

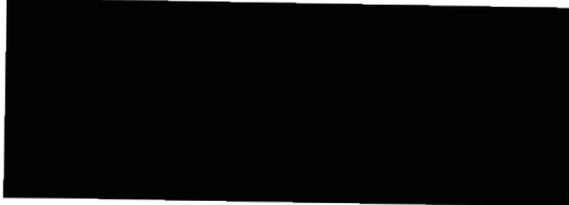
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



H6

H/2

FILE: [REDACTED] Office: LONDON Date: FEB 23 2010

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)
of the Immigration and Nationality Act (the 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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, London. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant 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 naturalized U.S. citizen and 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 reside with his wife in the United States.

The field office director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. *Decision of the Field Office Director*, dated January 14, 2008.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, Ms. [REDACTED], indicating they were married on May 3, 1996; several letters from the applicant and her husband; a copy of Ms. [REDACTED] naturalization certificate; a letter from Ms. [REDACTED] doctor; a letter from Ms. [REDACTED] sister; a letter from Ms. [REDACTED] sister's doctor; a letter from Ms. [REDACTED] previous employer; copies of tax and financial documents; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this 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 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. . . .

In this case, the record shows, and the applicant does not contest, that he entered the United States three times. The applicant first entered the United States to visit his girlfriend, now his wife, Ms. [REDACTED] using a visitor's visa in February 1995. He remained for five months and then returned to the United Kingdom. The applicant re-entered the United States using a visitor's visa in September 1995 and remained for six months before returning to the United Kingdom. The applicant attempted to re-enter the United States a third time using a visitor's visa in March 1996 and was denied admission. The applicant was given the opportunity to withdraw his application for admission or to appear for an exclusion hearing before an immigration judge. The applicant chose to appear for an exclusion hearing, was given notice of his hearing, and was granted parole. On May 3, 1996, the applicant married Ms. [REDACTED] who, at the time, was a lawful permanent resident. The applicant failed to appear for his hearing on October 8, 1996 and the immigration judge ordered him removed *in absentia*. He was further ordered to report to Atlanta, Georgia, on April 1, 1997, for his departure to the United Kingdom. The applicant failed to report for his scheduled departure.

In February 2002, Ms. [REDACTED] was naturalized as a U.S. citizen. In April 2002, the applicant filed an Application to Adjust Status (Form I-485). The applicant was granted authorization to work in June 2002 and again in August 2003. In January 2003, the applicant applied for advance parole to visit his elderly mother in the United Kingdom and included a copy of the immigration judge's October 8, 1996 exclusion order. The applicant's advance parole application was denied. On November 29, 2004, the applicant appeared for an interview in conjunction with his third application for work authorization. During this interview, the applicant was arrested and subsequently deported to the United Kingdom on December 15, 2004.

The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure from the United States in December 2004. Therefore, the applicant accrued unlawful presence of over seven years. He now seeks admission within ten years of his December 2004 departure. Accordingly, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for being unlawfully present in the United States for a period of more than one year. Furthermore, the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), as an alien previously removed.¹

A section 212(a)(9)(B)(v) waiver of the bar to admission 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. See section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(a)(9)(B)(v). 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).

¹ Although the applicant's Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) was denied on June 14, 2008, the applicant has not filed an appeal of that decision.

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. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) 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: 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 Court of Appeals for the Ninth Circuit has held that "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." *See 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) ("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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, the applicant's wife, Ms. [REDACTED], states that she has an older sister who is a U.S. citizen and is her only living relative. According to Ms. [REDACTED], her sister had a double mastectomy due to breast cancer and also had a hernia operation. Ms. [REDACTED] contends her sister is not in good health and that she needs to be in the United States to assist her sister. In addition, Ms. [REDACTED] states that after her husband was deported, she returned to the United Kingdom to be with him. Ms. [REDACTED], who is currently sixty years old, states that she has been unable to find a job in the United Kingdom "probably because of age." Moreover, Ms. [REDACTED] claims she has suffered a nervous breakdown as a result of the immigration process. She states that after her husband's deportation, she was "suddenly left in the USA on [her] own with a house [she] could not pay the mortgage on." *Letters from [REDACTED]*, dated October 3, 2005, and undated.

