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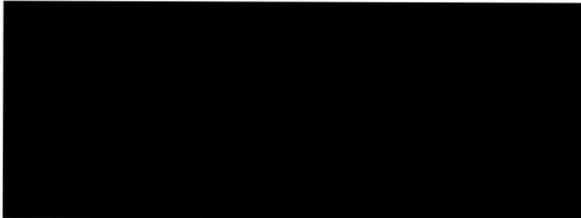
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE:

Office: ATHENS, GREECE

Date:

AUG 07 2006

IN RE:



APPLICATIONS: 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)

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application and the application for permission to reapply for admission were denied by the Acting Officer-in-Charge, Athens, Greece and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Lebanon who was ordered removed from the United States on April 8, 2002. He was ordered to appear for removal on July 16, 2002, but failed to appear. The record reflects that he left the United States on April 6, 2003, thus executing the removal order. In addition, he was found to be inadmissible to the United States for having been unlawfully present in the United States for a period of more than 180 days but less than one year. However, the record reflects that he was unlawfully present for more than one year. The applicant is therefore inadmissible 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 unlawful presence and requires permission to reapply for admission under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II). As both the waiver application and the application to reapply for admission were addressed in the same decision, the AAO will do likewise in this decision. The record indicates that the applicant has a U.S. citizen spouse, child and two stepchildren. The applicant seeks a waiver of inadmissibility and permission to reapply for admission in order to reside with his family in the United States.

The officer-in-charge found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer-in-Charge*, at 3, dated June 3, 2005. The officer-in-charge also denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). *Id.* at 4.

On appeal, counsel asserts that the acting officer-in-charge abused his discretion in denying the applications. *Addendum to Form I-290B*, at 1, dated June 30, 2005. In addition, counsel has also requested oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, the necessity for oral argument has not been shown. Consequently, the request is denied.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statements, financial documents for the applicant's spouse, support letters for the applicant and his spouse, medical records for the applicant's spouse and photographs of the applicant and his spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was admitted to the United States on a K-1 student visa on March 3, 1992, but he did not marry his fiancée within 90 days. The applicant subsequently filed for asylum on June 19, 1992 and the application was denied on May 7, 1997. The applicant was placed in removal proceedings where his renewed asylum case was denied on March 7, 2000. The Board of Immigration Appeals (BIA) denied his appeal on April 8, 2002 and he self deported on April 6, 2003.

The AAO notes that although the applicant had a pending asylum claim, the record reflects that he was employed without authorization in the United States during some of the time it was pending. The record indicates that the applicant was issued an extension of an employment authorization document. The extended employment authorization document expired on April 17, 1998, but there are no employment authorization extensions in the record after this date. However, the underlying I-130 petition reflects that the applicant was employed at H&M Petro Mart when the petition was filed on January 6, 2003 and that this employment started in January 1993. *Form I-130, Petition for Alien Relative*, at 1, dated January 6, 2003. In addition, counsel states that the applicant concedes that he worked without authorization in the United States. *Addendum to Form I-290B*, at 1. Therefore, the applicant was employed without authorization after his most recent employment authorization document expired on April 17, 1998. Pursuant to section 212(a)(9)(B)(iii)(II) of the Act, the applicant's employment without authorization would start the accrual of unlawful presence notwithstanding his pending asylum case. The applicant accrued unlawful presence from April 18, 1998, the day after his employment authorization document expired, until April 5, 2003, the date the applicant was removed from the United States. As such, the applicant is inadmissible based on section 212(a)(9)(B)(i)(II) of the Act, not section 212(a)(9)(B)(i)(I) of the Act. The applicant is also inadmissible pursuant to section 212(a)(9)(A)(ii)(II) of the Act as he is seeking admission within ten years of the date of his departure while an order of removal was outstanding.

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

(A) Certain alien previously removed.-

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

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-

(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.

(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.

(iii) Exceptions

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) **unless the alien during such period was employed without authorization in the United States.**

(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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 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 to the applicant, his child or his stepchildren is only relevant to the extent that it causes hardship to the qualifying relative. 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 AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Lebanon or in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

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. These factors include the presence of lawful permanent resident or United States citizen family ties to 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.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Lebanon. The record reflects that the applicant's spouse has two teenage children from a prior marriage and a child from her current marriage who is nearly two-years old. The applicant's spouse has physical custody of at least one of her teenage children. *Judgment of Divorce*, at 2, dated December 23, 1996.¹ The judgment of divorce states that the minor children are not to be removed from Michigan without the approval of the judge who awarded custody. *Judgment of Divorce*, at 5. Counsel states that the children's biological father will not consent to removing the children from Michigan. *Brief in Support of I-601*, at 10, dated November 4, 2004. The AAO finds it plausible that the applicant's spouse would lose custody of her children from the prior marriage if she relocated to Lebanon. The record indicates that the applicant's spouse does not have ties, family or otherwise, to Lebanon. *See Applicant's Spouse's I-601 Statement*, at 1, dated May 3, 2004.

