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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services



H3

FILE:



Office: ATHENS

Date:

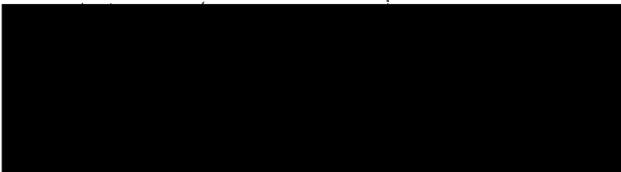
OCT 23 2006

IN RE:



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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Officer in Charge, Athens, Greece (OIC), denied the waiver application, and a subsequent appeal was rejected by the Administrative Appeals Office (AAO). The AAO will *sua sponte* reopen the matter. The decision of the OIC will be affirmed and the application will be denied.

On May 16, 2006, the AAO rejected the applicant's as untimely filed. The AAO finds that Citizenship and Immigration Services (CIS) did not provide counsel with the direct address of the office to which the appeal needed to be filed which resulted in the untimely receipt of the applicant's appeal. The AAO is therefore reopening the case *sua sponte*.

The applicant is a native and citizen of Syria who was found to be inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(I) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and 1182(a)(9)(B)(v), for having been convicted of a crime involving moral turpitude and for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is the spouse and father of U.S. citizens. He seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and children.

The acting officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Officer in Charge*, dated November 4, 2004.

On April 19, 1992, the applicant was admitted to the United States as a B-2 nonimmigrant with authorization to remain in the United States until October 19, 1992. The applicant remained in the United States after his authorized stay expired and took up unauthorized residence and employment in the United States. On October 22, 1993, immigration officers apprehended the applicant and placed him into immigration proceedings. On December 17, 1993, the applicant married his U.S. citizen wife, [REDACTED] (Ms. [REDACTED]). On January 11, 1994, Ms. [REDACTED] filed a Petition for Alien Relative (Form I-130) which was approved on March 31, 1994. On April 15, 1994, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) with the immigration court, based on the approved Form I-130.

The record reflects that, during immigration proceedings, the applicant admitted that, even though he had never been convicted of charges against him for larceny by check, larceny of property, forgery and using a false motor vehicle document, he had knowingly written bad checks on an account in which he knew there were insufficient funds to cover the checks written by him and that he had paid between \$20,000 and \$30,000 in restitution to the victims. As such, the immigration judge found that the applicant had admitted to committing acts which constitute the essential elements of a crime involving moral turpitude and found him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. On February 22, 1995, the immigration judge denied the Form I-485 and the application for voluntary departure, and ordered the applicant removed from the United States. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On October 28, 1998, the BIA dismissed the applicant's appeal. The applicant appealed to the U.S. District Court. On May 12, 2000, the U.S. District Court dismissed the applicant's appeal. The applicant appealed to the First Circuit Court of Appeals (the First Circuit). On April 5, 2002, the First Circuit dismissed

the applicant's appeal. On July 5, 2002, the applicant was removed from the United States and returned to Syria, where he has since resided.

The applicant then filed a motion to reopen with the BIA which was granted on July 30, 2002. On July 7, 2003, the BIA vacated the motion to reopen for lack of jurisdiction.

On March 16, 2004, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel contends that the acting officer in charge did not give sufficient consideration to the hardship in the applicant's case, did not give sufficient consideration to the applicant's outstanding equities, incorrectly applied legal standards for determining rehabilitation and made a factual error. *See Applicant's Brief* dated December 2, 2004. In support of the appeal, counsel submitted the above-referenced brief, copies of medical documentation for family members, copies of tax records, copies of travel documents, an affidavit from counsel and an affidavit from the applicant's spouse. The entire record was reviewed and considered in rendering a decision in this case.

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

- (1) Criminal and related grounds. —
  - (A) Conviction of certain crimes. —
    - (i) In general. — Except as provided in clause (ii), any 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

Waiver of subsection (a)(2)(A)(i)(I) . . .

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I). . . 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 . . .

