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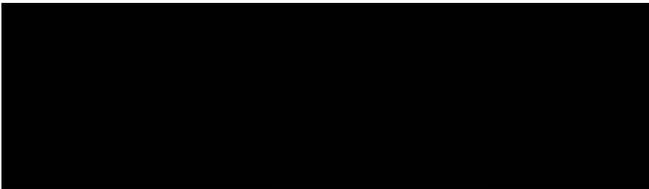
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



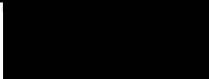
U.S. Citizenship
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FILE:



Office: PORT-AU-PRINCE, HAITI

Date: MAR 26 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:

SELF-REPRESENTED

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 Officer-in-Charge, Port-au-Prince, Haiti, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed. The application will be denied.

The applicant, [REDACTED] a native and citizen of Haiti, 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. He sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated April 24, 2007.*

The AAO will first address the finding of inadmissibility for unlawful presence. Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by departure from the United States following accrual of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), do not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record before the AAO reflects that [REDACTED] was unlawfully present in the United States from February 12, 1998 until January 15, 2006, at which time he departed from the country. He therefore accrued eight years of unlawful presence, and his departure from the United States triggered the ten-year bar. The Officer-in-Charge's finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is, consequently, correct.

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

The AAO will now address the Officer-in-Charge's finding that a waiver of inadmissibility should not be granted.

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act, which provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 waiver under section 212(a)(9)(B)(v) of the Act is dependent upon the applicant's showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and to his or her child are not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is [REDACTED] the applicant's U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The evidence submitted in support of the waiver application includes the following documents:

- A letter dated February 6, 2009, by the applicant's wife in which she conveys that since the denial of the waiver application she has had mental and physical distress and that her daughter, [REDACTED] is experiencing psychological trauma and is undergoing an evaluation at her school's request.
- A letter dated May 14, 2007, by [REDACTED], owner/director of [REDACTED] Ms. [REDACTED] states that [REDACTED] has been attending the learning center since October 2004, and that in the past months they have noticed a significant change in her attitude and behavior. She states that [REDACTED] has been crying during the day and asking for her father and that they hope that she can reunite with him.
- A letter dated June 19, 2007, by [REDACTED], a COP Family Therapist, with Suncoast Center for Community Mental Health, Inc. Ms. [REDACTED] conveys that [REDACTED] is emotionally fragile and is receiving treatment related to her tantrums and emotional meltdowns for the slightest provocation. She states that [REDACTED] difficulties relate to the loss of daily contact with her father, who was her primary caregiver from birth. She states that the abrupt separation of [REDACTED] from her father has left [REDACTED] feeling lost and somewhat abandoned. Ms. [REDACTED] diagnosed [REDACTED] with Adjustment Disorder with

Mixed Anxiety and Depressed Mood. With [REDACTED], the applicant's stepdaughter, Ms. [REDACTED] made similar findings, diagnosing her with Adjustment Disorder with Disturbance of Emotions and Conduct. Ms. [REDACTED] conveys that therapy will continue for [REDACTED] and [REDACTED] in an effort to ease some of the emotional turmoil they have experienced over separation from their father.

In the denial letter, the Officer-in-Charge conveys that the applicant submitted an undated letter by his spouse in which the applicant's spouse states that she might lose her job as she is totally alone with no help and does not have enough money to support her family. However, the applicant submitted no documentation to show that her job is jeopardized, that she has no help, or that she does not have enough money to support her family. 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).

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning" and establishing it is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors the Board of Immigration Appeals (BIA) considers relevant in determining whether an applicant has established extreme hardship under section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's spouse must be established if she remains in the United States without her husband, and alternatively, if she joins him in Haiti. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

As previously stated, in assessing hardship to [REDACTED] if she were to remain in the United States without her husband or if she were to join him to live in Haiti, the hardships imposed on her children are not a consideration under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and will be considered only to the extent that they result in hardship to Ms. [REDACTED]

The AAO finds that the letters by [REDACTED] and [REDACTED] concerning the applicant's children are somewhat vague, and the statement by the applicant's spouse in the letter dated February 6, 2009, is not sufficiently descriptive for the AAO to determine how the applicant's wife is affected by her children. The evidence, weighed collectively, fails to establish that the applicant's wife would endure extreme hardship in the event that she remains in the United States without her husband.

Furthermore, the applicant has made no claim of extreme hardship to his wife if she were to join him to live in Haiti.

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)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.