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U.S. Citizenship
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#3

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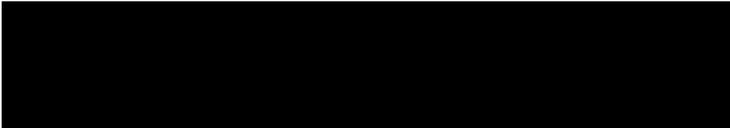
Date: JUL 03 2007

IN RE:



APPLICATION: 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)

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 Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Colombia 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 his last departure from the United States. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his wife and two United States citizen children.

The Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Director*, dated July 6, 2006.

On appeal, the applicant, through counsel, claims the applicant's wife will suffer extreme hardship if the applicant is removed from the United States. *See Motion to Reopen/Reconsider, attached to Form I-290B*, filed August 4, 2006.

The record includes, but is not limited to, counsel's statement, affidavits from the applicant's wife and the applicant, birth certificates for the applicant's United States citizen children, and a letter from Columbia Presbyterian Medical Center regarding the applicant's wife's medical condition. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 AAO notes that the record contains several references to the hardship that the applicant's United States citizen children would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(v) of the Act provides that a waiver, under section 212(a)(9)(B)(i)(II) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Congress specifically does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's children will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that the applicant entered the United States on a B2 nonimmigrant visa on April 8, 1995, with authorization to remain in the United States until October 7, 1995. On August 4, 1995 and May 21, 1997, the applicant's two children were born in New York. On June 25, 2002, the applicant married [REDACTED] a United States citizen, in New York. On September 16, 2002, the applicant's wife filed a Form I-130 on behalf of the applicant. On the same date, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On September 26, 2003, December 25, 2003, and April 2, 2004, the applicant departed the United States pursuant to an advance parole. On March 9, 2005, the applicant filed a Form I-601. On April 20, 2006, the Form I-130 was approved. On May 22, 2006, the Director found the Form I-485 abandoned. On June 12, 2006, the Director reopened the Form I-485. On July 6, 2006, the Director denied the Form I-485 and Form I-601, finding the applicant accrued more than a year of unlawful presence and he failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under IIRIRA, until September 18, 2002, the date the applicant filed his Form I-485. The applicant is attempting to seek admission into the United States within 10 years of his April 2, 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.

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 citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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.

Counsel asserts that the applicant's spouse would face extreme hardship if the applicant's waiver is denied. *Motion to Reopen/Reconsider, attached to Form I-290B, supra*. Counsel states that due to the applicant's wife's medical condition, she "does not work and she relying [sic] on her husband to support her." *Id.* A letter from Columbia Presbyterian Medical Center states that the applicant's wife "has a small ventricular septal defect." *Letter from Columbia Presbyterian Medical Center, signature illegible, dated July 24, 2006*. The applicant's wife states she has been suffering from this condition since 2004 and it causes her "chest pain, breathing with exertion and fainting...[her] medical condition rendered [her] almost disable [sic] to work." *Affidavit from [REDACTED], dated July 31, 2006*. The AAO finds that it has been established that the applicant's wife has a ventricular septal defect; however, it has not been established that the applicant's wife could not obtain employment because of her health condition. A medical report submitted by the applicant simply states that the applicant's wife "must avoid heavy exercise and stressful situations," but there is no reference to the applicant's wife being disabled. *Medical report, page 2, dated February 27, 2004*. The AAO notes that there was no documentation submitted establishing that the applicant's wife could not receive treatment for her health condition in Colombia. Further, her doctor did not claim that she had to remain in the United States to receive treatment. The applicant's wife states she is suffering from major depression and anxiety. *Affidavit from [REDACTED] supra*. The AAO notes that there are no professional evaluations for the AAO to review to determine what personal issues are affecting the applicant's wife's emotional and psychological wellbeing. The applicant's wife states that the applicant "is a devoted father," who provides economic assistance to his children, and she helps him in raising them; however, "if [the applicant] was to be deported [she] will be able to do it on [her] own." *Affidavit from [REDACTED], dated March 7, 2005*. The applicant states he is "the sole provider for [his] two children [and] if [he] was deported [his] children and [his] wife would not only suffer financially, but emotionally as well." *Affidavit from the applicant, dated March 7, 2005*. As noted above, the applicant's United States citizen children are not qualifying relatives for a waiver under section 212(a)(9)(B) of the Act. The AAO finds that the applicant failed to establish that his wife would suffer extreme hardship if she accompanied her husband in Colombia.

In addition, counsel does not establish extreme hardship to the applicant's spouse if she remains in the United States. As a United States 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. The AAO notes that no documentation was submitted indicating that the applicant's wife could not obtain employment in the United States. Further, the record fails to demonstrate that the applicant will be unable to contribute to his family's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang, 450 U.S. 139 (1981)*. The applicant's wife faces the decision of whether to remain in the United States or relocate to avoid separation. However, this is a factor that every case will present, and the BIA has held, "election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *Matter of Mansour, 11 I&N Dec. 306, 307 (BIA 1965)*.

United States 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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. In *Hassan, supra*, the Ninth Circuit Court of Appeals 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 he 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.