

**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

H3

**PUBLIC COPY**



FILE: Office: PHOENIX, AZ Date: **MAY 26 2006**

IN RE: 

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)

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 Interim District Director, Phoenix, AZ and the Administrative Appeals Officer (AAO) dismissed an appeal. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The applicant is a native and citizen of England 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 is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The interim 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 Interim District Director*, dated July 29, 2003. On appeal the AAO found that the applicant did establish that the applicant's spouse would suffer extreme hardship as a result of relocating to England but did not establish that he would suffer extreme hardship if he stayed in the United States. *AAO Decision*, dated September 10, 2004.

With the motion to reopen counsel asserts that the applicant is now pregnant with the couple's second child resulting in more extreme hardship to the applicant's spouse if she is removed to England. Counsel also challenges the definition of extreme hardship used by the AAO; asserts that the AAO abused its discretion in failing to consider all factors and regulations; and that the authorized travel that triggered the applicant's unlawful presence is contrary to a memorandum issued by the Service in 1997.

In the present application, the record indicates that the applicant entered the United States with a visitor's visa on or about January 2, 1999. The applicant overstayed her six month authorized stay and remained in the United States until December 29, 2001 when she departed and re-entered the United States using advance parole. The applicant submitted an application for lawful permanent residence (Form I-485) on August 4, 2000. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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.* Therefore, the applicant accrued unlawful presence from when her authorized stay under her visitor visa expired in July 1999 until August 4, 2000, the date she submitted her Form I-485. In applying for permanent residence, the applicant is seeking admission within 10 years of her February 2003 departure from the United States. Thus, the applicant is 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.

8 C.F.R. § 103.5(a)(2) (2002) states in pertinent part:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(3) (2002) states in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In his motion to reconsider counsel challenges the applicant's unlawful presence and resulting inadmissibility because the departure from the United States which triggered the unlawful presence was authorized by the Immigration Service through advanced parole. To support her claim counsel submitted a *Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, dated November 26, 1997*. This memorandum states that when an applicant for advance parole has accrued unlawful presence in the excess of 180 days before applying for permanent residence, the advance parole generally should not be granted, unless it appears that the applicant would be likely to receive a waiver of inadmissibility. Counsel claims that this memorandum indicates that a departure and re-entry with advance parole should not trigger unlawful presence as the applicant should never have been granted the advance parole. The AAO does not find counsel's assertions persuasive. The memorandum states that *generally* advance parole should not be granted to aliens in the applicant's situation. It is not an absolute statement.

Furthermore, when an advance parole document is issued it contains a warning. The applicant's advance parole document contained this warning which in bold print states, "Notice to Applicant: If after April 1, 1997

you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the proceedings of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment application to be approved.” *Applicant’s Advance Parole Document*, dated February 15, 2003. Counsel asserts that the applicant was not represented at the time and did not understand the nature of the warning. However, the AAO notes that the applicant is an educated, native speaker of English and the clear language of the warning indicates the consequences. Thus, the applicant’s unlawful presence must be considered and she will need a waiver of inadmissibility before her adjustment application can be approved.

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 the alien herself experiences or her children experience due to separation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to 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 England 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 AAO notes that in its previous decision the AAO found that the applicant had established the applicant’s spouse would suffer extreme hardship as a result of relocating to England. Therefore, this part of the analysis will not be discussed and this decision will focus on the hardship suffered by the applicant if he resides in the United States and the applicant is removed to England.

The applicant must establish that her spouse will suffer extreme hardship in the event that he remains in the United States. Counsel states that the applicant’s spouse would suffer extreme hardship as a result of the applicant’s removal to England because the family would be separated; he would have to pay for childcare as the applicant takes care of the children while he works; and he has no family in Phoenix to help him with caring for his children. Counsel also asserts that applicant will be unable to obtain health care in England and his child will not be born in the United States. The AAO notes that hardship to the applicant and the applicant’s children are irrelevant to section 212(a)(9)(B)(v) waiver proceedings and will not be considered. The AAO also notes that the record indicates that the applicant’s spouse earned \$90,000 in 2001. There is no evidence in the record showing that the applicant’s spouse would not be able to afford childcare for his children. Counsel asserts that the applicant’s spouse will suffer extreme hardship as a result of family separation. However, no documentary evidence was submitted to establish that the effects of separation on the applicant’s spouse would be any worse than other families separated by removal. In addition, there is no evidence to show that the applicant’s spouse would not be able to visit the applicant in England. Therefore, a thorough review of the entire record does not reflect that separation will result in extreme hardship to the applicant’s spouse.

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 spouse will endure hardship as a result of separation from the applicant. However, his situation, if she 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.

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 previous decisions of the district director and the AAO will be affirmed.

**ORDER:** The previous decisions of the district director and the AAO are affirmed.