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

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FILE:

Office: BOSTON

Date: **JAN 07 2010**

IN RE:

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

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Boston Field Office, denied the instant waiver application. 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 El Salvador, the wife a U.S. citizen, and the beneficiary of an approved Form I-130 petition. The field office director found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband. The field office director also found that the applicant had not established that failure to approve the waiver application would cause extreme hardship to her U.S. citizen husband, and denied the application.

On appeal, counsel contested the applicant's inadmissibility, submitted additional evidence, and argued that the evidence in the record demonstrates that denial of the waiver application would cause the applicant's husband to suffer extreme hardship.

The AAO will first analyze the issue of the applicant's inadmissibility.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

The record shows that the applicant entered the United States without inspection on March 1, 1998 and remained in the United States until May or June of 2008, when she departed for El Salvador. The record shows that the applicant returned to the United States on July 7, 2008. On appeal, counsel does not appear to dispute those facts.

The applicant filed her first Form I-821 Application for Temporary Protected Status (TPS) on April 9, 2001. Pursuant to DHS policy, because the TPS application was subsequently approved, the applicant's unlawful presence in the United States ended on that filing date. *See* Memo. from

Donald Neufeld, Acting Assoc. Dir., Domestic Ops. Directorate, US Citizenship and Immigration Services, US Dept. Homeland Sec., to Field Leadership, *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* (May 6, 2009) (Available at <http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF>) at 22.

The record contains no indication, however, that the applicant achieved any legal status in the United States from March 1, 1998, when she entered the United States, until April 9, 2001. Further, approval of the application for TPS did not cure the unlawful presence that the applicant had previously accrued. *Id.* at (b)(1)(F)(iii). Counsel does not appear to contest the finding that the applicant was unlawfully present in the United States for a period greater than a year and then departed.

In a brief filed with the waiver application, counsel stated, “The statute clearly defines the terms [sic] “admission” as physical entry into the United States.” Counsel further stated,

Because [the applicant] is present in the United States, she is not seeking admission to the United States; therefore the bar to admissibility set forth in INA § 212(a)(9)(B)(i)(II) does not apply to [her] case.

As is stated in section 101 of the Act, an alien who is paroled into the United States is not considered to have been admitted. Although the applicant is physically present in the United States, she has not been admitted. In seeking to have the waiver application approved, the applicant is seeking to perfect her admission into the United States, and is “seek[ing] admission” within the meaning of section 212(a)(9)(B)(i)(II) of the Act.

The evidence in the record is sufficient to show that the applicant was unlawfully present in the United States from March 1, 1998 to April 9, 2001, a period greater than one year. She then triggered her ten-year inadmissibility when she voluntarily departed the United States on a date during May 2008, and she is now seeking admission. The applicant is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The remainder of this decision will address whether waiver of the applicant’s inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] 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 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) 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 herself is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a 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).

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 nonexclusive list of 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).

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).

The record contains a declaration dated March 30, 2009 from the applicant's husband. The applicant's husband stated that the economic stability that he and the applicant enjoy depends upon both of their incomes and that without both incomes they would be unable to meet their obligations. The applicant's husband did not provide any further detail pertinent to those obligations.

The applicant's husband also stated that El Salvador ". . . is in the midst of a horrible economic downturn . . . with less than \$6,000 available per person in the [gross domestic product] according to U.S. government reports. Although the applicant's husband did not cite to any more specific evidence of El Salvador's economic downturn, the assertion that El Salvador is experiencing economic trouble will be considered.

In another declaration, dated June 19, 2009, the applicant's husband provided details about his courtship of the applicant and his feelings for her, and stated that when she visited El Salvador he

missed her. He further stated that he was born and raised in the United States, that his friends and family are here, and that he does not wish to live in El Salvador.

The record contains various letters from the applicant's friends and coworkers attesting to the applicant's character. Those letters have no direct relevance to hardship that removal of the applicant from the United States would cause to her husband and will not be addressed further.

The record contains an employment verification letter dated May 23, 2007 from [REDACTED] payroll administrator at Au Bon Pain, in Boston, Massachusetts. That letter states that the applicant worked for that company from May 19, 2006 through May 4, 2007 as a part-time customer service representative earning \$9.25 per hour.

The record contains an employment verification letter dated May 15, 2007 from [REDACTED] assistant food service director for Aramark at Boston University. That letter states that the applicant had worked for that company since February 3, 2003, was then working as a supervisor, and earned \$12.65 per hour.

The record contains a 2004 Form W-2 Wage and Tax Statement issued to the applicant's husband showing that he earned \$40,012.02 during those years. The record contains a copy of the applicant's husband's Form 1040EZ Income Tax Return for Single and Joint Filers with No Dependents. That return confirms that the applicant's husband earned income of \$41,012 during that year.

The record contains the joint 2005 Form 1040EZ of the applicant and her husband. That return shows that they declared a total income of \$68,236 during that year. W-2 forms submitted show that the applicant earned \$13,164.47 from one employer and \$11,598.31 from another employer, and that her husband earned \$43,473.65 during that year. The sum of those three amounts is \$68,236, rounded, which confirms the amounts shown on the 2005 tax return.

The record contains the joint 2006 Form 1040EZ of the applicant and her husband. That return shows that they declared a total income of \$74,461 during that year. W-2 forms submitted show that the applicant earned \$3,082.68 from one employer, and \$7,399.98 from another employer, and \$17,890.34 from a third employer, and that her husband earned \$46,088.04 during that year. The sum of those amounts is \$74,461, rounded, which confirms the amounts shown on the 2006 tax return.

