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U.S. Citizenship
and Immigration
Services

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H3

FILE:

Office: MEXICO CITY (SANTO DOMINGO)
relates)

Date: **MAY 22 2008**

IN RE:

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

ON BEHALF OF PETITIONER:

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 District Director, Mexico City, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The waiver application will be denied.

The applicant, a citizen of the Dominican Republic, was found inadmissible to the United States under section 212(a)(9)(B)(i)(II) of 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. 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). The applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant, therefore, also seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, the applicant's husband, a United States citizen, contends that he would suffer extreme hardship if the applicant is required to remain in the Dominican Republic. The entire record was reviewed and considered in rendering 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.

Section 212(a)(6)(C) of the Act states, in pertinent part, the following:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states, in pertinent part, the following:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO will first address the District Director's determination that the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). As noted previously, the record establishes that the applicant entered the United States without authorization on October 30, 1995.¹ She filed Form I-485, Application to Register Permanent Residence or Adjust Status, on November 22, 1996.² That application was denied on October 8, 1999. The applicant, however, did not depart the United States. She filed another Form I-485 on September 27, 2000. Therefore, the applicant accrued unlawful presence from October 8, 1999 through September 27, 2000, a period of more than 180 days, but less than one year.

As the applicant accrued more than 180 days, but less than one year, of unlawful presence in the United States, the District Director erred in finding the applicant inadmissible to the United States under section

¹ The applicant was apprehended after her entry, and detained after her apprehension. The Immigration Judge granted the applicant voluntary departure on November 7, 1995; she was to depart the United States on or before February 7, 1996. On November 20, 1995, she was released from detention after being granted a \$1,500 bond, to be released upon her departure from the United States. However, the applicant did not depart the United States by February 7, 1996. Accordingly, the bond was canceled on December 23, 1999, and a warrant for the applicant's removal was issued on April 24, 2000. The legacy Immigration and Naturalization Service sent a letter to the applicant's address of record on December 14, 2001, informing her that she was to appear for removal from the United States on January 25, 2002. The applicant did not appear. Upon returning from a trip abroad, the applicant was detained at John F. Kennedy International Airport on April 17, 2004. She was removed from the United States on April 20, 2004.

² 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 sections 212(a)(9)(B)(i)(I) and (II) of the Act. See Memorandum from Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, *Unlawful Presence*, HXADN 70/21.1.24-P (June 12, 2002).

212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). Rather, he should have analyzed the applicant's inadmissibility under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I). It was the three-year, and not the ten-year, ban on admission that was triggered.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment from her parole status. The applicant's last departure occurred in 2004. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

The AAO turns next to the District Director's findings regarding the applicant's ground of inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Specifically, the AAO notes that the applicant stated, on both of the Forms I-485, that she had never been deported or removed from the United States. The applicant, therefore, is inadmissible to the United States for making a willful misrepresentation of a material fact in order to gain a benefit (permanent residency in the United States) provided under the Act.

Thus, the first issue to be addressed is whether the applicant's inadmissibility would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion.

A waiver of the bar to admission under section 212(i) of the Act resulting from a violation of section 212(a)(6)(C) 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. Extreme hardship to the applicant herself is not a permissible consideration under the statute. In the present case, the applicant's husband is the only qualifying relative, and any hardship to the applicant cannot be considered, except as it may affect the applicant's husband. 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 applicant is required to demonstrate that her husband would face extreme hardship in the event the waiver application is denied, regardless of whether he joins her in the Dominican Republic or remains in New York without her.

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 *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. The United States Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981),

that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

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, 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 pursuant to section 212(i) of the Act. 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 held in *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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.

The record reflects that the applicant’s husband is a fifty-three-year-old citizen of the United States. He has been a citizen of the United States since 1998. He and the applicant have been married since August 9, 2000.

In his January 25, 2007 affidavit in support of the waiver application, the applicant’s husband states that he was missing a true companion before he met the applicant; that the applicant’s absence from the United States is causing financial hardship, as her income was crucial in allowing the couple to live the lifestyle to which they are accustomed; that he has depleted their savings since the applicant’s removal, as he has had to send her money, as she cannot find work in the Dominican Republic; that he lives paycheck to paycheck; that he works long hours, and the applicant was the one to take care of the house and prepare meals; that the applicant is a hard worker; that he and the applicant would like to have a child together; that the thought he might not be able to have a child with the applicant is causing severe stress and emotional hardship; that he has suffered chronic migraine headaches for fifteen years, which sometimes paralyze him completely; that the applicant called emergency medical services to have him taken to the emergency room during one of his headache crises; that, without the applicant, he could one day die during a headache crisis; that traveling back and forth to the Dominican Republic to visit the applicant has been a financial and emotional burden; that his performance at work has been affected; that he does not think he can survive such a regiment; and that the applicant’s absence from his life is ruining his efforts to make a better life for his family in the United States, and will be the end of his American Dream.

