



U.S. Citizenship
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FILE:

Office: VIENNA, AUSTRIA

Date:

AUG 10 2005

IN RE:

APPLICATION:

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

ON BEHALF OF APPLICANT:

PUBLIC COPY

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Assistant Officer in Charge, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Romania who was found to be inadmissible to the United States pursuant to § 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 and seeking readmission within ten years of her last departure from the United States. The applicant is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her family.

The assistant officer in charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. On appeal, counsel asserts that the applicant's spouse and children will undergo extreme hardship if the applicant is not permitted to return to the United States.

On appeal, counsel submits affidavits by the applicant's husband, her former fiancé, her sister in law, and two friends, a psychological evaluation of the applicant's husband and son, copies of her husband's prescriptions, medical documentation regarding the applicant's mother in law, country conditions information about Romania, and a copy of a 1991 AAO decision. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

Counsel points out that the officer in charge's decision erroneously refers to a waiver of inadmissibility under § 212(i) of the Act. The AAO recognizes that this was a typographical error, and that the waiver available to the applicant in the present case falls under § 212(a)(9)(B)(v). Counsel correctly observes that the Board of Immigration Appeals (BIA) has addressed the requirements for demonstrating extreme hardship under § 212(i) waivers, and the AAO notes that the same standards are applied to waiver adjudications under § 212(a)(9)(B)(v).

In the present application, the record indicates that the applicant entered the United States on a fiancée visa on March 19, 1996. The applicant failed to marry the individual who petitioned for her in that case. Instead, she married her current husband on August 16, 1996. Her husband then filed an I-130 petition for alien relative on October 21, 1996, and the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on March 9, 1998. On June 9, 1999 the application for adjustment of status was denied. The applicant departed the United States pursuant to a grant of voluntary departure on January 4, 2003.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until March 9, 1998, the date she filed the Form I-485, and from June 9, 1999, the date her application was denied, until January 4, 2003, when she departed. In applying to adjust her status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within ten years of her departure from the United States. The applicant is, therefore, inadmissible to the United States under § 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A § 212(a)(9)(B)(v) waiver of the bar to admission resulting from § 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 the alien herself or her children experience upon deportation is irrelevant to § 212(a)(9)(B)(v) waiver proceedings. 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). On appeal, counsel asserts that the officer in charge failed to consider all the positive factors present in this case. However, since the officer in charge found that the applicant had not established that her husband would undergo extreme hardship, there was no need to weigh the discretionary factors presented.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deems relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act. 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.

Counsel asserts that the applicant's spouse would face extreme hardship if he returned to his native Romania in order to remain with the applicant. In an affidavit dated September 3, 2003, the applicant's husband stated that he could not close his business and return to Romania, because he would have no way of making a living in that country, and he would be unable to support his family. The country conditions material on the record does not establish that the applicant's husband would be unable to earn sufficient income in Romania, or that the applicant herself would be unable to work to assist her family while in that country. Moreover, the U.S. Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

The applicant's husband also mentions that his teenage son does not know how to read and write Romanian, but, as noted above, difficulties affecting the applicant's children are not a factor in this analysis. The record does not establish that the applicant's son's hardship in adjusting to life in Romania would cause her husband to suffer extreme hardship.

The record also fails to establish extreme hardship to the applicant's spouse if he remains in the United States. The AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request. Counsel contends that the applicant's husband suffers and will continue to suffer extreme psychological hardship on account of the applicant's inadmissibility. Counsel maintains that the officer in charge failed to give sufficient importance to the emotional pain the applicant's spouse experiences, and he cites to a 1991 AAO case in support of his assertion. The AAO is not in possession of the record in the cited, non-precedent decision, and the officer in charge's decision does not indicate whether he reviewed the cited decision in the process of analyzing the instant application. However, if the previous application was approved based on the same assertions that are contained in the current record, the approval would constitute material error. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Citizenship and Immigration Services (CIS) is not required to treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The record contains evaluations of the applicant's husband and son performed by [REDACTED] Ph.D., based on a three and a half hour interview which took place on August 30, 2003. Dr. [REDACTED] writes that he concurs with a prior psychological evaluation that revealed that the applicant's husband was experiencing severe emotional distress. The record does not indicate that Dr. [REDACTED] had any previous contact with the applicant's husband, however, and it appears that the report is based solely on information provided by the applicant's husband and the test results. Dr. [REDACTED] writes that the applicant's husband is experiencing clinical depression and anxiety, conditions that will be exacerbated by the applicant's continued absence. Dr. [REDACTED] also notes that the applicant's husband takes two antidepressant medications. The report does not indicate that the applicant's husband will be unable to function or that he will become incompetent or disabled as a result of the applicant's inadmissibility. The psychological evaluation does not provide sufficient evidence upon which the AAO may conclude that the applicant's husband is suffering or will suffer greater emotional stress than other, similarly situated individuals.

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. The AAO recognizes that the applicant's husband will endure hardship as a result of separation from the applicant. However, his situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails 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 she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. See § 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.