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U.S. Citizenship  
and Immigration  
Services

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114

FILE:

OFFICE:

DALLAS, TX

Date:

MAR 03 2009

IN RE: Applicant:

APPLICATION:

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

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. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Dallas, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the district director for continued processing.

The record reflects that the applicant, a native and citizen of El Salvador, initially entered the United States without inspection in August 1998. In July 2003, the applicant obtained Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1254. He subsequently departed and reentered the United States with advance parole authorization on April 4, 2006. The applicant accrued unlawful presence from August 1998 until July 2003. He was thus 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.<sup>1</sup> The applicant seeks a waiver of inadmissibility in order to remain with his U.S. citizen spouse and children, born in 2003 and 2004.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 29, 2006.

In support of the appeal, counsel submits the following, *inter alia*: a brief, dated August 24, 2006; an affidavit from the applicant's U.S. citizen spouse, dated August 24, 2006; and information about country conditions in El Salvador. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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.

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<sup>1</sup> The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

(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...

To begin, counsel asserts on appeal that the applicant disclosed his illegal entry and presence in all immigration applications and as such, by having granted the applicant a Form I-512, Authorization for Parole of an Alien into the United States (Form I-512), in September 2005, a waiver of inadmissibility was implicitly granted by the U.S. Citizenship and Immigration Services (USCIS).

The AAO finds that the November 26, 1997, Memorandum, “Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days”, by [REDACTED] Acting Executive Associate Commissioner (Memo) makes clear that a USCIS grant of advance parole status did not confer any waiver of inadmissibility benefits upon the alien. The memo further clarified that an alien who became inadmissible due to his or her departure from the United States had to file an I-601, Application for a Waiver of Excludability, and upon adjudication of that waiver, had to establish extreme hardship to a qualifying relative, in accordance with applicable legal standards. In addition, the memo clarified that aliens granted advanced parole would also receive a written warning regarding the possible harsh consequences of departing the United States, to ensure that they were aware of the risks of departure. The records indicate that the applicant was given a written warning, on the advance parole document issued to him on September 19, 2005, of the consequences of departing the United States.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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.

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).

The record contains several references to the hardship that the applicant's U.S. citizen children would suffer if the applicant's waiver of inadmissibility is not granted. Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their children cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse further contends that she will suffer emotional and financial hardship if the applicant is removed from the United States. In a declaration she states that she would suffer extreme emotional hardship due to the long and close relationship they have, and that she would suffer extreme financial hardship as she, without a high school diploma and currently earning only \$5 an hour, would have to maintain the home and the children without the applicant's financial support. *Affidavit of [REDACTED]*, dated August 24, 2006.

Were the applicant unable to reside in the United States, the applicant's U.S. citizen spouse would have to assume the role of primary caregiver and breadwinner to two young children, without the complete emotional, physical and financial support of the applicant. Moreover, country condition reports indicate that it would be difficult for the applicant to find a job in El Salvador in his area of expertise, namely construction, with sufficient income to support his spouse and children in the United States. *See U.S. Department of State Profile-El Salvador*, dated February 2009. The AAO thus concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were the applicant to relocate abroad while she remains in the United States. The applicant's spouse needs her husband's emotional and financial support on a day to day basis.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. The AAO notes that El Salvador is currently designated under the Temporary Protected Status (TPS) program due to a series of severe earthquakes that left over a quarter of the country's population without housing and significantly damaged the infrastructure of the country, including its transportation, education and health sectors. *Federal Register*, Vol. 73, No. 191, pp. 57129, Wednesday, October 1, 2008, Notices. Under the TPS program, citizens of El Salvador are allowed to remain in the United States temporarily due to the inability of El Salvador to handle the return of its nationals due to the disruption of living conditions. As such, requiring the applicant's U.S. citizen spouse and children to relocate to El Salvador in its current state would constitute extreme hardship.

The AAO also finds that the applicant's U.S. citizen spouse would face extreme hardship independent of the TPS-related finding of extreme hardship. As asserted by the applicant's spouse, she has no relatives in El Salvador. Moreover, she is concerned with the high crime rate in the country, including the kidnapping of Americans, and the substandard health care. *Supra* at 1-2. The

U.S. Department of State confirms El Salvador's problematic country conditions. As stated by the U.S. Department of State, in pertinent part:

The U.S. Embassy considers El Salvador a critical crime-threat country. The homicide rate in the country increased 25 percent from 2004 to 2007, and El Salvador has one of the highest homicide rates in the world. Violent crimes, as well as petty crimes are prevalent throughout El Salvador, and U.S. citizens have been among the victims. The Embassy is also aware that there has been at least one rape of an American minor and one attempted rape of an American adult in the past year. Travelers should avoid displaying or carrying valuables in public places. Passports and other important documents should not be left in private vehicles. Armed assaults and carjacking take place both in San Salvador and in the interior of the country, but are especially frequent on roads outside the capital where police patrols are scarce. Criminals have been known to follow travelers from the international airport to private residences or secluded stretches of road where they carry out assaults and robberies. Armed robbers are known to shoot if the vehicle does not come to a stop. Criminals often become violent quickly, especially when victims fail to cooperate immediately in surrendering valuables. Frequently, victims who argue with assailants or refuse to give up their valuables are shot. Kidnapping for ransom continues to occur, but has decreased in frequency since 2001. U.S. citizens in El Salvador should exercise caution at all times and practice good personal security procedures throughout their stay.

*Country Specific Information-El Salvador, U.S. Department of State, dated May 1, 2008.*

Based on the problematic country conditions in El Salvador, as confirmed by the U.S. Department of State, and El Salvador's designation under the TPS program, the AAO concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to El Salvador to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse and children would face if the applicant were to relocate abroad, regardless of whether they relocate or remain in the United States, the applicant's apparent lack of a criminal record, community ties, payment of taxes and the passage of more than ten years since the applicant's unlawful entry to the United States. The unfavorable factors in this matter are the applicant's entry without inspection and periods of unauthorized presence and employment in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the favorable factors, in particular the extreme hardship imposed on the applicant's U.S. citizen spouse as a result of his inadmissibility, outweigh the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained. The waiver application is approved. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.