



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: MIAMI, FL Date: **MAR 30 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:

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, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The applicant is a native and citizen of Venezuela 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 10 years of her last departure from the United States. The applicant is married to a U.S. citizen and has two U.S. citizen stepchildren. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The district director found that the applicant did not establish that her spouse would suffer extreme hardship as a result of her inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated September 27, 2006.

On appeal, counsel asserts that during the period between July 21, 2001 to November 5, 2004 the applicant applied for an extension of stay and that she remained in the United States because her son had three brain surgeries during this time period. *Form I-290B*, dated October 26, 2006. Counsel states that U.S. Citizenship and Immigration Services lost the applicant's original application for an extension of stay and requested she submit a new application in 2003. Counsel states that the applicant never received a decision on her extension of stay and that her removal from the United States will result in extreme hardship to her U.S. citizen spouse. *Id.*

The record indicates that the applicant entered the United States on a visitor visa on January 22, 2001, with authorization to remain in the United States until July 21, 2001. At this time the applicant entered the United States to accompany her son who was undergoing medical treatment for a brain tumor. The applicant then departed the United States on November 5, 2004. The record indicates that at the time of her departure the applicant's son was residing in Venezuela and she was returning to care for him.

On April 29, 2005, the applicant attempted to enter the United States at the Miami, Florida Port of Entry, but was sent to secondary inspection because of her prior overstay. During the interview at secondary inspection, the applicant stated, under oath that she was returning to the United States to obtain human growth hormone for her son and would be returning to Venezuela in twenty-two days. Based on this testimony the applicant was granted humanitarian parole with authorization to remain in the United States until May 23, 2005. On May 7, 2005, eight days after the applicant entered the United States, she and her U.S. citizen spouse were married. The applicant has not departed the United States since her November 5, 2004 departure and on July 7, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485).

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(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 provides that:

(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 Department of State Foreign Affairs Manual states that, "in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either: Apply for adjustment of status to permanent resident..." *DOS Foreign Affairs Manual*, § 40.63 N4.7(a)(1).

The Department of State developed the 30/60-day rule which applies when, "an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...Marrying and takes [sic] up permanent residence." *Id.* at § 40.63 N4.7-1(3).

Under this rule, "when violative conduct occurs less than 30 days after entry into the United States, the Department may presume that the applicant misrepresented his or her intention in seeking a visa or entry." *Id.* at § 40.63 N4.7-4.

The AAO finds that the applicant is inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting material facts during her interview at secondary inspection on April 29, 2005 at the Miami Port of Entry in order to gain admission to the United States. The applicant stated that she was entering the United States for twenty-two days in order to obtain human growth hormone for her son in Venezuela. The record indicates that eight days later she was married to a U.S. citizen and a month later she applied for status as a lawful permanent resident. In addition, she has not returned to Venezuela since November 2004 nor does the record indicate

that the applicant had any contact with her son's doctors in Miami past November 2004. Thus, the AAO finds that the applicant willfully misrepresented her intent as an immigrant to the United States in order to gain admission to the United States.

The AAO also finds that the applicant is inadmissible under section 212(a)(9)(B) 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.

(iv) Tolling for good cause. - In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(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.

