work in the United States in violation of the VWP. The applicant admitted to living and working illegally in the United States in six month increments from November 14, 2001 until June 2006. Based upon the applicant's admission, the applicant is inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting the material fact of her true intention in coming to the United States under the VWP.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

- (1) The Attorney General [now the Secretary 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.

Since the applicant is inadmissible under both section 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act, the AAO will discuss in this decision the waivers of inadmissibility for both of those sections.

If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which states that K visa applicants must file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1) The standard for granting a waiver of inadmissibility stated in section 212(a)(9)(B)(v) of the Act governs the adjudication of [REDACTED] Form I-601.

A waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant under sections 212(a)(9)(B)(v) and 212(i) is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's fiancé is the

only qualifying relative here. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I & N Dec. 880, 882 (BIA 1994).

The AAO will now apply the *Cervantes-Gonzalez* factors here in its consideration of hardship to the applicant’s fiancé. Extreme hardship to the applicant’s fiancé must be established in the event that he remains in the United States without the applicant, and alternatively, if he joins him to live in England. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The applicant’s fiancé [REDACTED] conveys that he is currently employed at the Young Men Christian’s Association (YMCA) and would not be able to transfer his position if he moved to England. He states that he is mid-way through a program offering a degree in exercise science and had to stop his program in order to work overtime to save money for his fiancée and unborn child. He states that he wishes to continue living and attending college in the United States and would like for his son to be raised in the United States. He indicates that he will be deployed with the national guard and would like to establish a safe home in the United States for his fiancée and child before his deployment.

The applicant’s fiancé indicates that he wishes for the applicant and son to live with him in the United States. Courts have stated that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent’s bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. However, it finds that [REDACTED] situation, if he remains in the United States without his fiancée, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO conveys that the emotional hardship is not unusual or beyond that which is normally to be expected upon removal. *See Hassan and Perez, supra*.

[REDACTED] indicates that if he joined the applicant to live in England he would not be able to transfer his present job there. The loss of a job does not constitute extreme hardship. *See, e.g., Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978) (“loss of a job and the concomitant financial loss incurred is not synonymous with extreme hardship”); *Matter of Pilch*, 21 I&N Dec. 627 BIA 1996) (loss of current employment does not constitute extreme hardship); *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985) (loss of a job along with its employee benefits does not entail extreme hardship).

[REDACTED] indicates that he is in the middle of a degree program in exercise science. However, he has provided no independent documentation to show that he is in a degree program and that he would be unable to complete that particular degree program in England. 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).

Although [REDACTED] asserts that he wants his son to be raised in the United States, [REDACTED] does not describe in any manner the extreme hardship that he would experience if his son were raised in England.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range

of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under sections 212(a)(9)(B)(v) and 212(i) of the Act.

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 sections 212(a)(9)(B)(v) and 212(i) of the Act the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.