

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Ave., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



43

FILE: [REDACTED] Office: NEWARK, NJ Date: **MAY 10 2006**

IN RE: [REDACTED]

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) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, NJ. 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 Canada who was found to be inadmissible to the United States pursuant to 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 having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that based on the evidence in the record, the applicant failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director*, dated October 8, 2004.

On appeal, counsel asserts that the district director's decision was arbitrary, capricious and against the weight of evidence. *Letter from Counsel*, dated November 9, 2004.

The record includes, but is not limited to: an affidavit from the applicant's spouse; a letter from the applicant's spouse; a report from Alberta Children Services; a letter from the Coalition Against Rape and Abuse; four letters from members of the applicant's community; and affidavits from the applicant's spouse's mother, father and sister. The entire record was reviewed and considered in rendering a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States at some time after September 20, 1998 when she was refused admission at the Toronto pre-flight inspection, but before August 1999, when she reported her first U.S. residence. The record is unclear as to how the applicant entered the United States. The applicant claims that she was inspected by an Immigration Officer at the U.S-Canada border. If the applicant did enter with inspection at the border, she would have been admitted for a period of six months. Thus, if she legally entered the United States in August 1999 her unlawful status started to accrue beginning February 2000.¹ On October 8, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). In February 2004, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States. The AAO notes that the applicant overstayed the period of stay authorized by her entry at the Canadian border by remaining in the United States for over two years.

¹ The AAO notes that counsel asserts that the applicant, as a Canadian citizen who was inspected, but not issued an I-94, is subject to the same considerations as those aliens admitted for duration of status and is, therefore, not inadmissible under section 212(a)(9)(B) of the Act. However, the applicant has provided insufficient detail on her entry to determine that she was inspected and not issued an I-94. The AAO will, therefore, assume she was issued an I-94 valid for six months. In the alternative, the AAO could view her as having entered without inspection, in which case, her unlawful presence would begin from the date of her entry. In any event, she accrued unlawful presence in excess of one year and is inadmissible under section 212(a)(9)(B) of the Act.

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 February 2000, the date her stay as a visitor would have expired, until October 8, 2002, the date of her proper filing of the Form I-485. In applying to adjust her status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of her February 2004 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

The present application also indicates that the applicant was convicted in Canada of possession of stolen property on one occasion and theft on four different occasions. The applicant was convicted of possession of stolen property on January 12, 1985; theft under \$1,000 on November 2, 1990, December 10, 1990, and March 5, 1992; and theft under \$5,000 on October 24, 1996.

Section 212(a)(2)(A) of the Act states in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO notes that at the present time three of the applicant's actions leading to convictions took place more than 15 years prior to the applicant's applying for admission. However, the applicant's convictions in 1992 and 1996 do not fall under the section 212(h)(1)(A) exception. Therefore, the applicant is still subject to section 212(a)(2)(A) of the Act and will require a waiver under section 212(h)(1)(B) of the Act as well as a waiver under section 212(a)(9)(B) of the Act for unlawful presence.

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 upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien herself experiences due to separation is irrelevant to section 212(a)(9)(B)(v) and section 212(h) waiver proceedings. The AAO notes that the applicant has two daughters living in the United States, but they are not U.S. citizens or lawful permanent residents, therefore, any hardship they might suffer is irrelevant to this application. The only hardship to be considered is the hardship suffered by the applicant's spouse. 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 he resides in Canada or in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides in Canada. The applicant's spouse states that he has substantial family ties in the United States as his entire immediate family resides in New Jersey. He states that he would suffer financially if he moves to Canada because he recently became licensed as a real estate agent and this license will not be valid in Canada. The applicant's spouse also states that he is the only male in the United States to carry on his family name and that if he moved to Canada he would not be able to continue his family's history in the United States. The AAO notes that Canada is an economically developed country with living standards very similar to the United States. The applicant submits no evidence that he would not be able to find employment or maintain his well-being in Canada. Furthermore, the AAO notes that relocation to a foreign country generally involves some inherent difficulties such as finding new employment, a new residence, and separation from family. However, the record does not reflect that relocation will result in extreme hardship to the applicant's spouse.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. The applicant's spouse states that he and his wife have been together for seven years and have established a family unit. He also states that he would suffer financially because he would have to provide for himself in the United States and his wife in Canada. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

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.

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 section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely 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.