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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  
and Immigration  
Services

H6

FILE:

Office: ATHENS

Date:

APR 12 2010

IN RE:

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 PETITIONER:

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 "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge, Athens, Greece, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Yemen who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(i)(II), for having been unlawfully present in the United States for one year or more. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States and reside with his spouse and children.

The officer-in-charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *Decision of the Officer-in-Charge* dated September 29, 2008.

Counsel for the applicant asserts that the applicant's wife is suffering extreme psychological and financial hardship as a result of her prolonged separation from the applicant. Specifically, counsel states that her survival skills "are being sorely tested" and that the separation combined with the responsibilities of raising seven children on her own without the support of her husband constitutes extreme hardship. *See Notice of Appeal to the AAO* (Form I-290B). In support of the appeal counsel submitted a psychological evaluation of the applicant's wife, medical records for the applicant and her son, letters from the applicant's oldest daughter and her father, school records for the applicant's daughter, letters from the applicant's daughters' school, a declaration from the applicant's wife, and copies of Yemeni legislation concerning child custody. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (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, 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 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. 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 *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (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. These factors included 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 566. The BIA has further stated:

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 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). 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).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS*, *supra*, the court further held 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.

Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In the present case, the record reflects that the applicant is a fifty year-old native and citizen of Yemen who initially entered the United States as a B2 visitor on October 16, 1992 and was ordered deported by an immigration judge on March 27, 1997. He remained in the United States until May 4, 2006, when he was deported to Yemen. The applicant is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The record further reflects that the applicant's wife is a thirty-three year-old native of Yemen and citizen of the United States whom he married on April 19, 2000. The applicant currently resides in Yemen and his wife resides in Lamont, California with their seven children.

Counsel asserts that the applicant's wife is suffering from emotional and psychological hardship due to separation from the applicant, and in support of this assertion submitted a psychological evaluation conducted on October 10, 2008 at the Behavioral Healthcare Center in Bakersfield, California. The evaluation states that the applicant's wife briefly attended school in Yemen and in the United States, but returned to Yemen at age ten and never learned to read or write in English or Arabic. See *Psychological Evaluation of* [REDACTED] dated October 15, 2008. The Evaluation describes the applicant's wife's upbringing in Yemen and the United States, and her first marriage to a Yemeni man, which ended in divorce after her husband abandoned her and their three children. *Psychological Evaluation of* [REDACTED]. The evaluation indicates that she has a history of depression starting when her first marriage collapsed and has also experienced recurring depression since the applicant left the United States and has noticed their children becoming sad and depressed in his absence. *Psychological Evaluation of* [REDACTED]. The evaluation further describes the applicant's wife's financial situation and states that due to Yemeni cultural standards and her lack of education she has never worked outside the home and is financially dependent on her father since the applicant left the United States. *Psychological Evaluation of* [REDACTED].

The psychological evaluation states that the applicant's wife reported attempting suicide after the applicant's departure by steering her car into traffic but was not involved in an accident. It further states that she was prescribed anti-depressants by her physician but stopped taking them because of undesirable side-effects. It concludes that she is suffering from severe depression with symptoms including auditory hallucinations, is overwhelmed with raising her children without the assistance of her husband, and is also functionally impaired with a history of learning disability and possible mild mental retardation. The evaluation further states,

In our clinical opinion, [REDACTED] needs psychiatric treatment. . . . [REDACTED] depressive symptoms will likely exacerbate if she continues to raise her children alone, without her husband. She seems to be aware of her deficits without the skills to overcome them, thus she experiences depression. She has had a suicidal gesture in the past; suicidality is of concern in this case. [REDACTED] presence is essential to the well being and success of treatment of [REDACTED]. Prognosis is at best guarded in this case.