The record indicates that on July 19, 2001 the applicant filed a timely Application to Extend/Change Nonimmigrant Status (Form I-539). In support of this assertion, the record contains a copy of a check for \$120.00, dated July 18, 2001, made payable to the Immigration and Naturalization Service (INS). This check also shows that it was deposited in a Bank of America account for the Texas Service Center on July 19, 2001. The record also contains a certified receipt showing that documentation was delivered to the Texas Service Center from the applicant on July 19, 2001. Counsel asserts that on November 20, 2001 the applicant sent a letter to the Texas Service Center to inquire about her Form I-539. The record includes a copy of a post office mailing receipt showing that a package was delivered to the Texas Service Center on November 23, 2001. On December 5, 2001 the applicant received a letter from the Texas Service Center, which acknowledged her recent correspondence and stated that due to staffing shortages in their office, they are no longer able to translate letters received in a foreign language. The letter requests that she resubmit her letter in English or accompanied by an English translation. The record also contains a letter in English submitted to the Texas Service Center, dated January 2, 2002, in which the applicant inquires about the status of her Form I-539 submitted on July 19, 2001. Counsel states that the applicant did not receive any response from the Texas Service Center until February 18, 2003. The record contains a receipt notice from the Texas Service Center showing the receipt date for the applicant's Form I-539 as February 14, 2003. The receipt notice states that the fee was previously collected. The record contains another notice from the Texas Service Center stating that an inquiry was made about the applicant's Form I-539 on August, 14, 2003 and that the application was then currently with an officer. The record shows that the applicant checked her case status on April 29, 2004, and the response indicated that on January 23, 2004 the Texas Service Center received the applicant's response to a request for evidence or information. The AAO notes that the record does contain a Customs and Border Protection memorandum, dated April 29, 2005 and indicating that the applicant's request had been denied on July 7, 2004. On July 27, 2005, the applicant again checked her case status. The online system for U.S. Citizenship and Immigration Services (USCIS) states that her case was reopened on a USCIS motion and that the case is now in process. The status update states that it takes 140 to 200 days for this type of case to be processed.

The AAO notes that the applicant was lawfully admitted to the United States, filed a timely application for an extension of stay and was not employed before or during the 120 days tolled by the application. Therefore, the applicant accrued unlawful presence starting on November 18, 2001, 120 days after she filed her Form I-539, and ending on November 5, 2004, the date she departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of her November 5, 2004 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.

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 and a section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act are 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 the alien experiences or her children experience is not considered in section 212(a)(9)(B)(v) and section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

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 in the event that he resides in Venezuela and 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.

Counsel states that the applicant provides financial and psychological support to her spouse and stepchildren and that her spouse cannot fully support his household without the applicant. *Counsel's Brief*, dated November 26, 2006. Counsel states that the applicant is a licensed physician in Venezuela and she has been taking care of her spouse and stepchildren. *Id.* In a brief submitted with the initial waiver application, counsel states that the applicant has a close relationship with her two stepchildren and cares for all of their daily needs. Counsel states that the applicant is preparing to take the exam to become a licensed physician in Florida, she has a

Bachelor of Science in Nursing and she works as a presenter on a Christian Radio station that reaches twenty-two countries and is broadcast over the internet. *Counsel's Brief*, dated September 5, 2006. The applicant's spouse states that the applicant is the heart of his family, she cares for his children and cares for him. *Spouse's Statement*, dated August 16, 2006. He states that when he had gallbladder surgery the applicant took care of him and continues to monitor his hypertension and GERD. The applicant's spouse states that he feels psychologically devastated and sick because his family's future is in jeopardy. *Id.* The record also contains letters from the applicant's stepchildren attesting to their close relationship with the applicant.

The record indicates that the applicant's spouse is an Electrical Engineer with a Master's Degree in Information Technology. *Id.* The applicant's spouse's employer, [REDACTED], states that the applicant's spouse's current title is Senior Technical Operations Engineer and he earns an annual salary of \$63,900. *Letter from Employer*, dated May 1, 2006.

In regards to the applicant, her spouse and the applicant's stepchildren relocating to Venezuela, counsel states that returning the applicant to Venezuela, a country ruled by a dictator, with no freedom of speech or expression and with more than half the population unemployed would be compared to a death sentence. *Counsel's Brief*, dated September 5, 2006.

The AAO finds that the current record does not establish that the applicant's spouse would suffer extreme hardship as a result of her inadmissibility. The record does not contain independent documentation to support the claims made by counsel or the applicant's spouse. The record contains no documentation to support the claims made of psychological suffering nor does the record support claims of hardship upon return to Venezuela. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

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.

In addition, counsel states that USCIS weighs the positive and negative factors together when determining whether to grant a waiver. *Counsel's Brief*, dated November 26, 2006. The AAO notes that when adjudicating a waiver application, USCIS first determines whether the applicant has established that a qualifying relative will experience extreme hardship as a result of his or her inadmissibility. Only after extreme hardship has been established would the positive and negative factors in the applicant's case be considered in making a determination of whether the Secretary should exercise discretion. Having found the applicant has not established extreme hardship to a qualifying relative and is thus 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 sections 212(a)(6)(C) and 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.