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

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FILE:



Office: NEW YORK (GARDEN CITY)

Date: JAN 29 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).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record contains a previous Form I-130 filed by the applicant's previous spouse. The instant decision, however, pertains to the Form I-601 waiver application that the applicant signed on May 8, 2006 and submitted on May 9, 2006; in connection with a Form I-130 that the applicant's present wife filed for him on January 18, 2001, which waiver application was approved on January 5, 2007.

The record reflects that the applicant is a native and citizen of the Dominican Republic. In a decision dated March 9, 2007 the district director found the applicant inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(9)(B)(i) for having been unlawfully present in the United States.

The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182 (a)(9)(B)(v), in order to reside in the United States with his wife and daughter. The district director also concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on the applicant's spouse and denied the waiver application accordingly. On appeal, the applicant¹ submitted a statement pertinent to his claim of hardship.

The record contains, among other documents, a declaration by the applicant's wife, pay statements pertinent to the applicant's wife's income, IRS printouts pertinent to the applicant's and applicant's wife's taxes, and employment verification letters.

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

(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, 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.

....

¹ The record reflects that counsel submitted a Form G-28 Notice of Entry of Appearance on February 9, 2009. When the applicant filed the appeal in this matter, on April 4, 2007, the applicant was not represented by counsel.

(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 [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 shows that the applicant entered the United States without inspection on August 22, 1992. Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's unlawful presence began on April 1, 1997.

The applicant stated, on his Form I-601 and elsewhere in the record, that he lived in the United States continuously since he first entered on August 22, 1992.² On January 18, 2001 the applicant filed a Form I-485 Application to Adjust Status.³ Therefore, on that date, the applicant ceased to accrue unlawful presence. See Memo. from [REDACTED], 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) at (b)(3)(A).

For the purpose of inadmissibility, then, the applicant was unlawfully present in the United States from April 1, 1997 until January 18, 2001, a period greater than one year.

² In earlier submissions, the applicant stated that he entered the United States during January of 1991. The AAO notes that the difference is not relevant to his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act.

³ The applicant filed a second Form I-485 on November 28, 2003.

The record contains a Form I-94 Departure Record that shows that the applicant entered the United States on May 19, 2002, pursuant to an advance parole. This demonstrates that he had voluntarily departed the United States since accruing more than one year of unlawful presence. The AAO therefore affirms the district director's finding that the applicant remains inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.⁴

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 or his child 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 wife 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-Morales*, 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 (BIA) 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 also held that:

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).

⁴ The record suggests an additional inadmissibility issue. On his waiver application, the applicant stated that he also departed the United States during 2003, and returned by entering without inspection. If this were so, then the applicant would also be inadmissible pursuant to section 212(a)(9)(C) of the Act. No waiver is available for inadmissibility under that section of law. Further, if the applicant left the United States during 2003 without obtaining advance parole, his adjustment application should have been denied on the basis of abandonment. *See* 8 C.F.R. § 245.2(a)(4)(ii)(A) and 8 C.F.R. §§ 212.5(c) and (f). As this issue has not been thoroughly addressed previously, the AAO notes it here but declines to make a finding that the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act.

U. S. courts have stated, “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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also 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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to the applicant’s wife must be established in the event that she accompanies the applicant to the Dominican Republic to live and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

On the Form I-290B appeal, the applicant cited various precedent cases, including U.S. Supreme Court cases, with no direct relevance to the statute being applied in this case. The decisions relied upon by the applicant do not address or alter the statutory requirement of demonstrating extreme hardship under section 212 of the Act. Although the appeal contains no clear argument based on the cases cited, the applicant appears to challenge the constitutionality of the relevant statutory provisions. The AAO observes that, like the Board of Immigration Appeals, it cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

In her declaration, the applicant’s wife noted that she and the applicant have a child together and stated that her other child, who is the applicant’s stepchild, is affected by lead poisoning. She stated that the applicant provides child care as well as financial and emotional support. The record contains no corroborating medical evidence pertinent to the applicant’s stepchild’s lead poisoning or its severity. The extent to which that medical problem, coupled with the applicant’s absence from the United States, might cause hardship to the applicant’s wife has not been demonstrated.

The record contains an employment verification letter that indicates that the applicant works at a delicatessen in a supermarket in Brooklyn, New York, and earns \$300 per week. That letter is undated and does not indicate when the applicant's employment began. The record contains printouts of information from the tax returns of the applicant and his wife. Although those printouts show the sum of the wages paid to the applicant and his wife during those years, they do not show the amount the applicant earned individually. Although the loss of any income typically constitutes some degree of hardship, the evidence in the record is insufficient to show that the loss of the applicant's income would cause hardship to the applicant's wife which, when considered together with the other hardship factors in this case, would rise to the level of extreme hardship.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of financial, 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 plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exists.

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 standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that, if the applicant returns to the Dominican Republic, and the applicant's wife remains in the United States, the applicant's wife will experience extreme hardship as a consequence of her separation from the applicant.

Further, the record contains no evidence, or even argument, to demonstrate that the applicant's wife would suffer hardship if she accompanied the applicant to live in the Dominican Republic. The record does not support a finding that the applicant's wife will face extreme hardship if she relocates to the Dominican Republic to live with the applicant.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) 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 section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests 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.