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U.S. Citizenship
and Immigration
Services

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FILE:

Office: ATHENS, GREECE

Date: JAN 07 2009

IN RE:

Applicant:

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Athens, Greece, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], is a native and citizen of Israel 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. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the OIC denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the OIC, dated June 29, 2006.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9) 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and ((II) are not counted in the aggregate.¹ For purposes

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record reflects that the applicant entered the United States in November 1998 on a B1/B2 visa and left the country in August 1999, returning to Israel. In November 1999 the applicant returned to the United States and lived here until May 2001, at which time he voluntarily departed from the country. The applicant does not contend the OIC's finding that he was unlawfully present in the United States from May 2000 to May 2001. Given that the applicant accrued more than one year of unlawful presence, when he voluntarily departed from the country he triggered the ten-year-bar. Consequently, the OIC was correct in finding him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is [REDACTED], the applicant's U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez*, extreme hardship to the applicant’s wife must be established in the event that she joins the applicant; and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Courts in the United States have stated that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted).

On appeal, counsel states that the OIC’s decision was unduly harsh, especially because the abnormal EKG of the applicant’s 25-year-old wife indicates the severity of her hardship. She states that the situation in Israel has become even more dangerous and tense, adding to the problems of the applicant’s wife and her concern about the endangerment of her children. She states that the U.S. Department of State has issued travel warnings in the region. Counsel states that the applicant’s wife’s condition has deteriorated, that she is under constant medical supervision and has frequent chest pains, that she is unable to properly care for her U.S. citizen children, and is now on medication for her psychological problems.

The record contains the following documentation in support of the waiver application:

- A medical record indicating that the applicant's wife had arthralgia since the birth of her daughter over one year ago. It states that during the last few weeks she has had constant central chest pain, but does not convey that her EKG is abnormal.
- A psychiatric evaluation of the applicant's wife by [REDACTED], conveys that the applicant's wife was examined in his clinic on August 7, 2006, and that he reviewed her psychological report, which was signed by [REDACTED], and other medical documents. He states that the applicant's 25-year-old wife has three children, ages one, two, and three years old. He states that about five years ago the applicant's wife immigrated to Israel and a year later married the applicant. [REDACTED] states that soon after her arrival to Israel in 2001, the applicant's wife began feeling "emotional distress: situations of fear, extreme hardship, and homesickness, strong feelings of missing her parents and family, difficulty getting used to the way of life in Israel, sleep difficulties and a general depressed demeanor. Gradually her weight rose significantly." He states that in the same year, in Jerusalem, where the applicant's wife lives, there were a number of terror attacks that agitated and worsened her mental situation, causing her to minimize her activities, and that physical ailments began to bother her and she made visits to doctors. He indicates that the applicant's wife raises the children while her husband works outside the house, that the applicant's wife's connection with her in-laws is formal and they do not support and help her, and that she misses the family environment she was used to in the United States. [REDACTED] conveys that for about a year the applicant's wife's mental state has gotten worse, possibly from the birth of her youngest child, and has influenced the progression of the symptoms of chest pain, rapid pulse, low moods, internal disquiet, difficult sleeping, and body pains for which no pathological findings exist. He states that the applicant's wife was hospitalized for two days to evaluate her situation, but no medical diagnosis was found and her weight went up by approximately 40 kilograms. [REDACTED] states that the applicant's wife left her family when she wasn't mature to do so and immigrated to Israel, a foreign country. He states that she has had severe difficulties assimilating to Israel's culture and lifestyle, and living with its terror activity and daily insecurity. He states that she is in a state of extreme and unusual hardship and does not have the mental and emotional strength to deal with her issues without the support of her biological parents. The diagnosis by [REDACTED] is that the applicant's wife has anxiety and severe depression and he recommends emotional treatment, medication and talking therapy, the immediate return to the United States to be with her family there, and psychiatric observation by a treatment team in the United States.
- In her undated letter, the applicant's wife states that she finds it difficult raising her children on her own without her family's help and she indicates that her husband's parents are not available to help her and his siblings are raising their own children. She states that her husband recently closed his business, a mini-market, due to financial problems and she indicates they now have financial burdens. She states that many times she feels like having a nervous breakdown and that she has gone to a hospital's emergency room on account of chest pains, which the doctors attributed to mental and emotional stress. She states that stress has stopped her from functioning normally as a mother and a wife and she conveys that in

New York she would have her family's help so she would be able to start taking care of herself. She states that they live near her husband's parent's house and that living conditions are bad as they have a small apartment. She states that her husband is barely working and they have no income; she cannot work because she cares for the children. She conveys that her husband has several job offers in the United States.

