

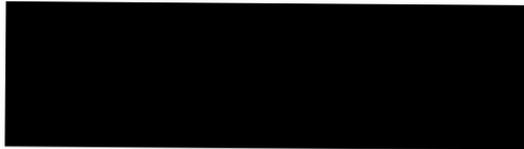
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



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



H₂

FILE:



Office: PHILADELPHIA

Date:

FEB 25 2010

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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days, but less than one year, and seeking readmission within three years of her last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States as a lawful permanent resident pursuant to an approved Form I-130 relative petition filed by her husband on her behalf.

The district director found that the applicant failed to establish extreme hardship to her U.S. citizen husband and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated August 26, 2005.

On appeal, counsel for the applicant asserts that the district director erred in finding that the applicant's husband will not experience extreme hardship if the present waiver application is denied. *Statement from Counsel on Form I-290B*, submitted September 27, 2005. Counsel contends that the applicant was not properly informed of the consequences of departing the United States in the course of her application for advance parole into the United States, and the district director should be estopped from finding her inadmissible pursuant to section 212(a)(9)(B)(i)(I) of Act. *Id.* at 1.

The record contains, in pertinent part, statements from counsel; statements from the applicant, the applicant's husband, the applicant's stepson, the applicant's church, and friends of the applicant and her husband; medical documentation for the applicant; documentation of the applicant's health insurance; tax, employment, and banking records for the applicant's husband; birth records for the applicant and her husband; a copy of the applicant's marriage certificate; a copy of the applicant's passport; documentation in connection with the applicant's application for advance parole into the United States, and; documentation regarding the applicant's unlawful presence in the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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-

(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 . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again

seeks admission within 3 years of the date of such alien's departure or removal, . . . 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.

The record reflects that on January 12, 2002 the applicant entered the United States in B-2 status as a visitor for pleasure with authorization to remain until July 11, 2002. On June 26, 2003 she filed a Form I-485 application to adjust her status to lawful permanent resident based on her marriage to her U.S. citizen husband. She filed a Form I-131 application for advance parole into the United States, which was approved on July 2, 2003. She subsequently departed the United States and was paroled into the United States upon her return on October 8, 2003.

Based on the foregoing, the applicant accrued unlawful presence from July 12, 2002, the date her B-2 status expired, until June 26, 2003, the date she filed a bona fide Form I-485 application to adjust her status to lawful permanent resident. This period totals approximately 11 months. As she seeks admission pursuant to her Form I-485 application, she was found inadmissible under section 212(a)(9)(B)(i)(I) of the Act for having been unlawfully present in the United States for more than 180 days, but less than one year, and seeking readmission within three years of her last departure.

On appeal, counsel asserts that the applicant was not properly informed of the consequences of departing the United States in the course of her application for advance parole into the United States, and thus the district director should be estopped from finding her inadmissible pursuant to section 212(a)(9)(B)(i)(I) of Act. However, on the front of the applicant's one-page Form I-512 advance parole document, it clearly and prominently states:

NOTICE TO APPLICANT: If after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved.

Thus, the applicant had notice of the risk of departure from the United States using her advance parole document. She was found inadmissible for precisely the reason presented in the warning on the document. Counsel's assertion that the applicant was not properly notified of the potential for inadmissibility due to unlawful presence is not persuasive.

It is further noted that the AAO, like the Board of Immigration Appeals (BIA), is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of United States Citizenship and Immigration Services (USCIS) from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003) and subsequent amendments. Accordingly, the AAO has no authority to address counsel's equitable estoppel claim.

Based on the foregoing, the applicant was properly deemed inadmissible under section 212(a)(9)(B)(i)(I) of the Act, and she requires a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(I) 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 the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship to a qualifying relative. These 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.

On appeal, counsel asserts that the applicant has serious medical conditions for which she requires continued medical care in the United States. *Brief from Counsel*, dated October 26, 2005. Counsel states that the applicant has been under the care of physicians for a pituitary adenoma, which is a tumor that requires follow-up brain scans to prevent complications including blindness. *Id.* at 1. Counsel notes that the expenses of the applicant's medical care are paid by health insurance she receives through her husband's employment. *Id.* Counsel contends that, should the applicant return to Jamaica, she will not have medical coverage or adequate care, and thus she will probably die. *Id.*

Counsel asserts that the applicant's husband will experience extreme hardship if the applicant is compelled to depart the United States and forego required medical care for a potentially fatal condition. *Id.* at 1-2. Counsel states that the applicant's husband's life improved significantly once

he married the applicant, as he transitioned from a 54-year-old divorced man living alone with little emotional support to a vibrant husband with a successful career. *Id.* at 2.

