



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: SAN FRANCISCO, CA

Date: MAY 30 2007

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) and section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, 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)(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 his last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation on September 28, 2000. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant failed to show that his qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. The application was denied accordingly. *Decision of the District Director*, dated April 5, 2004.

On appeal, counsel asserts five ways in which the director erred in adjudication of the applicant's case. First, she states that the service erred in requesting a waiver of inadmissibility for unlawful presence and then denying the application on two grounds, unlawful presence and misrepresentation when the applicant was not given notice or an opportunity to address the second ground. Counsel states that the Service cannot make a determination about the applicant making a misrepresentation without knowing what the applicant was asked at the port of entry. Counsel states that the applicant's silence at the airport does not constitute a misrepresentation. Second, counsel states that the Service erred in granting advanced parole if the Service was not going to grant a waiver of inadmissibility. Third, the Service erred in not finding that the applicant's spouse would experience extreme hardship. Fourth, counsel states that the concept of after-acquired equities does not apply to waivers of inadmissibility. Fifth, counsel states that good cause exists for approving the applicant's waiver application. *Counsel's Brief*, dated May 6, 2004.

The AAO notes that the applicant's inability to address the ground of inadmissibility involving his misrepresentation did not affect the decision in his initial waiver application because he was also inadmissible for unlawful presence. The extreme hardship standard applied in a waiver application involving a misrepresentation is identical to that applied in a waiver application involving fraud.

The record indicates that the applicant entered the United States on September 28, 2000 under the visa waiver program. On February 3, 2003, the applicant testified under oath that he entered the United States on the visa waiver program, with the intent to remain in the United States. The applicant further stated on his adjustment application that he had been living and working in the United States since 1997. Counsel asserts that the applicant's silence at the port of entry does not constitute a misrepresentation. The AAO finds that the applicant's act of presenting his U.K. passport under the visa waiver program to U.S. immigration officers in order to procure admission into the United States as a visitor when he was an intending immigrant was a willful misrepresentation, regardless of whether he was questioned at entry. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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.

In the present application, the record indicates that the applicant entered the United States under the visa waiver program on September 28, 2000. The applicant filed for adjustment of status on April 22, 2002. 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 Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant remained in the United States until May 2002, when he departed the United States with advance parole. Therefore, the applicant accrued unlawful presence from September 28, 2000, the date he last entered the United States until April 22, 2002, the date of his proper filing of the Form I-485. In applying for adjustment of status, the applicant is seeking admission within 10 years of his May 2002 departure from the United States. Therefore, the applicant is also 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.

Counsel's asserts that the Service erred in granting the applicant advance parole if they were not going to grant the applicant's waiver of inadmissibility. *Counsel's Brief*, dated May 6, 2004. Counsel cites a 1997 memorandum from legacy Immigration and Naturalization Service Headquarters, which states that, "...advance parole generally should not be granted, unless it appears that the alien would, in the exercise of discretion, be likely to receive a waiver of inadmissibility." *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, dated November 28, 1997.* The AAO notes, however, that this memorandum allows for the exercise of discretion when granting advance parole to applicants with unlawful presence. There is no extreme hardship analysis involved in the decision to grant advanced parole and the approval of the Form I-131, Application for Travel Document, does not require a subsequent finding of extreme hardship. Furthermore, the advance parole document issued to the applicant included a notice, which states in large print:

NOTICE TO APPLICANT: ...If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the proceedings of your application. If you are found

inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved. *Applicant's Authorization of Parole of an Alien into the United States*, dated April 26, 2002.

Therefore, the applicant was given notice that by using his advance parole he might be found 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.

....

(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.

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 himself experiences due to separation 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 alien 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. 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). In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. 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).

In her brief, counsel states that the concept of after-acquired equities does not apply to waiver applications. The AAO notes that in applying for a waiver under section 212(a)(9)(B)(v) and section 212(i) of the Act an applicant must first prove extreme hardship to a qualifying relative. Once extreme hardship is established, a determination is made as to whether the Secretary should exercise discretion in the applicant’s case. It is during this discretionary analysis and the balancing of positive and negative factors that after-acquired equities may be taken into account. The AAO also notes that if extreme hardship is not established, Citizenship and Immigration Services (CIS) does not consider whether the applicant merits a waiver as a matter of discretion because no purpose would be served in doing so.