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 acting officer in charge based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's admission to committing acts which constitute the essential elements of a crime involving moral turpitude. Counsel does not contest the acting officer in charge's determination of inadmissibility. The acting officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(v) of the Act on the applicant's admission to overstaying his authorized nonimmigrant stay in the United States. Counsel does not indicate whether he contests the acting officer in charge's determination of inadmissibility under this section of the Act.

The record reflects that the applicant remained in the United States after his nonimmigrant status expired on October 19, 1992 and he was placed into proceedings prior to filing the Form I-485. 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.* However, an application for adjustment of status that is filed after the applicant has been served with a notice to appear for removal proceedings is not deemed to be an authorized period of stay for purposes of determining inadmissibility pursuant to section 212(a)(9)(B)(i) of the Act. *See Id.* As such, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until July 5, 2002, the date on which he departed the United States.

Counsel contends the applicant should be granted a waiver of his grounds of inadmissibility because he is rehabilitated and the acting officer in charge incorrectly found that the applicant could only show rehabilitation after his departure from the United States. An applicant for a waiver pursuant to section 212(h) of the Act may show rehabilitation from the date on which the applicant committed the acts constituting the essential elements of a crime involving moral turpitude and need not wait until he has departed the United States to be able to show rehabilitation. The crime involving moral turpitude for which the applicant was found inadmissible last occurred in 1995, less than 15 years prior to the applicant's application for an immigrant visa or the date of this decision. Therefore, the AAO finds the applicant is statutorily ineligible to apply for a waiver under section 212(h)(1)(A) since he does not meet the requirement that the activities for which he is inadmissible occurred more than 15 years prior to his application for an immigrant visa.

While a section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, child or parent of the applicant, a section 212(a)(9)(B)(v) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien himself is not a permissible consideration under either a section 212(h) or 212(a)(9)(B)(v) waiver of the Act. It is noted that Congress specifically did not include hardship to an alien's children as a factor to be considered in assessing section 212(a)(9)(B)(v) extreme hardship. Therefore, hardship to the applicant's children will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 at 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier

of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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 record reflects that the applicant and Ms. [REDACTED] have a ten-year old son and an eight-year old daughter, who are both U.S. citizens by birth. The record reflects further that the applicant and Ms. [REDACTED] are in their 40's and Ms. [REDACTED] and both the children have had some health concerns.

Counsel contends that a factual error occurred in the issuance of an approval of an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) the applicant filed because counsel inadvertently listed an incorrect A# for the applicant on the application and the approval was issued in the incorrect A#. Counsel contends that, even though the approval was issued under the incorrect A#, the application was approved after a full review of the relevant record and, since the Form I-212 requires a showing of hardship, the Form I-601 should be approved because the applicant had to show that extreme hardship would result if he were not granted permission to reapply for admission. The AAO finds that, in filing a limited record with the Form I-212 and listing an incorrect A# on the application, approval of the Form I-212 was not necessarily based on a full review of the relevant record. Whether a rescission of the Form I-212 or issuance of an approval with the correct A# is not the matter that is currently before the AAO. However, counsel's assertion that the Form I-601 should be approved because the Form I-212 was approved does have bearing on the matter currently before the AAO. The AAO finds that counsel's assertions are unpersuasive. Applications for permission to reapply for admission do not require a similar standard as applications for waivers pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act. Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens 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 who 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 on a 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 contiguous territory, the

Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

An applicant for permission to reapply for admission must show that the favorable factors in his case outweigh the negative factors in his case. There is no requirement, unlike an application for a waiver pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, that an applicant establish that a qualifying relative would suffer extreme hardship.