The record contains an employment verification letter dated May 14, 2007 from [REDACTED] operations manager at [REDACTED] an attorneys' firm. That letter states that the applicant's husband had then worked for that firm for 17 years. That letter further states, "[The applicant's husband's] current salary with this years, 2007, increase included is \$34,840." [Errors in the original.] Why that annual salary, including an increase, is less than the applicant's husband's previous earnings with the same firm is unclear to the AAO.

The record contains medical reports dated August 22, 2008 and June 22, 2009 that indicate that the applicant and her husband have been having difficulty conceiving a child.

The record contains a letter dated October 16, 2009 from [REDACTED] a licensed mental health counselor in Boston, Massachusetts. The body of that letter reads, in its entirety,

Since October 1, 2009 [the applicant's husband] has been coming in weekly for mental health counseling.

[The applicant's husband] sought out professional counseling due to feeling anxious and depressed. He states the anxiety he experiences and depressed mood has [sic] persisted for the past 2 years. Based upon the counseling sessions we have had, I have referred him to a psychiatrist to assess if an anxiety and/or antidepressant medication would be beneficial to him at this time. I also recommend that he continue with weekly one-on-one counseling sessions to help him work through the difficult issues he is now experiencing in his life.

In a brief filed in support of the appeal, counsel cited non-precedent decisions, asserting that the facts of those cases were similar to the facts of the instant case.

Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is without precedential effect.

Counsel further asserted that the evidence in the instant case demonstrates that, because of the economic situation in El Salvador and the applicant's husband's fragile mental health, failure to approve the instant waiver application would result in extreme hardship to the applicant's husband. Counsel also noted the inability of the applicant and her husband to produce a child.

To demonstrate that the applicant's absence would cause extreme hardship to her husband, the applicant must show that, if she is absent from the United States and her husband remains in the United States he will suffer extreme hardship. The applicant must also demonstrate that if she leaves and her husband joins her to live in El Salvador that will cause him extreme hardship. The AAO will first consider the scenario of the applicant being removed and her husband joining her in El Salvador.

Initially, the AAO notes that El Salvador is a country designated for Temporary Protected Status (TPS). A TPS designation acknowledges that presence in a particular country is unsafe because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions.

El Salvador was designated for TPS on March 9, 2001, based on the devastation caused by a series of severe earthquakes that occurred on January 13, and February 13 and 17, 2001. The Secretary of Homeland Security has extended the TPS designation for El Salvador through September 9, 2010 because, finding that the conditions that warranted the March 9, 2001 designation continue to be met, and because of the resulting inability of El Salvador to adequately handle the return of its nationals. El Salvador's TPS may be extended further. *See* 73 FR 57123. Thus, based on the

representations of the applicant's spouse pertinent to El Salvador's economic condition and his unwillingness to live there, and the TPS designation of El Salvador, the AAO finds that to relocate to El Salvador would cause extreme hardship to the applicant's husband.

The remaining scenario to consider is that of the applicant remaining in El Salvador and her husband remaining in the United States.

The evidence in the record demonstrates that the applicant has earned income in the United States during various years. The applicant's husband stated that he requires the applicant's income in order to meet obligations and for his financial stability. The AAO notes that the loss of any amount of income typically represents some degree of hardship. The applicant's husband did not provide any more specific detail, however, pertinent to those obligations or the economic level he would be reduced to in the event that the applicant is unable to return.

The inability to maintain one's present standard of living does not necessarily constitute extreme hardship. *See Matter of Pilch*, 21 I&N Dec. 627, 631 (BIA 1996). The evidence shows that the applicant's husband has a substantial income. The applicant's husband failed to provide evidence of his recurring expenses. Without that evidence, the AAO is unable to determine whether the absence of the applicant's husband income would cause extreme hardship.

The evidence in the record does not show that, if the applicant remains in El Salvador and her husband remains in the United States, her husband will suffer financial hardship which, when considered together with the other hardship evidence in the record, rises to the level of extreme hardship.

The asserted significance, if any, of the inability of the applicant to conceive a child is unclear. No argument in the record supports the proposition that, because the applicant is unable to bear a child, if she remains in El Salvador and her husband remains in the United States, he will suffer extreme hardship.

The remaining hardship factor to consider is the emotional or psychological hardship that the applicant's absence from the United States would cause to her husband. [REDACTED] October 15, 2009 letter indicates that he referred the applicant's husband to a psychiatrist to assess whether medication would be appropriate, but the record contains no indication that the applicant's husband consulted with a psychiatrist, and no indication that he was placed on medication. The record contains no other evidence that the applicant's husband has received regular mental health counseling or any other treatment.

[REDACTED] letter indicates that the applicant's husband was being seen weekly and suggested that the sessions continue so that the applicant's husband could work through his difficult issues. However, only two weeks had transpired since the applicant's husband's first meeting with [REDACTED] and, although the applicant's husband has stated that he misses the applicant when she is absent, [REDACTED]'s letter does not suggest that the applicant's husband's difficult issues were related to the applicant's absence.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases. The evidence submitted is insufficient to show that, if the applicant remains in El Salvador and her husband remains in the United States, he will suffer emotional or psychological hardship which, when considered together with the other hardship factors in this case, will rise to the level of extreme hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband faces extreme hardship if the applicant's waiver application is not granted. Rather, the record suggests that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties that typically arise when a spouse is removed from the United States.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

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 rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.