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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: BUFFALO, NY

Date:

JAN 27 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 or reopen, 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, Buffalo, New York. 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 Ireland 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 for more than one year and seeking readmission within 10 years of her last departure.¹ The applicant seeks a waiver of inadmissibility in order to remain in the United States.

The district director denied the Form I-601 application for a waiver of ground of inadmissibility based on the fact that the applicant's husband died and thus she no longer has a qualifying relative. *Decision of the District Director*, dated September 15, 2006.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) may approve the present application for a waiver under *nunc pro tunc* principles, based on circumstances prior to the death of the applicant's husband. *Brief from Counsel*, dated November 14, 2006. Counsel contends that, when the applicant's husband was alive, he would have suffered extreme hardship if the applicant were compelled to depart the United States. *Id.*

The record contains a brief from counsel; a copy of an airline ticket for the applicant; documentation in connection with the applicant's proceedings in Immigration Court; copies of the applicant's husband's military records; medical documents for the applicant's husband; a copy of the applicant's husband's death certificate; documentation in connection with the applicant's criminal convictions, and; documentation in connection with the applicant's unlawful presence in the United States. 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:

¹ The applicant was previously found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude. Specifically, the applicant was convicted of four separate counts of larceny, from 1981 to 1983. As these convictions occurred over 15 years ago, the applicant was eligible for consideration for a waiver of her inadmissibility due to these crimes under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act does not require an applicant to have a U.S. citizen or permanent resident relative. When weighing an application for a waiver under section 212(h)(1)(A) of the Act, a USCIS adjudicator must assess whether an applicant has been rehabilitated and whether her admission would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A) of the Act. An adjudicator must also balance positive and negative factors to determine whether an applicant warrants a favorable exercise of discretion. Section 212(h) of the Act. In her decision to deny to present application, the district director noted the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, and stated that the applicant's "criminal convictions do not appear to affect admissibility as they occurred more than 15 years ago." *Decision of the District Director* at 4. While the district director did not present a full analysis, the AAO finds her comments sufficient to show that she determined the applicant meets the requirements of section 212(h)(1)(A) of the Act, and found that the applicant warrants a favorable exercise of discretion. The AAO will not disturb this finding, and the applicant does not require a waiver of inadmissibility due to her prior crimes involving moral turpitude.

(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.

In the present matter, the record indicates that the applicant was admitted to the United States on or about December 17, 1987 in C-4 status. She was in the United States without a legal status from approximately 1988 until she departed on or about February 24, 2004.² Thus, the applicant began accruing unlawful presence on April 1, 1997, the date the unlawful presence provisions took effect, until she received an order of Voluntary Departure on October 24, 2003,³ totaling over one year. The applicant now seeks admission to the United States as a permanent resident pursuant to a Form I-485 application to adjust her status to permanent resident. Accordingly, the applicant was deemed

² On October 24, 2003, an Immigration Judge granted the applicant Voluntary Departure until February 21, 2004. Counsel for the applicant claims that the applicant departed prior to February 21, 2004, yet the district director noted that the applicant departed on February 24, 2004. In the present proceeding, the applicant provides a copy of an airline ticket that suggests she flew from Buffalo, New York to Boston, Massachusetts on February 20, 2004, and from Dublin to Boston on March 7, 2004. However, the ticket does not show when the applicant departed the United States for Ireland. Thus, the ticket is not sufficient evidence to show that the applicant departed within the time permitted under the order of Voluntary Departure. As the applicant has not shown that she departed within the permitted period, the record suggests she accrued additional unlawful presence once the Voluntary Departure order expired on February 21, 2004. However, irrespective of whether she accrued unlawful presence after February 21, 2004, the record shows that she accrued over one year of unlawful presence in the United States.

³ As previously noted, the applicant may have accrued additional days of unlawful presence after the order of Voluntary Departure expired, due to her failure to depart the United States within the time permitted by the order.

inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure. The applicant does not contest her inadmissibility on appeal.

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 or parent of the applicant. Hardship the applicant experiences upon being found inadmissible is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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).

As noted above, the applicant's U.S. citizen husband died on November 30, 2005. The applicant has not asserted or shown that she presently has a U.S. citizen or lawful permanent resident spouse or parent. Counsel contends that USCIS may approve the present application for a waiver *nunc pro tunc*, based on circumstances prior to the death of the applicant's husband. *Counsel's Memo on Eligibility to Adjust Status* at 1-3.

Counsel cites the decision of the Ninth Circuit in *Freeman v. Gonzales*, 444 F.3d 1039 (9th Cir. 2006) to support the proposition that "the spouse of a U.S. citizen remains a spouse of a U.S. citizen even after the U.S. citizen's death." *Id.* at 1. However, in waiver proceedings under section 212(a)(9)(B)(v) of the Act, the applicant must show that denial of the waiver application "would result in extreme hardship to the citizen or lawfully resident spouse or parent." Section 212(a)(9)(B)(v) of the Act (emphasis added). The mere fact that an applicant is the spouse of a U.S. citizen is not sufficient to show eligibility for a waiver under section 212(a)(9)(B)(v) of the Act. It is further noted that that the present matter does not arise within the jurisdiction of the Ninth Circuit, thus the reasoning in *Freeman v. Gonzales* is not binding in the instant case. The AAO does not find the reasoning in *Freeman v. Gonzales* sufficient support to show that the present application may be granted on a *nunc pro tunc* basis once the applicant's qualifying relative died.

Counsel asserts that other applications for waivers have been granted on a *nunc pro tunc* basis, citing *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976); *Matter of Rapacon*, 14 I&N Dec. 375 (BIA 1970); *Matter of Macorro-Perales*, 12 I&N Dec. 228 (BIA 1967), and; *Matter of M*, I&N Dec. 285 (BIA 1959). However, none of the cited matters addressed the death of an applicant's only qualifying relative prior to adjudication of an application for a waiver, under section 212(a)(9)(B)(v) of the Act or any other provision. Thus, the AAO does not find the cited matters sufficient authority to show that the present application may be adjudicated on a *nunc pro tunc* basis.

In *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), the Board of Immigration Appeals found that, to be eligible for a waiver of removal under section 237(a)(1)(H)(i) of the Act, an applicant must

establish a qualifying relationship to a “living relative.”⁴ Section 237(a)(1)(H)(i)(I) of the Act uses language to describe a required relationship to a U.S. citizen or lawful permanent resident that is nearly identical to the language used to describe a qualifying relationship in section 212(a)(9)(B)(v) of the Act. Thus, the reasoning in *Matter of Federiso* supports that the applicant must show that she has a qualifying relationship to a living relative. As the applicant’s husband is deceased and she presently has no other spouse or parent who is a U.S. citizen or permanent resident, she has not shown that she is eligible for consideration for a waiver under section 212(a)(9)(B)(v) of the Act.

Based on the foregoing, the applicant has not shown that she has a qualifying relative, or that the present waiver application should be adjudicated on a *nunc pro tunc* basis. In proceedings for a waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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.

⁴ In *Matter of Federiso*, the BIA stated that “It is clear from the language of the statute and its interpretation by the courts and this Board that the purpose of the fraud waiver is to unite aliens with their living United States citizen or lawful permanent resident family members. Because his mother is deceased, the respondent does not have a qualifying relative with whom to remain in the United States.” *Matter of Federiso* at 664.