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

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FILE:

Office: TEGUCIGALPA, HOUDURAS

Date SEP 08 2009

IN RE:

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

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 Officer-in-Charge (OIC), Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The application will be approved.

The applicant is a native and citizen of Nicaragua who was found to be 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. The OIC also found the applicant to be inadmissible under sections 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien previously removed from the United States; and under 212(a)(6)(B) of the Act for failure to attend a removal hearing. *Decision of the OIC, dated February 6, 2007.*

The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601), seeking a waiver for unlawful presence pursuant to section 212(a)(9)(B)(v) of the Act. The applicant also sought an Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212). The OIC stated that since there is no waiver available for inadmissibility under section 212(a)(6)(B) of the Act for failure to attend a removal hearing, the applicant is statutorily inadmissible to the United States within five years from the date of his removal on May 1, 2004. Having found the applicant statutorily ineligible for relief, the OIC concluded that no purpose would be served in discussing whether the applicant merits a waiver under section 212(a)(9)(B)(v) of the Act for unlawful presence, or for permission to reapply for admission. Thus, the OIC denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212. *Decision of the OIC, dated February 6, 2007.* The applicant submitted a timely appeal.

The AAO will first consider in this decision the applicant's grounds of inadmissibility.

The record reflects that the applicant entered the United States without inspection on February 14, 1999. On August 12, 1999, the applicant failed to appear to a court hearing and the immigration judge ordered his removal in absentia. On May 2, 2004, the applicant was removed from the United States.

With regard to failure or refusal to appear at a proceeding, section 212(a)(6)(B) of the Act states that:

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

The applicant's removal occurred on May 2, 2004. Since it has now been more than five years since his removal from the United States, the applicant is no longer admissible under section 212(a)(6)(B) of the Act.

However, the AAO finds that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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.

With the case here, the OIC was correct in finding that the applicant was unlawfully present in the United States for more than one year. The applicant entered the United States without inspection on February 14, 1999, remaining here until his removal on May 2, 2004. He therefore accrued

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.

approximately five years of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides the following:

- (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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, who must be the applicant’s U.S. citizen or lawfully resident spouse or parent. Hardship to an applicant and to his or her child is not a consideration under sections 212(a)(9)(B)(v) and 212(i) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 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). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant’s qualifying relative and 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.

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).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's wife must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in Honduras. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The letter dated October 31, 2006, by the applicant's wife states that she and her husband were hired to be property managers of an apartment complex and were working together until their separation. She states that she lives in the building that she manages and that on October 21, 2006, there was a homicide in an apartment near hers and that the suspect had not been caught. The AAO notes that the record contains a newspaper article of the crime. The applicant's wife conveys that she feels unsafe managing the apartment building by herself because the residents in the apartment complex know that she is alone and without her husband. She states that she cannot sleep some nights and worries about a criminal living right next to her. She indicates that she can neither move nor leave her job because she must earn enough money to support her four children. She states that she would like to move to a safer place with her husband. If she moved to Nicaragua she conveys that she would live in a poor country full of crime and with few employment opportunities, and would be far from her children and immediate family members.

In a letter dated March 21, 2006, the applicant's wife asserts that separation from her husband has impacted her emotionally, physically, and financially. She states that she is having difficulty focusing on her job, dealing with her four children, and leaving her husband every time she visits him in Nicaragua. She states that she is an apartment manager of a 102 unit building and needs her husband to help her manage the property. She states that she works long hours and is exhausted between her job and her children's activities. Her two oldest daughters, she states, are preparing to go to college and need her financial assistance. Lastly, she conveys that it is expensive for her to travel to Nicaragua and that she cannot financially afford to bring her nine-year-old son with her.

In his March 26, 2006 letter, the applicant conveys that his wife needs his assistance and that they have been separated for two years and he has seen her only three times.

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).

The factors as presented reveal that the applicant's wife will experience extreme hardship if she remains in the United States without the applicant. She lives in and manages a large apartment complex where she feels unsafe and requires her husband's assistance in managing the property. In addition, she continues to care for four children without her husband's help.

The applicant's spouse states that her move to Nicaragua would mean living in a poor country where there is a high level of crime and few employment opportunities, and separation from her children and immediate family members. The AAO notes that nationals of Honduras and Nicaragua have been granted Temporary Protected Status (TPS) until July 5, 2010. The Secretary of Homeland Security grants TPS to aliens who are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. *See*, section 244 of the Act and 8 C.F.R. § 244. In light of the fact that Nicaragua has been designated for TPS, the AAO finds that the applicant's spouse would experience extreme hardship if she were to join her husband to live in Nicaragua.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and his U.S. citizen children, and the passage of approximately ten years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's entry into the United States without inspection, his failure to appear at a court hearing, his removal from the United States, and periods of unauthorized presence and employment. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

The AAO notes that the applicant is still inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien previously removed from the United States and therefore still requires permission to reapply for admission under section 212(1)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

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

ORDER: The appeal is sustained. The application is approved.