Counsel contends that the applicant's spouse would suffer extreme hardship if the applicant were denied admission to the United States because she has two U.S. citizen children, her standard of living is reduced, and she suffers emotional and financial hardships without the applicant's income and support. Ms. [REDACTED] in her affidavits, states that she is not working, she lives on a negative income, reducing the families savings, and needs the applicant as her sole provider so that she can care for the children. She further states that she is physically and emotionally tired of being a single mother and having to care for her children alone while she suffers from bouts of illness, such as pneumonia and a ligament and nerve problem in her foot, the children suffer with ailments, such as otitis media-related hearing loss, and her father suffered two heart attacks which were brought on by her husband's immigration situation. Ms. [REDACTED] states that she was unable to carry her son when he sprained his ankle because she has a slight case of scoliosis and she needed the applicant's support in such a situation.

The record indicates that Ms. [REDACTED] was employed as an account officer with the U.S. Trust Bank from 1988 until at least 1995. There is no evidence in the record to suggest that Ms. [REDACTED] would be unable to earn sufficient income to support herself and the applicant's children should she choose to resume employment. As discussed below, there is no evidence in the record to suggest that Ms. [REDACTED] is unable to resume employment due to a physical or mental illness. While it is unfortunate that Ms. [REDACTED] has essentially become a single parent and professional childcare may be an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. The record does not support a finding of financial loss that would result in an extreme hardship to Ms. [REDACTED] if she had to support herself and her children without additional income from the applicant, even when combined with the emotional hardship described below.

There is no evidence, besides Ms. [REDACTED] affidavits, confirming that her father has suffered a heart attack, that it was related to her husband's immigration situation or what his prognosis is. Medical documentation establishes that the applicant was seen as an outpatient in 2003. However, there is no evidence to confirm that the applicant has been diagnosed with slight scoliosis or any other physical or mental illness that would prevent her from performing job duties, daily activities or the activities involved in caring for her children. Medical documentation establishes that the applicant's son has been seen by his family physician for regular medical visits and on one occasion for a muscle strain. However, there is no evidence to confirm that the applicant's son has been diagnosed with a physical or mental illness that would cause Ms. [REDACTED] hardship that is beyond those commonly suffered by aliens and families upon deportation. Medical documentation in the record establishes that the applicant's daughter was diagnosed with otitis media-related hearing loss which was scheduled for correction through surgery in January 2005. Otitis media is a middle ear infection that is common among children, as is the surgery which the applicant's daughter's doctor recommended and scheduled her for. *National Institute of Health, Otitis Media (Middle Ear Infection)*

www.nidcd.nih.gov/health/hearing/otitism.asp. The medical documentation does not indicate the applicant's daughter's prognosis after surgery, whether hearing loss is permanent, and does not indicate that the applicant's daughter requires assistance from the applicant or any other person to function on a daily basis. While it is unfortunate that Ms. [REDACTED] has essentially become a single parent and her children are essentially being raised in a single-parent household and are separated from their father, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Additionally, according to the record, Ms. [REDACTED] has family members in the United States, such as her parents, who may support her emotionally, physically and financially in the absence of the applicant.

Counsel contends that the applicant's children would suffer even more hardship if they were to return to Syria with the applicant and Ms. [REDACTED]. However, in her affidavits, Ms. [REDACTED] does not indicate that she would return to Syria with the applicant or that she or the children would suffer hardship if they returned to Syria with the applicant. The statements of counsel as to matters of which they have no personal knowledge are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 3042 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 2820 (BIA 1980). The AAO is, therefore, unable to find that Ms. Rekkbie would experience hardship should she choose to join the applicant in Syria. Additionally, the AAO notes that, even if counsel had established Ms. [REDACTED] would suffer extreme hardship by accompanying the applicant to Syria, 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 and, as discussed above, Ms. [REDACTED] would not experience extreme hardship if she remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that Ms. [REDACTED] will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in sections 212(h) and 212(a)(9)(B)(v) of the Act, be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver pursuant to section 212(h) of the Act, in which hardship to the applicant's children is utilized in determining whether an applicant has shown extreme hardship to a qualifying family member, or as a matter of discretion. However, the AAO does note that counsel's arguments in regard to the applicant's outstanding equities would be factors in deciding whether the applicant merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decision of the OIC is affirmed.

**ORDER:** The prior decision is affirmed and the application is denied.