In regard to the financial impact of departure, counsel states that the applicant's spouse would not be able to pay off her home equity line of credit if she resided in Lebanon. *Brief in Support of Appeal*, at 2, dated November 7, 2005. The line of credit is for \$78,000 and there is a balance of \$23,303.75. *Chase Loan Statement for May 2005*, undated. The applicant's spouse states that the applicant can't find a job in Lebanon. *Applicant's Spouse's I-601 Statement*, at 1. The record reflects that the applicant's spouse has several health problems as discussed below, however, it is not clear if suitable medical care is available in Lebanon. Considering the aforementioned factors, in particular the issue of losing child custody rights, the AAO finds that the applicant's spouse would face extreme hardship if she resided in Lebanon.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that the applicant's spouse only receives \$52.50 per month in child support and she is financially responsible for three children. *Id.*, at 2. Counsel states that the applicant's spouse continues to struggle with the baby as she is raising him alone, working and caring for her two other children. *Brief in Support of I-601*, at 13. Counsel states that the applicant's spouse is obligated to pay her mortgage of \$1,619.76 per month, monthly bills of \$300 per month and car insurance of \$1,547.47 per six months. *Id.* The record includes substantiating evidence of these amounts. Counsel states that the

¹ The judgment of divorce states that physical custody of the children ends when they reach the age of eighteen or graduate from high school, whichever occurs last. *Judgment of Divorce*, at 2. The applicant's spouse's oldest child is currently nineteen years old, but it is not clear from the record if he has graduated from high school. The applicant's spouse states that he has delayed starting college because he lost a semester due to assistance provided to his mother while she was pregnant. *Applicant's Spouse's Statement*, at 1, dated June 29, 2005. If he has graduated from high school, then he would no longer be in her physical custody according to the judgment of divorce.

applicant is living off of her current income and a home line of equity which she obtained in order to cover her and her children's living expenses. *Id.* The applicant's spouse's sister states that she has her own family and financial problems and can't support the applicant's spouse financially or with babysitting her children and the rest of their siblings live in different states. *Letter from [REDACTED]*, dated June 23, 2005. The record reflects that the applicant's spouse's business only generated \$24,302 in total income in 2004. *2004 U.S. Corporation Tax Return for H & B Billing Company*, at 1, dated March 26, 2005. However, the applicant and his spouse had a joint income of \$66,769 in 2002. *2002 U.S. Individual Tax Return*, at 1, dated April 1, 2003. Therefore, the record indicates that the applicant's presence would alleviate his spouse's financial problems.

In regard to issues of health, the record includes a letter which states that the applicant's spouse has hypothyroidism, anxiety disorder, panic attacks, depression and she has been given supportive psychotherapy and pharmacotherapy. *Letter from [REDACTED]*, dated June 29, 2005. The record includes another doctor's letter which states that the applicant's spouse has been given supportive psychotherapy and pharmacotherapy with an anti-depressant and anxiolytic medications. *Letter from [REDACTED]*, dated June 28, 2005. The applicant's spouse states that she was taken to the hospital in an ambulance due to a rapid heart beat and shortness of breath and her doctor said it was due to too much stress. *Applicant's Spouse's Statement*, at 2. The record reflects that she was taken to the emergency department on different occasions due to atrial fibrillation and sinus tachycardia. *Cardiology Consultation*, at 2, dated March 27, 2004. The applicant's spouse has a history of episodic palpitations, awakening from her sleep with body shakes and rapid, forceful and irregular heart palpitations. *Id.* at 1.

In light of the financial and medical issues in this case, the AAO finds that the applicant's spouse will suffer extreme hardship if the applicant is unable to join her in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

There are several favorable discretionary factors for the applicant including his marriage to a U.S. citizen for over eight years, a U.S. citizen son, two U.S. citizen stepchildren, extreme hardship to his spouse and letters including favorable comments. The applicant does not have a criminal record.

The unfavorable factors include the applicant’s failure to depart after his K-1 status expired, employment and presence in the United States without authorization, and his failure to appear for removal.

The AAO finds that the applicant’s violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

As the applicant merits a favorable exercise of discretion for his I-601 application, the AAO finds that he also merits a favorable exercise of discretion for his I-212 application which is evaluated under the same discretionary factors.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained and both the I-601 and I-212 approved.

ORDER: The appeal is sustained.