A letter from Ms. [REDACTED]'s sister, Ms. [REDACTED], states that she has lived in the United States since 1964. Ms. [REDACTED] states that it was wonderful having her sister take care of her after she underwent a

bilateral mastectomy in 2004. In addition, Ms. [REDACTED] states that in February 2004, due to arthritis in her knees, she fell down while getting out of bed. After this incident, Ms. [REDACTED] told her sister that she would have to live with the applicant and Ms. [REDACTED] because she was afraid she might fall again and her arthritis was getting worse. Ms. [REDACTED] further states that she underwent a hernia operation in 2006, but had to take care of herself. According to Ms. [REDACTED], she now needs a second hernia operation, which she has delayed in the hopes that her sister and the applicant will be permitted to return to the United States. *Letter from [REDACTED], dated January 31, 2008.*

A letter from Ms. [REDACTED] physician states that Ms. [REDACTED] had a bilateral mastectomy in August 2004 due to breast carcinoma. The letter states that she “then developed an MRSA mesh infection and required removal of the infected mesh with an abdominal reconstruction” in October 2006. In addition, the letter states that Ms. [REDACTED] has a “recurrent hernia of her right lower abdomen and requires revision of abdominal wall hernia surgery.” According to the physician,

this is an extremely debilitating operation and requires significant assistance for the patient postoperatively at home. I [the physician] will not perform this operation unless [Ms. [REDACTED] has family members at home to assist in her recovery. She will not be able to do simple functions such as climbing stairs, grabbing food materials off of the top shelf, and bending down to pick up dropped items She will not be able to travel to and from the store [She] also suffers from arthritis that further incapacitates her

The physician further states that Ms. [REDACTED] is Ms. [REDACTED] only living relative as Ms. [REDACTED] does not have any children at home and her husband passed away. The physician concludes that it is “imperative” that Ms. [REDACTED] and her husband be allowed back in the United States to assist Ms. [REDACTED]. *Letter from Dr. [REDACTED], dated January 29, 2008.*

A letter from a second physician states that Ms. [REDACTED] was diagnosed with breast cancer and underwent a bilateral mastectomy with reconstruction in 2004. According to this physician, Ms. [REDACTED] also has a history of arthritis which has grown progressively worse. The letter states that Ms. [REDACTED] has been prescribed Arimidex for her cancer which has the known side effects of joint pain, bone mineral density loss, and fatigue, exacerbating her arthritis. The physician states that Ms. [REDACTED] only living relative is her sister. The physician states that it would be “tremendously advantageous for Mrs. [REDACTED] to have her sister and brother-in-law here to assist her” and that cancer patients do better when surrounded by family and loved ones. *Letter from Dr. [REDACTED] dated January 28, 2008.*

Most recently, the applicant submits a letter stating that his wife has been diagnosed with “a cancerous tumour [sic] of the colon with a secondary spread to her liver and lung.” The applicant states that his wife underwent a three month course of chemotherapy and has now returned to the United States “for a further course of chemotherapy followed by surgery and further chemotherapy that would not have been available” in the United Kingdom. *Letter from [REDACTED], dated January 10, 2010.*

A letter from a physician in the United Kingdom states that Ms. [REDACTED] has been diagnosed with "metastatic carcinoma of the caecum, indeterminate lung lesions but at least one liver secondary on CT scanning." The letter states that after three months of chemotherapy, the physician would "try and make a decision about whether or not surgery should be part of her care. This would probably be laparoscopic hemicolectomy initially and then, hopefully, a liver resection if the disease has responded well to chemotherapy treatment." The letter further states that Ms. [REDACTED] has very high blood pressure and a history of asthma. In addition, the physician states that "[b]oth her sister and mother have suffered from carcinoma of the breast so, understandably, there is a lot of anxiety regarding her new diagnosis." *Letter from Dr. [REDACTED] dated August 10, 2009.*

Upon a complete review of the record evidence, the AAO finds that the applicant has established his wife has suffered, and will continue to suffer, extreme hardship if his waiver application is denied. The record shows that Ms. [REDACTED] and her sister both have cancer, as did their mother. The record indicates that Ms. [REDACTED] and her older sister have no other living relatives. With respect to Ms. [REDACTED] the record shows that she needs Ms. [REDACTED] to assist her after she has a second hernia operation and that the physician will not conduct the surgery without ensuring that Ms. [REDACTED] is available to assist her. *Letter from Dr. [REDACTED]* Furthermore, the record shows that Ms. [REDACTED] herself is undergoing cancer treatment and is currently in the United States to receive further treatment that was unavailable in the United Kingdom. *Letter from [REDACTED] supra; Letter from Dr. [REDACTED]* The record also indicates that cancer patients not only need assistance, but also seem to do better when they are surrounded by family and loved ones. *Letter from [REDACTED], supra.* Based on these factors, the AAO finds that the hardship Ms. [REDACTED] would experience if her husband were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that Ms. [REDACTED] faces extreme hardship if the applicant is refused admission.

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 T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant's failure to appear at his exclusion hearing, failure to leave the United States pursuant to the exclusion order, and his unlawful presence in the United States. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's wife if he were refused admission; the applicant's record of lawful employment and paying taxes in the United States, and the applicant's lack of any criminal convictions.

The AAO finds that although the applicant's immigration violations are serious and cannot be condoned, 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.

ORDER: The appeal is sustained.