Extreme hardship to the applicant’s spouse must be established in the event that she resides in the United Kingdom or in the event that she resides in the United States, as she 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.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in the United Kingdom. The AAO notes that the applicant’s spouse was born in Ireland and has lived in the United States for 10 years. Counsel asserts that the applicant’s spouse could not relocate to the United Kingdom, because as a former Irish citizen living in England, she would be treated as a second-class citizen. *Counsel’s Brief*, dated May 6, 2004. Counsel states that the applicant’s spouse would face discrimination and unemployment in England. In support of these assertions the applicant submitted a letter from the Consulate General of Ireland, which states that the applicant’s spouse is a manager at a local bar and

therefore would not be able to find any employment opportunities outside the United States since her employer was a local bar. *Letter from Vice Consul General of Ireland*, dated April 28, 2003. In addition, the Vice Consul General of Ireland states that the applicant is in the process of obtaining his Federal Aviation Authority (FAA) license and it is unclear whether these qualifications would be recognized in Ireland. *Id.* In addition, the applicant submitted a letter from the Irish Immigration Pastoral Center which states that she will not be able to find employment and housing in the United Kingdom because of the discrimination there against the Irish. *Letter from Irish Immigrant Chaplain*, dated April 28, 2003. The record also contains letters from family and friends stating that the applicant and his spouse would not be able to find employment and housing in the United Kingdom.

The AAO notes that no country condition reports concerning the employment and housing conditions in the United Kingdom were submitted. Counsel cites a *San Francisco Chronicle* article about employment in Europe, but this article was not submitted as part of the record. *Counsel's Brief*, dated May 6, 2004. No reports were submitted regarding the discrimination faced by Irish citizens in the United Kingdom. The only evidence submitted regarding these assertions comes from the Irish Immigrant Pastoral Center. The Irish Immigrant Pastoral Center gives no basis for its statements or any information regarding its qualifications to comment on the economic situation in the United Kingdom, thereby rendering its findings speculative and diminishing the letter's value in determining extreme hardship.

As previously discussed, the inability of the applicant to find a job in aviation in the United Kingdom is not considered in section 212(i) or 212(a)(9)(B)(v) waiver proceedings unless it is established that his inability to find employment will cause his spouse extreme hardship. The current record does not contain supporting documentation to show that the applicant's training in the United States will not transfer to the United Kingdom nor does it contain documentation establishing a connection between the applicant not being able to find employment in the aviation field and the applicant's spouse suffering extreme hardship. Moreover, the record fails to establish that the applicant's spouse, currently the manager of a San Francisco bar, would be unable to find work if she relocated. The AAO also notes that she is not limited to seeking employment in Ireland or Great Britain. Absent a formal renunciation of her Irish citizenship under Irish law, the applicant's spouse continues to hold Irish citizenship based on her birth in Ireland and may, accordingly, live and work anywhere in the European Union. *See Irish Citizenship by Descent* (FBR), Embassy of Ireland, Washington, D.C. (<http://www.irelandemb.org/flor.html>). This same opportunity is open to the applicant, a British citizen.

The applicant's spouse states that she is an active member of her community and has built many relationships with close friends in the San Francisco Bay Area. *Spouse's Declaration*, undated. The AAO recognizes that the applicant's spouse will endure some emotional hardships as a result of relocating to the United Kingdom, but the record does not reflect that these emotional hardships would rise to the level of extreme. Furthermore, the AAO notes that relocation to a foreign country generally involves some inherent difficulties such as finding new employment and new housing. However, the record does not establish that the difficulties to be faced by the applicant's spouse upon relocation constitute extreme hardship.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that if the applicant is removed from the United States his spouse will be left on her own and will constantly worry about the applicant's well being. *Id.* Counsel states that as a result of the separation, the marriage vows the couple made to each other will most likely result in

divorce. Counsel also states that the applicant's spouse will suffer emotionally because she will have to live in the couple's house alone and will not be able to start a family. The applicant's spouse states that being permanently separated from the applicant would cause her extreme emotional hardship. *Spouse's Declaration*, undated.

Moreover, counsel states that the applicant's spouse will suffer financially because she will have to support herself and her husband who will not be able to find employment in the United Kingdom. *Counsel's Brief*, May 6, 2004. As previously noted, the record contains no financial documentation to establish that the applicant's spouse would suffer without the applicant or that the applicant would not be able to find employment in the United Kingdom to support himself. Therefore, a review of the entire record does not find that separation would result in the applicant's spouse suffering extreme hardship above and beyond what would normally be expected upon the removal of a family member.

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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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.