- In her July 24, 2005 letter, the applicant's wife states that she lived in the United States until she was 21 years old. She states that she spent nine months in Israel in 2001, when she was 20 years old, and decided to move to Israel because she was very happy there. She states that she returned to the United States and met her husband here; they decided to marry in Israel and relocate there, which she did in June 2002, giving birth to her first child in February 2003 and her second in February 2004. She states that after her second birth she began to experience the anxiety that she feels today, making her feel reliant on her husband as her sole source of support and helping in the care of their children. She conveys that the political situation in Israel worsened and she began to fear for her and her children's safety on a daily basis. She states that she then became pregnant with her third child, and concluded that she had to return to the United States. She states that she cannot travel to the United States to visit her family because she has three small children. The applicant's wife indicates that the pressure of raising her children in a foreign country, trying to make ends meet, and worrying about her family's safety have put her in a stressful situation and the effect is her weight gain, her visit to a psychologist, and her hospital visit for chest pains, for which the doctors found no physical cause, although one doctor suggested the pains could be stress induced.
- The letter by [REDACTED], a licensed clinical psychologist, states that the applicant's wife was seen by him on June 21, 2005. He states that the applicant's wife originally came to Israel as a single student with plans of settling in Israel and that after she moved to Israel as a married woman she began to experience adjustment difficulties. He states that the applicant's wife is fearful of the security situation in Israel, as there have been terrorist attacks in the Jerusalem area. He states that she is close to her family in the United States, calling them regularly; and has not been successful in forming relationships with her neighbors; and her in-laws, who live across town and are working people with a different cultural background, which has been an obstacle to their being a source of emotional support to the applicant's wife. He states that the applicant spends long hours at work and that his wife cannot travel to the United States to receive emotional support from her parents. He states that for the mental health of the applicant's wife she is not to be separated from her husband as she is not capable of functioning independently in his absence.
- The Summary of Illness for the hospitalization of the applicant, which is dated July 18, 2005, conveys that she was hospitalized because of stabbing and epigastric discomfort that spread to her chest and the right shoulder and caused feelings of choking. Her lab tests were normal and no pathological findings were made.

The applicant's wife indicates that she has severe stress because of financial burdens, separation from her family in the United States, raising three children without help, adjusting to Israel's culture,

feeling unsafe in Israel, and being unable to travel to the United States to be with her family. Although there is no independent documentation in the record to substantiate the assertion that the applicant no longer has an income or that his wife and children are unsafe in Jerusalem. the AAO finds that the physical symptoms of the applicant's wife as described by [REDACTED] her hospitalization, and the findings that her symptoms are not related to a specific health problem of a physical nature, the evidence here, considered individually and weighed collectively, establishes that the applicant's wife would endure extreme emotional hardship if she were to continue raising her children in Israel.

Further, the record reflects that the applicant's wife has three young children, and that her husband has been the sole financial support of their family while she raises their children. This, in conjunction with [REDACTED]'s recommendation that she not be separated from her husband, establishes that the applicant's wife would experience extreme hardship if she were to live in the United States without her husband.

The record establishes that the applicant's wife would experience extreme hardship if she were to remain in Israel and if she were to live in the United States without her husband. Consequently, the factors raised in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's wife and children and the applicant's history of employment as shown in the Biographic Information. The unfavorable factor in this matter is the applicant's unlawful presence in the United States.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's immigration violation, it finds that the hardship imposed on the applicant's wife and children as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for an application for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.