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U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy

H3

[Redacted]

FILE:

[Redacted]

Office: PHOENIX, AZ

Date: FEB 24 2009

IN RE:

[Redacted]

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:

[Redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona. 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 the United Kingdom 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 ten years of her last departure from the United States. The applicant is married to a U.S. citizen and has two U.S. citizen daughters. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The district director found that the applicant failed to establish that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated August 22, 2006.

On appeal, counsel states that the applicant is eligible for a 245(i) adjustment according to the findings of *Acosta v. Gonzales*. Counsel also states that she is submitting additional evidence provided by a medical doctor, substantiating the hardship claim by her U.S. citizen spouse concerning his mental instability. *Form I-290B*, undated.

In the present application, the record indicates that the applicant entered the United States on an H1-B visa on January 20, 1997 with an authorized stay until February 1, 1999. On April 14, 2000 the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On July 13, 2000, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart the United States on August 7, 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.* Thus, the applicant accrued unlawful presence from February 1, 1999, the date her authorized stay expired, until April 14, 2000, the date of her proper filing of the Form I-485. In applying for an immigrant visa, the applicant is seeking admission within ten years of her August 7, 2000 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.

Furthermore, the AAO notes that applying for adjustment of status under Section 245(i) of the Act does not excuse or provide an exception for being subject to the unlawful presence provisions under section 212(a)(9)(B) of the Act. Counsel asserts that according to the Ninth Circuit Court of Appeals in *Acosta v. Gonzales* and in *Perez-Gonzales v. Ashcroft*, 379 F. 3d 783 (9th Cir. 2004) and the Tenth Circuit Court of Appeals in *Padilla-Caldera v. Gonzales*, 426 F. 3d 1294 (10th Circ. 2005), section 245(i) of the Act provides for applicants who have re-entered the United States after accruing a year of unlawful presence to apply for adjustment of status by paying a \$1,000 fee. *Counsel's Letter*,

dated September 18, 2006. The applicants' inadmissibility in the three cases cited above were based on section 212(a)(9)(C) of the Act and involve the eligibility for the applicants to apply for permission to reapply for admission. This section of the law is not applicable to the applicant's situation as the applicant is inadmissible under section 212(a)(9)(B) of the Act and not section 212(a)(9)(C) of the Act.

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 and/or parent of the applicant. Hardship experienced by the applicant or her children due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse.

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 applicant 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.

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 AAO notes that extreme hardship to the applicant's spouse must be established both in the event that he resides in the United Kingdom 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 record of hardship includes a letter from counsel and a psychiatric evaluation for the applicant's spouse. Counsel states that the applicant's spouse suffered from severe depression while living in England due to climate conditions and that being separated from his spouse or having to return to the English climate will trigger his depression, "nudging him further towards an irrevocable mentally depressed condition." *Counsel's Letter*, dated September 18, 2006. The record also contains a psychiatric evaluation from [REDACTED]. Dr. [REDACTED] states that the applicant's spouse is determined to stay with his wife and children, but fears a recurrence of an old illness as a result of having lived in England and having to return there. *Letter from [REDACTED]* dated September 15, 2006. [REDACTED] states that the applicant's spouse provides an extensive history of mental health problems currently associated with stress and another more serious disorder while he lived in England. [REDACTED] states that the applicant's spouse believes that he will suffer a recurrence of his prior mental health problem if he returns to the English climate. The applicant's spouse stated that if he relocates to England he is certain he will suffer severe depression and likely become suicidal. [REDACTED] states that the applicant's spouse described years of recurring depression in England related to the constant cloudy, rainy weather and a sudden complete absence of this depression when he moved to Arizona and a sunny climate. [REDACTED] states that what the applicant's spouse describes is consistent with Seasonal Affective Disorder, where constant lack of sunlight results in bouts of severe and chronic depression. [REDACTED] states that untreated this disorder can result in suicidal ideations and/or actual suicide. The treatment, he states, primarily consists of exposure to the form of ultraviolet light provided by the sun and patients are often advised to live in sunny climates to reduce the risk of reoccurrence. Finally, [REDACTED] states that the applicant's spouse's current mental state is one of moderately severe anxiety and gradually increasing depression as a result of the depletion of energy caused by abnormal levels of anxiety in association with his fear of what might happen to him and his family. *Id.*

In addition to the documentation submitted on appeal, the applicant submitted documentation of hardship with his initial waiver application. This documentation included: a brief from counsel; a clinical assessment by [REDACTED]; an affidavit from the applicant; an affidavit from the applicant's spouse; letters from the applicant's employer and other community members; and financial documents. Counsel states that the applicant is the primary caretaker for her children and that she emotionally and psychologically supports the children. *Counsel's Brief*, undated. Counsel states that it would be a hardship for the applicant's spouse to have to choose between separating his family and relocating his children to England where they will not be provided the same welfare and educational benefits as they would in the United States. *Id.* In her clinical assessment, [REDACTED] states that the applicant's spouse and children will face economic and psychological problems as a result of the applicant's inadmissibility. *Clinical Assessment*, dated June 1, 2003.

The AAO notes that the record lacks sufficient documentation to establish extreme hardship to the applicant's spouse as a result of the applicant's inadmissibility. The applicant's spouse's extreme hardship claim is primarily based on his past mental health problems in England. However, the record contains no documentation of the applicant's spouse's mental health history in England. In addition, the record does not establish that the applicant's spouse would not be able to receive treatment for a mental health illness in England. Furthermore, without documentation of the applicant's spouse's previous mental health records from England, the AAO cannot conclude that because of this mental health history he would be vulnerable to a relapse if separated from the applicant.

Furthermore, the evidence of hardship submitted with the initial waiver application includes no mention of the applicant's spouse suffering severe depression while living in England. The documentation submitted with the waiver application does not show that the applicant's spouse would suffer hardship as a result of the applicant's inadmissibility. The assertions regarding welfare and education in England as opposed to the United States are not substantiated by the record nor are any claims of economic hardship upon relocation. The clinical assessment submitted by [REDACTED] bears little weight on the record of hardship because [REDACTED] met with the applicant and his family only once. The assessment does not reflect the insight and elaboration commensurate with an established relationship with a mental health professional.

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.