The applicant expresses that she and her husband share a close relationship and that they do not wish to be separated. *Statement from the Applicant*, dated October 12, 2005. She notes that she has health problems, and that her husband has been exceptional in helping her, including providing health insurance, taking her to medical appointments, and supporting her emotionally. *Id.* at 2. The applicant explains that she does not have a life in Jamaica, and that the only family she has there is her father and stepmother. *Id.* She indicates that she wouldn't have a place to live in Jamaica, and that she would have difficulty finding employment. *Id.* She notes that she has diabetes, and that stress exacerbates her condition. *Id.*

The applicant's husband expresses that he is close with the applicant and that she has helped him grow in every aspect of life. *Statement from the Applicant's Husband*, dated September 27, 2005. He states that he does not have other close family members, and that he cannot imagine life separated from the applicant. *Id.* at 1. He describes his and the applicant's plans to purchase a home and reside together with the applicant's three children. *Id.* at 3. The applicant's husband states that he would be unable to support the applicant and her children in Jamaica due to the high costs and lack of employment opportunities. *Id.*

The applicant submits letters from her and her husband's friends who attest that the applicant and her husband share a close relationship, and that the applicant's husband would endure significant emotional hardship should the applicant be compelled to depart the United States. *Letters from Friends of the Applicant and the Applicant's Husband*, dated 2004 and 2005.

The applicant provides medical documentation, including a letter from her physician, [REDACTED]. [REDACTED] states that the applicant has been under his care since March 10, 2004, and she is being treated for hypertension, diabetes, and pituitary adenoma. *Letter from [REDACTED]*, dated September 19, 2005. [REDACTED] indicates that the applicant is taking medications including Glucophage, Glucotrol, Avandia, and Enalapril. *Id.* at 1. In a prior letter, [REDACTED] stated that the applicant was being referred to a neurosurgeon for a surgical resection due to her pituitary adenoma. *Prior Letter from [REDACTED]*, dated September 15, 2004.

The applicant provides a letter from another physician with West Philadelphia Women First who states that the applicant was diagnosed with pituitary tumor for which she takes Dostinex, and for which she will require ongoing monitoring and follow-up brain scans to prevent complications such as blindness. *Letter from West Philadelphia Women First*, dated September 19, 2005.

The applicant provided a report that discusses the results of a magnetic resonance imaging (MRI) of her brain that confirms the presence of a pituitary adenoma. *Report on MRI*, dated June 14, 2004.

Upon review, the applicant has shown that her husband will experience extreme hardship if she is compelled to depart the United States. The applicant has presented evidence to show that she suffers from significant health problems, particularly a pituitary adenoma. A pituitary tumor poses a

substantial risk to the applicant's health, including possible blindness and other complications. The applicant requires ongoing, advanced medical care, and she has shown that she has received monitoring and treatment in the United States, including exams from multiple doctors, an MRI, and referral to a neurosurgeon. The applicant stated that she receives medical insurance through her husband that has covered her care, and she has provided documentation to support this assertion. Thus, should the applicant depart the United States, she will become separated from the doctors who have diagnosed and treated her condition, and her ongoing monitoring will be interrupted. The applicant has shown that disturbing her present health care will create a significant risk to her health with serious potential consequences, including blindness.

Direct hardship to an applicant is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit, non-qualifying family member, or the applicant should be considered to the extent that it has an impact on qualifying family members. Thus, hardship to the applicant will be considered to the extent that it creates hardship for the applicant's husband.

As discussed above, the applicant has shown that she will face a significant threat to her health should she depart the United States. As the applicant and her husband share a close bond, it is evident that such threat to the applicant's health would create extreme emotional hardship for her husband. The serious threat to the applicant's health constitutes an unusual circumstance not ordinarily faced when a spouse relocates abroad due to inadmissibility. Thus, the applicant has distinguished her husband's emotional hardship from that which is ordinarily faced when a spouse's waiver application is denied. The applicant's husband would face extreme emotional hardship whether he joins the applicant in Jamaica or he remains in the United States without her, as the threat to her health would remain in either location.

The applicant's husband would face other elements of hardship should he relocate to Jamaica, including the loss of his employment, the interruption of his and the applicant's health insurance, and the economic challenge of providing for himself and his family in a country where he has no apparent professional or personal ties (apart from the applicant.)

The applicant's husband would face other elements of hardship should he remain in the United States without the applicant, including the emotional hardship of separation from the applicant with whom he shares a close bond, and the interruption of his and the applicant's plans to build a life in the United States with the applicant's three children.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that denial of the present waiver application "would result in extreme hardship" to her husband, as required for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the

authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant remained in the United States without a legal immigration status for approximately 11 months.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted of a crime; the applicant's U.S. citizen husband would experience extreme hardship if she is prohibited from residing in the United States; the applicant would endure serious detriment to her health should she relocate abroad, and; the applicant has supported her U.S. citizen husband emotionally and cultivated a strong family bond.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Mendez-Morales*, 21 I&N at 301 (finding that, in addition to establishing extreme hardship, an applicant must show that he or she merits a favorable exercise of discretion). In this case, the applicant has met her burden that she is both eligible for a waiver and merits approval of her application.

ORDER: The appeal is sustained.