A letter from the applicant's wife's doctor, who delivered her seven children and has been her physician for fourteen years, further states that she is in desperate need of the care and support of her husband and is suffering from depression and anemia and declining health. *Letter from* [REDACTED] [REDACTED] dated October 13, 2008. A more recent letter from a different doctor states that she is suffering from severe depression and is unable to cope with the day to day responsibilities of raising the children, and the children are also going through a very difficult time. *Letter from* [REDACTED] [REDACTED]. A letter from the counselor at her daughters' high school states that the two girls are suffering emotionally due to the stress created by their father's absence, and one daughter reports that "the anxiety her mother is visibly experiencing is a constant worry for her." *Letter from* [REDACTED] [REDACTED] dated February 1, 2010.

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The letters from the mental health professionals who evaluated the applicant's wife as well as her physicians state that she is suffering from severe depression and is overwhelmed by having to care for her seven children on her own without the support of the applicant, and there is concern her condition will worsen with ongoing separation and is at risk for suicide. The applicant's wife further reports that she must rely of the financial support of her parents, but due to their poor health and other financial obligations, they are unable to continue with this support, leaving her in a desperate financial situation with no means to work and support herself. *See Letter from* [REDACTED] [REDACTED] dated October 11, 2008. In light of her psychological condition, it appears that separation from the applicant is causing the applicant's wife great emotional distress that is jeopardizing her mental health and that of her children. When considered in the aggregate, the factors of hardship to the applicant's wife should she remain in the United States without the applicant constitute extreme hardship.

The applicant's wife states that she fears returning to Yemen and her older children, who have lived there in the past, do not want to return there. A letter from the applicant's oldest daughter states that if they return there custody of her and two her sisters would be awarded to their biological father under Yemeni law because they have reached the age of twelve and their mother is remarried. *Undated Letter from* [REDACTED] [REDACTED]. The AAO notes that provisions of Yemeni law that appear to address child custody were submitted with the appeal, but the English translation is not intelligible and it is not clear from the record whether the children would in fact be returned to their father. Nevertheless, the applicant and her daughters fear this will happen, and evidence on the record, including a 1999 restraining order, indicates that he was abusive to the applicant, verbally abusive to the children, and threatened to harm her and another family member if she remarried. The AAO takes further notice of information on Yemeni child custody law issued by the U.S. Department of State:

Yemen is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, nor are there any international or bilateral treaties in force between Yemen and the United States dealing with international parental child abduction. American citizens who travel to Yemen are subject to the jurisdiction of Yemeni courts, as well as to the country's laws and regulations. This holds true for all legal

matters including child custody. Parents planning to travel with their children to Yemen should bear this in mind.

**CUSTODY DISPUTES:** Cases involving divorce and the custody of minor children are adjudicated in local courts that apply principles of Islamic law. Islamic law will be applied regardless of the religious beliefs of the parents.

In Yemen, Islamic law gives priority for custodianship to the mother as long as certain restrictive conditions are met. However, once the children reach adolescence (age 9 for boys and age 12 for girls), the father can take custody. If the mother refuses, the father can file in court for custody. . . .

Removal of children from Yemen without the father's permission is a crime in Yemen. Immigration officials at the port of exit may request permission from the father before permitting the children to leave Yemen. *U.S. Department of State, Bureau of Consular Affairs, International Parental Child Abduction -Yemen.*

In light of these circumstances and the applicant's wife's psychological condition, the fear that she would lose custody of her three oldest children in Yemen, combined with the hardships of having to readjust to life there after residing in the United States for over ten years, would result in hardship beyond the common results of removal or inadmissibility and rise to the level of extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(a)(9)(B)(v) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine

whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s immigration violations, including remaining unlawfully in the United States for several years after his authorized stay expired, failing to appear at his removal hearing, and remaining in the United States after being issued a final order of deportation. The favorable factors in the present case are the hardship to the applicant’s wife and children and the applicant’s lack of a criminal record.

The AAO finds that applicant’s violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.<sup>1</sup>

**ORDER:** The appeal is sustained.

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<sup>1</sup> In her decision on the Form I-601, the Field Office Director, Athens, also denied the applicant’s Form I-212 Application for Permission to Reapply for Admission, based on the denial of the Form I-601. As the AAO has now sustained the applicant’s appeal on the Form I-601 the Field Office Director shall reopen the Form I-212 and render a new decision on its merits.