

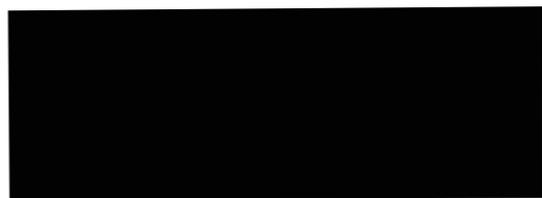
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: MEXICO CITY, MEXICO (PORT-AU-PRINCE) Date: **APR 28 2010**

IN RE: [REDACTED]

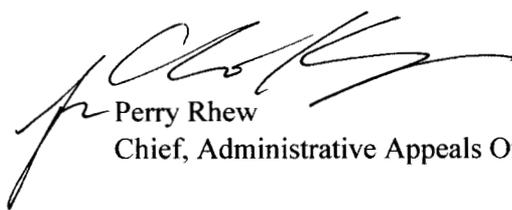
APPLICATION: Application for Waiver of Ground of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a 26-year-old native and citizen of Haiti who is 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. The applicant is married to a citizen of the United States, and she seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her husband and children in the United States.

The director found that the applicant was inadmissible under section 240B(d) of the Act, 8 U.S.C. § 1229c(d), for failure to depart the United States within the time period specified for voluntary departure. *Decision of the Director*, dated Sept. 13, 2008. The director determined that no waiver was available, and denied the application accordingly. *Id.*

On appeal, the applicant contends through counsel that section 240B(d) of the Act is inapplicable to her case because she is seeking an immigrant visa, and is not seeking adjustment of status. *See Brief on Appeal*. The applicant also contends that she has established that the denial of the waiver imposes extreme hardship on her U.S. citizen husband. *Id.* These contentions have merit.

The record contains, among other things, a copy of the couple's marriage certificate; birth certificates for the couple's two U.S. citizen children; a psychological evaluation of the applicant's husband; a statement by the applicant; an affidavit by the applicant's husband; affidavits in support of the waiver application; financial documents; documents relating to the foreclosure of the couple's home; family photographs; country conditions information; and a brief on appeal. The entire record was reviewed and considered in rendering this decision on appeal.

Section 212(a)(9) 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 [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 [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.

The applicant claims that she entered the United States without being inspected and admitted or paroled on or around December 21, 2002. The applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) on June 23, 2003. The applicant's asylum application was referred to an immigration judge on August 12, 2003. On January 19, 2006, the applicant withdrew her asylum application, and the immigration judge granted the applicant voluntary departure until May 19, 2006. The applicant's spouse filed a Petition for Alien Relative (Form I-130) on her behalf, which U.S. Citizenship and Immigration Services (USCIS) approved on May 24, 2006. The applicant departed the United States on or around June 3, 2008. The applicant's unlawful presence for more than one year and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006).

Beyond the decision of the director, the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), which provides in pertinent part:

Any alien . . . who—

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible.

An exception to this ground of inadmissibility is available under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), which provides:

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

Because it has not been ten years since the date of the applicant's departure while under an order of removal in 2008, and USCIS has not approved an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act.

The director determined that that applicant is inadmissible under section 240B(d)(1) of the Act, which provides in pertinent part:

if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249.

Section 240B(d) of the Act subjects an applicant to civil penalties for failure to depart within the time period specified for voluntary departure, and provides that the applicant is ineligible for certain forms of relief for a period of ten years. Here, the applicant correctly contends that section 240B(d) of the Act is inapplicable because it is not a ground of inadmissibility, and because the applicant is not seeking any forms of relief enumerated in section 240B(d)(1)(B) of the Act.

This case concerns the applicant's request for a waiver of inadmissibility for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. In order to obtain a hardship waiver under section 212(a)(9)(B)(v) of the Act, an applicant must show that the bar imposes extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse or parent. *See* 8 U.S.C. § 1182(a)(9)(B)(v). Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) ("When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the Act that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *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 mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the U.S. Supreme Court affirmed that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant’s spouse, [REDACTED], is a 31-year-old native of Haiti and citizen of the United States. The applicant and his wife have been married for more than four years, and they have two U.S. citizen children, who are now 5 and 3 years old.

The AAO finds that the applicant has established that the denial of a waiver would impose extreme hardship on her spouse if he remains in the United States without his wife, or if he relocates to Haiti to be with the applicant.

The Department of Homeland Security (DHS) Secretary, Janet Napolitano, has determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti is warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010. As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009, the U.S. Department of State noted the extensive damage to the country after four hurricanes struck in August and September 2008, and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti, January 28, 2009*. Based on the designation of TPS for Haiti and the disastrous conditions which have compounded an already unstable environment, and which will affect the country and people of Haiti for years to come, the AAO finds that requiring [REDACTED] to join the applicant in Haiti would result in extreme hardship.

For the same reasons, the AAO finds that [REDACTED] also would experience extreme hardship were he to remain in the United States without the applicant. This finding is based on the extreme emotional harm [REDACTED] will experience due to concern about the applicant's well-being and safety in Haiti, a concern that is beyond the common results of removal or inadmissibility.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of Coelho*, 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the applicant's unlawful presence in the United States, and her failure to depart from the United States within the voluntary departure period. The favorable and mitigating factors in this case include: the applicant's ties to her U.S. citizen spouse and children in the United States; the applicant's lack of a criminal record; and the extreme hardship to the applicant, her spouse, and her children, caused by the denial of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (setting forth relevant factors). The AAO finds that the favorable factors in this case outweigh the adverse factors, and that a grant of relief in the exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.