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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H 4

[REDACTED]

FILE:

[REDACTED]

Office: ROME DISTRICT OFFICE

Date: JAN 28 2005

IN RE:

[REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i)

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Rome. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a 27-year-old native and citizen of France who was found inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a U.S. citizen. She seeks a waiver of inadmissibility to immigrate to the United States as the beneficiary of an immediate relative petition filed on her behalf by her U.S. citizen husband.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. On appeal, counsel contends that the applicant established that refusal of her admission would result in extreme hardship to her U.S. citizen husband. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—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.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's attempt to hide from U.S. Immigration Inspectors her prior visits and unlawful violations of her authorized periods of stay in the United States in an attempt to procure admission to the United States under the Visa Waiver Program, as described in INA § 217, 8 U.S.C. § 1187, in September 2002. The applicant does not contest the district director's determination of inadmissibility. Section 212(i) of the INA addresses waivers of inadmissibility under 212(a)(6)(C) and provides, in pertinent part:

(i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . .”

8 U.S.C. § 1182(i)(1).

The applicant was also found inadmissible under section 212(a)(9)(B) of the Act, which 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 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 U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

The record indicates that the applicant was admitted to the United States pursuant to the Visa Waiver Program on September 21, 1999, authorized to remain until December 20, 1999. She remained in the United States until December 2001, and worked without employment authorization during that period. The applicant accrued unlawful presence from December 21, 1999 until December 2001, or a period of approximately two years. The applicant is now seeking admission within 10 years of her 2001 departure from the United States. The applicant is, therefore, 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.

As noted above, 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. Similarly, INA § 212(i) provides, in pertinent part:

(i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in *extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . .*"

8 U.S.C. § 1182(i)(1) (emphasis added). The question on appeal is whether the applicant established a that refusal to admit her will result in extreme hardship to her spouse. Hardship to the alien herself is not a permissible consideration under the statute.

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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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 record reflects that the applicant's husband [REDACTED] is a 34-year-old U.S. citizen born in New York. He and the applicant married on November 16, 2002, in France, after the applicant was refused admission to the United States under the Visa Waiver Permanent Program on September 22, 2002, due to her prior overstay. He filed a relative petition on her behalf and returned to the United States. The applicant gave birth to the couple's first child in 2003, in France. Mr. [REDACTED] does not have family ties in France, except the applicant, their child, and the applicant's parents. Mr. [REDACTED] indicates that he suffers mental anguish due to his separation from his wife and young child, who does not recognize him due to his young age and lack of close contact with Mr. [REDACTED]. He states that he also suffers emotional distress due to the separation in that his grandmother died in 2004 without ever having met his son, his wife missed his brother's wedding in the United States, and may miss his sister's wedding in the spring of 2005.

The applicant has worked as a cashier, waitress, and child care worker. [REDACTED] is a small business owner (restaurant) earned \$58,760 in 2001, and holds assets of approximately \$49,000, including stocks, life insurance, and savings. He has assumed the cost of supporting his wife and son in France, as well as the costs of telephone communications and travel. The couple's son and the applicant traveled to Montreal, Canada, for the child's baptism, so that extended family living in the United States could attend. Mr. [REDACTED] raises concerns over the cost of maintaining two households, paying for travel to France, paying for an American education in France, and paying for the family to travel and reunite in Canada. He does not speak French. He indicates that he does not have skills transferable to France and therefore could not be employed there.

The record also contains letters of reference attesting to Mr. [REDACTED] generosity and public service contributions to the community through his restaurant.

The record reflects that this is the applicant's second application for a waiver of inadmissibility since 2002, addressing essentially the same issues. The applicant's arguments and evidence were discussed in detail by the district director below in his decisions dated May 7, 2003 and September 3, 2003. On appeal, counsel raises essentially the same arguments, and further requests consideration of the hardship faced by the applicant's child, who was born in 2003. As noted above, the applicable statutes do not permit consideration of hardship to the applicant's child. Additionally, it must be noted that the hardships faced by [REDACTED] must be assessed in view of his knowledge of his wife's inadmissibility at the time of their marriage and subsequent birth of their child. The equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married with knowledge that the alien might be deported. *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991). It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. See also *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986). Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper. The hardships faced by [REDACTED] in terms of cultural adjustment and employability should he relocate to France to avoid separation from his wife and the costs and emotional hardships associated with remaining in the United States without his wife and child are therefore appropriately significantly discounted, due to his prior knowledge that his wife was inadmissible to the United States, before they married and before they had their child.

The AAO finds that the record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that [REDACTED] faces hardship rising to the level of extreme if the applicant is refused admission. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship). Inability to pursue one's chosen career or a reduction in standard of living does not necessarily result in extreme hardship. See *Ramirez-Durazo v. INS*, 794 F.2d 491, 499 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.") The record does not support that [REDACTED] is unemployable in France or that the aggregate of the hardships he would face if he relocates there amount to extreme hardship. Therefore, the applicant's spouse faces, as all spouses facing deportation or refusal of admission of

a spouse, the choice of whether to remain in the United States or relocate to avoid separation. The BIA has held, “[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed.” *See Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA §§ 212(i) and 212(a)(9)(B)(v), 8 U.S.C. §§ 1186(i), 1186(a)(9)(B)(v).

In these proceedings, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.