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U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: LOS ANGELES, CA
(SANTA ANA, CA)

Date:

MAR 09 2009

IN RE:

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:

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. Grisson, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. 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)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and is seeking readmission within three years of her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated August 18, 2006.

On appeal, counsel asserts that the District Director erred in finding that the applicant had failed to meet her burden of establishing extreme hardship to her qualifying relative, as necessary for a waiver. *Form I-290B; Attorney's brief.*

In support of this assertion, counsel submits a brief. The record also includes, but is not limited to, a statement from [REDACTED]; a psychiatric letter relating to the applicant's spouse; a statement from the applicant's spouse; tax statements for the applicant and her spouse; earnings statements and W-2 Forms for the applicant's spouse; an employment letter for the applicant's spouse; a car insurance policy; a property lease; and bank statements for the applicant and her spouse. 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-

...

(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

(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 July 28, 2004 under the Visa Waiver program for 90 days. *For I-94W, Departure Card*. The applicant remained in the United States beyond her period of authorized stay. She married her U.S. citizen spouse on September 29, 2004 and filed a Form I-485, Application to Register Permanent Resident or Adjust Status on August 23, 2005, based on the Form I-130, Petition for Alien Relative, filed by her spouse. On December 12, 2005 the applicant was issued a Form I-512L, Authorization for Parole of an Alien into the United States. According to counsel, the applicant departed the United States for ten days prior to her Form I-485 interview, which took place on May 19, 2006. *Attorney's brief; Form I-485*. The applicant returned to the United States on May 9, 2006. *Form I-512L*. The applicant, therefore, accrued unlawful presence from October 27, 2004, the date her authorized stay ended until August 23, 2005, the date she filed the Form I-485 application. 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 J. [REDACTED] Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. In applying for lawful permanent residence, the applicant is seeking admission within three years of her May 2006 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year.¹

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of 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. The plain language of the statute indicates that hardship that the applicant or her child would experience upon removal is not directly relevant to the determination as to whether she is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful

¹ Based on counsel's statements regarding the timing of the applicant's departure from the United States, it appears that the applicant's period of inadmissibility will end at or around the beginning of May 2009.

permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in the United Kingdom or the United States, as he is not required to reside outside 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.

If the applicant's spouse travels with the applicant to the United Kingdom, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. The applicant's spouse suffers from Bipolar II disorder. *Statement from [REDACTED]*, dated June 5, 2006. He is taking medication for this condition and has been under his physician's care for approximately five years. *Id.* Counsel asserts that the applicant's spouse is acclimated to life in the United States and has deep U.S. roots. *Attorney's brief*. Relocation to the United Kingdom would be devastating, not to mention the standard of medical care *vis a vis* the United States for his mental illness. *Id.* While the AAO acknowledges counsel's assertions, it notes that the record does not include any published country conditions reports documenting the availability or quality of psychiatric care in the United Kingdom. The record does not document that the applicant's spouse would be unable to receive adequate treatment for his bipolar disorder in the United Kingdom. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant's spouse states that he can no longer interact with the public in a meaningful way and, therefore, that most of his work is done via the internet. *Statement from the applicant's spouse*, October 10, 2006. He contends that, if he were forced to move to the United Kingdom, he would have virtually no viable way of making a living. *Id.* The AAO acknowledges the claims of the applicant's spouse. It notes, however, that his statement indicates that most of his work is currently done via the internet and that the record fails to demonstrate that he would be unable to telecommute and continue with his current work from the United Kingdom. Furthermore, there is no documentation in the record that establishes that the applicant's spouse would be unable to secure employment in the United Kingdom, a developed country whose national language is English, and contribute to his family's financial well-being.

The applicant's spouse also asserts that his access to a competent psychiatrist in the United Kingdom would be limited due to its socialist medical system. *Statement from the applicant's spouse*, October 10, 2006. He contends that he could not afford private health care as he would be unable to work and would also be ineligible for private care under the British system. *Id.* While the AAO

acknowledges the statements of the applicant's spouse, it, again, notes that the record does not include any documentary evidence to support them. The record does not include published reports discussing access to and the availability of counseling services in the United Kingdom. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)). When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United Kingdom.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. As previously noted, the applicant's spouse suffers from Bipolar II disorder and is currently on medication. *Statement from [REDACTED]* dated June 5, 2006. The applicant's spouse states that if he stayed in the United States, his work would suffer and his depression would be significantly enhanced. *Statement from the applicant's spouse*, undated. He believes he would probably lose his job and be forced to go on permanent disability for his condition. *Id.* The physician treating the applicant's spouse states that the applicant's spouse would be more affected by a separation than would normally be the case. *Statement from [REDACTED]* *Diplomat, American Board of Psychiatry and Neurology*, dated June 5, 2006. The AAO acknowledges the mental health problem faced by the applicant's spouse, as documented by a licensed healthcare professional, and the emotional impact that separation would have on him. Additionally, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. When looking at the aforementioned factors, particularly the mental health condition of the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to remain in the United States.

However, as the record has failed to establish the existence of extreme hardship to the applicant's qualifying relative if he relocates to the United Kingdom, the applicant is not eligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(I) of the Act. 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.