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U.S. Citizenship
and Immigration
Services

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FILE:

Office: PANAMA

Date: OCT 20 2006

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, § 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Officer-in-Charge, Panama. 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 Panama 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 acting officer-in-charge found that based on the evidence in the record, the applicant failed to establish that her qualifying relative would undergo extreme hardship through her continued exclusion. The application was denied accordingly. *Decision of the Acting Officer-in-Charge*, dated April 5, 2005.

On appeal, counsel asserts that the applicant should not be subject to the extreme hardship provisions associated with inadmissibility when applying for an immigrant visa, but should be subject to the less stringent requirements associated with a nonimmigrant visa waiver as she was applying for a K3 nonimmigrant visa. Counsel also asserts that if the Service finds that the applicant's waiver application is in association with an immigrant visa, the standard of extreme hardship to a U.S. citizen spouse had been established. *Counsel's Brief*, dated April 21, 2005.

The AAO notes that if an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

(a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or “K” nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

The applicant filed the waiver application on Form I-601 on September 14, 2004 with the American Consulate in Panama. The Department of State promptly forwarded the application to CIS, which denied the application on April 5, 2005. The question raised in the instant appeal is the appropriate standard to be applied to adjudication of the Form I-601.

Counsel contends that, because the underlying application is for a nonimmigrant visa, use of the “extreme hardship” standard contained in the statutory waiver provision applicable to immigrants is inappropriate. Counsel contends that the relevant statutory provision is INA § 212(d)(3), which provides:

(3) Except as provided in the subsection, an alien

(A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a)

. . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . .

8 U.S.C. § 1182(d)(3). The BIA has held:

In deciding whether or not to grant an application under section 212(d)(3)(B), there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.

Matter of Hranka, 16 I&N Dec. 491, 492 (BIA 1978). Counsel contends that the standard enunciated in this precedent decision is the proper standard for determining whether the applicant is eligible for a waiver of inadmissibility under INA § 212(a)(9)(B)(II). Counsel states that the immigrant visa standard will not apply until the applicant, having arrived in the United States, makes an application to adjust status to that of a lawful permanent resident.

Counsel's assertions are not persuasive. The Department of State regulation provides as follows:

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an

alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related CIS provision is 8 C.F.R. § 212.7(a)(1), cited *supra*, specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1)(66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the Federal Register along with this amendment to 212.7(a)(1) stated:

Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the CIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If CIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible, and so would not need the benefit of INA § 212(d)(3).

The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined, in that, since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will be adjudicated in the United States in **light** of the already-approved waiver of **any** identified inadmissibility grounds.

Counsel's citation of cases in support of the proposition that nonimmigrant waivers should be granted somewhat liberally are inapposite to the Form I-601 adjudication, in that a significant reason for the liberal construction is the temporary nature of the applicant's stay in the United States. K-3 visa applicants intend to remain in the United States permanently. The Form I-601 process ensures that waivers for K-3 applicants will be scrutinized under the appropriate standard in recognition of their intent to immigrate to the United States, and also capitalizes on the existing immigrant waiver process to provide for consistency, transparency, and the opportunity for the applicant to be heard on the merits of the application.

Finally, although 8 C.F.R. § 212.3, the CIS regulation governing waivers under INA § 212(d)(3), does not explicitly preclude a K nonimmigrant visa applicant from seeking relief under INA § 212(d)(3), whether to grant this relief is a matter entrusted to the discretion of the Secretary of Homeland Security, upon the recommendation of the Secretary of State. The Administrative Appeals Office concludes that 8 C.F.R. § 212.7(a)(1), by requiring the K nonimmigrant to seek a waiver on the same terms as an immigrant visa applicant, must be seen as precluding CIS from exercising the discretion under INA § 212(d)(3) in the applicant's favor. The supplemental information cited above, 66 Fed. Reg. 42587, clearly supports this conclusion. Further, as an alternative ground for this decision, the AAO concludes that, even if 212.7(a)(1) does not actually *preclude* granting relief under INA § 212(d)(3) of the Act, it would not be an appropriate exercise of discretion to grant relief under INA § 212(d)(3) of the Act to an alien who does not intend his sojourn in the United States to be temporary.

The acting officer-in-charge, therefore, correctly concluded that the standard for granting a waiver of inadmissibility stated in INA § 212(a)(9)(B)(v) governs the adjudication of the applicant's Form I-601.

In the present application, the record indicates that the applicant entered the United States on a visitor's visa on March 6, 1998. The applicant remained in the United States until September 17, 1999. The AAO notes that the applicant made a sworn statement at the Newark International Airport stating that her father filed an extension for her visitor's visa to extend her stay for sixth months. The AAO notes that the applicant submitted no evidence to establish that an extension was filed. Therefore, the applicant accrued unlawful presence from when her lawful stay under the visitor's visa expired on April 5, 1998 until September 17, 1999, the date she departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of her September 17, 1999 departure from the United States. Therefore, 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.

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 due to separation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's qualifying relatives. 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 qualifying relatives must be established in the event that they reside in Panama or in the event that they reside in the United States, as they are 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 the applicant states that her two parents reside in the United States, however the record does not establish her parents' status as lawful permanent residents. The applicant is applying for a waiver based solely on the hardship experienced by her U.S. citizen spouse.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides in Panama. The applicant's spouse states in a letter dated April 22, 2005 that he cannot relocate to Panama and reside with the applicant because he must stay in New York and care for his mother who is suffering from Alzheimer's disease and requires 24-hour care. The applicant's spouse states that he is his mother's only child and although she has a 24-hour caregiver, he is responsible for preparing and administering her medications. The applicant's spouse states that he could not relocate his mother to Panama because he would not want to remove her from the superior care she is receiving for her disease in New York City. The applicant's spouse submitted medical records for his mother to support his assertions. The AAO finds that because the applicant's spouse is the only child of his ailing mother and is responsible for many of her everyday needs, it would be extreme hardship for him to relocate to Panama and be separated from his mother.

However, the applicant has not established that her spouse would suffer extreme hardship if he remained in the United States, separated from the applicant. The applicant's spouse states that if the applicant is refused entry into the United States it would cause an unthinkable emotional, psychological, and financial crisis for him. *Spouse's Affidavit*, dated July 19, 2004. He states in his letter that with the worsening of his mother's illness, his responsibilities towards her have increased and that these increased responsibilities coupled with the absence of his wife is causing him greater psychological stress. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, the applicant's spouse has not established that his situation rises to the level of extreme hardship. He has not submitted any evidence to establish the extent of his emotionally suffering nor has he shown how the applicant's presence in the United States would relieve this emotional suffering. Furthermore, the applicant's spouse states that since his

marriage to the applicant in 2003 he has traveled many times to Panama to visit the applicant. Therefore, a thorough review of the entire record does not reflect that continued 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.

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