The record also contains an undated letter from [REDACTED], M.D. Dr. [REDACTED] states that the applicant's husband has been under her care for the management of migraine headaches and hyperlipidemia³ since 2002. She states that the applicant's deportation has created extreme hardship and stress that has affected the applicant's husband's health: he has had more frequent migraines, requiring medication, a neurology evaluation, and an MRI of the brain. She also states that the applicant's husband suffered from abdominal pain due to nephrolithiasis,⁴ which was seen in a September 2006 CT scan of the abdomen. Dr. [REDACTED] asks that CIS consider the physical and emotional anguish of the applicant's husband in adjudicating the waiver application.

In her January 22, 2007 letter, the applicant's sister-in-law expresses her great affection for the applicant, speaks to her good moral character, and states that her absence from the applicant's husband's life has affected him terribly. The applicant's other sister-in-law expresses similar sentiment in her January 22, 2007 letter.

The record also contains several letters that speak the good moral character of both the applicant and her husband.

On appeal, counsel makes no arguments, assertions, or representations in support of the applicant's waiver application, but provides the above-mentioned documents.

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *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); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

As noted previously, the applicant is required to demonstrate that her husband would face extreme hardship in the event the waiver application is denied, regardless of whether he joins her in the Dominican Republic or

³ According to the website of the American Heart Association, hyperlipidemia "is an elevation of lipids (fats) in the bloodstream. These lipids include cholesterol, cholesterol esters (compounds), phospholipids and triglycerides. They're transported in the blood as part of large molecules called lipoproteins." See <http://www.americanheart.org/presenter.jhtml?identifier=4600> (accessed May 14, 2008).

⁴ According to the website of the Cleveland Clinic Center for Continuing Education, nephrolithiasis (kidney stones) is caused by the formation of crystal aggregates in the urinary tract. See <http://www.clevelandclinicmeded.com/medicalpubs/diseasemanagement/nephrology/nephrolithiasis/nephrolithiasis.htm> (accessed May 14, 2008).

remains in New York without her. In limiting the availability of the waiver to cases of “extreme hardship,” Congress provided that a waiver is not available in every case where a qualifying family relationship exists.

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 husband will face extreme hardship if the applicant remains in the Dominican Republic without him. The record does not establish that she faces greater hardships than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is refused admission into the United States. The AAO notes the presence of three medical concerns in this case—hyperlipidemia, nephrolithiasis, and migraines. The applicant has not demonstrated that these conditions are causing her husband extreme hardship, nor has she indicated why her presence in the United States would alleviate her husband’s suffering. Nor does the record indicate that either these conditions require any type of ongoing treatment or attention, or that they are adversely affecting his ability to manage his daily affairs in any way. That her husband suffers from either of these conditions does not warrant approval of the waiver application.

As for the applicant’s husband’s migraine headaches, the AAO notes the applicant’s husband assertion that he has been suffering from them for fifteen years. However, the applicant has again failed to indicate how her presence in the United States would alleviate her husband’s suffering. The record does not indicate that the migraine headaches were serious enough to warrant medication before June 2005, more than a year after she was removed.⁵ It does not explain how the applicant’s husband was able to manage his condition before the marriage. While the applicant’s husband and his doctor explain that the migraine headaches have become much more severe since the applicant departed the United States, they have not detailed the frequency of the migraines nor indicated how they were affecting the applicant’s husband’s life. The record contains one note indicating he was seen for migraine headaches on June 11, 2005 and could return to work on June 13, 2005. There is no further indication of how the migraines were affecting his life or ability to work.

Although CIS is not insensitive to his situation, the financial strain of visiting the applicant in the Dominican Republic, the stress associated with maintaining two separate households, and the emotional and financial hardship of separation are common results of separation and do not rise to the level of “extreme” as contemplated by statute and case law. The applicant has failed to demonstrate that her husband would experience hardship if he remains in the United States without her.

Nor has the applicant established that her husband would face extreme hardship if he joined her in the Dominican Republic: again, the record fails to demonstrate that he would face hardship beyond that normally faced by others in his situation. Diminished standards of living, separation from family, and cultural adjustment are to be expected in such a situation. No evidence was submitted, or any claims made, to establish that he would experience financial or emotional hardship that would rise to the level of “extreme” as contemplated by statute and case law in such a situation. Nor has the applicant established that her husband’s medical conditions could not be treated in the Dominican Republic. Moreover, the AAO notes

⁵ The AAO also notes that there is no documentation in the file to support the applicant’s husband’s assertion that his migraine headaches resulted in an emergency room visit. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

that the applicant's husband is a former national of the Dominican Republic, which would diminish the severity of his cultural readjustment vis-à-vis others in his situation.

In nearly every qualifying relationship, there is a deep level of affection and a certain amount of emotional and social interdependence. While the prospect of separation 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 INA § 212(i), be above and beyond the normal, expected hardship involved in such cases. In adjudicating this appeal, the AAO finds that the record fails to demonstrate that the applicant's husband would suffer hardship beyond that normally expected upon separation from a spouse.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to demonstrate that her United States citizen husband would suffer hardship that is unusual or beyond that normally expected upon the inadmissibility of a spouse. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

Finally, the AAO notes that the applicant's husband has requested oral argument. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, the record identifies no unique factors or issues of law to be resolved. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden.

ORDER: The appeal is dismissed. The waiver application is denied.