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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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FILE:



Office: PHILADELPHIA, PA

Date: OCT 07 2009

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:



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 Acting District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Italy 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 one year or more and seeking readmission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The acting district director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Acting District Director*, at 2-3, dated January 18, 2006.

On appeal, counsel states that the Form I-601 should not have been required and that the determination of hardship was erroneous. *Form I-290B*, received February 17, 2006.

The record includes, but is not limited to, the applicant's spouse's statements, financial records for the applicant and his spouse, and medical records for the applicant. The entire record was reviewed and considered in rendering a decision on the appeal

The record reflects that the applicant entered the United States on December 16, 2001 under the visa waiver program, his authorized period of stay expired on March 15, 2002, he filed for adjustment of status on March 17, 2003, he subsequently departed the United States and he reentered the United States with an advance parole document on December 29, 2003. The applicant accrued unlawful presence from March 16, 2002, the date after his authorized period of stay expired, up to March 17, 2003, the date he filed for adjustment of status. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his departure.

Counsel asserts that the government's issuance of the advance parole document contributed in a vital way to the alleged violation of unlawful presence, the document was issued to an unrepresented individual who received no advice on the legal consequences of accepting the document and traveling with it, the written notification with subjective warnings about what might happen was not sufficient notice for an unrepresented individual, the applicant should not be inadmissible under section 212(a)(9)(B)(i)(II) of the Act as it is arguable that government complicity created the alleged violation, and the government's role in creating the situation should have been taken into account in assessing the waiver and the required level of hardship adjusted accordingly. *Brief in Support of Appeal*, at 2, dated February 16, 2006. Counsel also states that the applicant's advance parole makes him an arriving alien, the Third Circuit Court of Appeals has found that an arriving alien is not barred from adjusting status, and the applicant should be permitted to continue his application in the same status he had when he left (as a visa waiver overstay). *Id.* The AAO notes counsel's claims, but finds that they do not alter the fact that the applicant departed the United States after he had been

after he had been unlawfully present for more than one year, thereby triggering the provisions of section 212(a)(9)(B)(i)(II) of the Act. The AAO also observes that the extreme hardship requirement for a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is set by statute and may not be adjusted to fit the circumstances of a specific case.

Section 212(a)(9)(B) of the Act 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.

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 to the applicant is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to his spouse. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of lawful permanent resident or United States citizen family ties to 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Italy or in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Italy. The record reflects that the applicant has a history of multiple sclerosis and is under treatment. *Applicant's Medical Records*, dated August 29, 2006. However, the record is not clear as to the severity of his medical condition or how it would affect the applicant's spouse if she relocated to Italy. The record does not include evidence of emotional, financial or any other type of hardship to the applicant's spouse should she move to Italy. The AAO finds that the record does not include sufficient evidence to establish that the applicant's spouse would experience extreme hardship if she relocated to Italy.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. The applicant's spouse states that it took her several years to find the right man; she has finally found someone who loves her deeply and who is caring and supportive; the applicant works two jobs and is trying to make a better life for her; they have both been working hard in order to buy a house and start having children; she came from a very troubled childhood, her parents got divorced, and she only met her biological father three years ago; she grew up feeling unloved and unwanted, and her self-confidence was depleted; she went through a deep depression because of her childhood and parental issues; she was not able to work or stay in high school because of these same issues, and she dropped out; the applicant helped her get out of her depression, he made her feel loved and wanted for the first time in her life, he helped restore her self-confidence, and he gave her the opportunity to get her high school diploma; she now has a job and is functioning in society; and she will surely fall back into a deep depression, lose her job and probably live on the streets if the applicant were deported. *Applicant's Spouse's Statement*, dated November 2, 2004. Counsel states that the applicant's spouse received \$11,350 in tuition assistance for school while she was earning \$13,885 from her work, she was able to go to school on her income because the applicant's combined income of \$16,310 pulled them into an appropriate income range, and their pay stubs reflect that the applicant is making most of the money so his spouse can go to school. *Brief in Support of Appeal*, at 2. The record includes documentary evidence to support the income figures cited by counsel. The record reflects that the applicant has a history of multiple sclerosis. *Applicant's Medical Records*. However, the record is not clear as to the severity of his medical condition or how it would affect the applicant's spouse if he were to be removed.

The AA acknowledges that the applicant's spouse would encounter emotional and financial hardship without the applicant. However, the record does not include sufficient evidence that the applicant's spouse would experience extreme hardship if she remained in the United States. The applicant's spouse's statements regarding her emotional dependence on the applicant and the impact that his removal would have on her life are not supported by any documentary evidence. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See 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)). The record also fails to provide sufficient

evidence to determine the financial circumstances of the applicant's spouse in the absence of the applicant. Although the record provides copies of the applicant's and his spouse's earnings for 2005, there is no contemporaneous documentation of their financial obligations. Neither does the record include documentation that the applicant's spouse is attending school or the costs of her education.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), 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. In the present matter, the record does not distinguish the hardships that would be encountered by the applicant's spouse from those commonly associated with removal. Accordingly, it does not establish that the applicant's spouse would suffer extreme hardship if he is removed from the United States.

A review of the documentation in the record has failed to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.