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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**

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FILE: [REDACTED] Office: MEXICO CITY, MEXICO Date: JAN 05 2010
(consolidated therein)

IN RE: Applicant: [REDACTED]

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:

[REDACTED]

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of the Bahamas who 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 and seeking readmission within 10 years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 reside in the United States with his United States citizen wife and children.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated October 17, 2007.

On appeal, the applicant, through counsel, asserts that District Director erred "in [denying] the Applicant's I-601 when it failed to consider precedent case law that remains in the Applicant's favor and when it failed to consider th[e] evidence that the Applicant submitted with his waiver application." *Form I-290B*, filed November 16, 2007.

The record includes, but is not limited to, letters and affidavits from the applicant's wife, family, and acquaintances; household bills; documents regarding the applicant's son's speech disorder; a letter from Dr. [REDACTED] regarding the applicant's wife's emotional state; and marriage and divorce documents for the applicant. 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:

(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 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 [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 AAO notes that the record contains references to the hardship that the applicant's children would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(i) of the Act provides that a waiver, under section 212(a)(9)(B)(v) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's wife is the only qualifying relative, and hardship to the applicant's children will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that the applicant entered the United States on August 10, 2000, on a B-2 nonimmigrant visa with authorization to remain in the United States until February 18, 2001. The applicant failed to depart the United States when his authorization expired. On July 7, 2003, the applicant married Ms. [REDACTED], a United States citizen, in Florida.¹ On August 23, 2003, the applicant's wife filed a Form I-130 on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On September 13, 2004, the applicant's wife withdrew the Form I-130. On October 20, 2003, a Notice to Appear (NTA) was issued. On December 2, 2003, an immigration judge granted the applicant voluntary departure to depart the United States by January 2, 2004. On January 9, 2004, the applicant departed the United States. On December 13, 2004, the applicant's Form I-485 was denied. On February 21, 2006, the applicant's wife filed another Form I-130 on behalf of the applicant. On June 19, 2006, the applicant's Form I-130 was approved. On October 16, 2006, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On August 13, 2007, the applicant filed a Form I-601. On October 17, 2007, the District Director denied the Form I-601, finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from February 18, 2001, the date the applicant's authorization to remain in the United States expired, until August 23, 2003, the date the applicant filed his adjustment application, and again from January 3, 2004 until January 9, 2004, the date the applicant departed the United States. The applicant is attempting to seek admission into the United States within 10 years of his January 9, 2004 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

¹ The AAO notes that the applicant had previously been married twice.

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 citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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, 565-66 (BIA 1999), the Board of Immigration Appeals (Board) 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.

In an undated brief, counsel claims that "if the appeal and waiver is not granted, [the applicant's wife] will suffer exceptional and extremely unusual hardship as a result of separation from [the applicant], causing her extreme emotional and financial hardship, or as the result of the alternative of virtual exile to a foreign country culture, away from her parents, her twin sister, and her ailing grandmother." In a letter dated November 8, 2007, Ms. [REDACTED] states the applicant's wife's grandmother had open heart surgery in January 2007, and she needs her family close to her. Counsel states the applicant's wife's mother "has severe arthritis and Sjogren's Syndrome and her stepfather is an invalid with spinal stenosis and congestive heart failure." The AAO notes that there is no medical documentation in the record establishing that the applicant's wife's parents suffer from any medical conditions. Additionally, there was nothing from a doctor indicating what assistance is needed/or given by the applicant's wife. 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)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, though the applicant's wife's parents and grandmother may suffer some hardship in being separated from the applicant's wife; however, they are not qualifying relatives for a waiver under section 212(a)(9)(B)(v) of the Act.

Counsel states the applicant's twin daughters "will need specialized medical care in the future." The AAO notes that other than statements from counsel and the applicant's wife, there is no medical documentation in the record establishing that the applicant's twin daughters suffer from any medical conditions. Additionally, the AAO notes that there is no evidence in the record that the applicant's children cannot be treated for any medical conditions in the Bahamas or that they have to remain in the United States to receive treatments. Counsel states the applicant's son "has a speech and language disability and requires continuing speech therapy." In a speech and language progress note dated

November 12, 2007, Ms. [REDACTED] recommended skilled speech and language therapy for the applicant's son; however, she states the applicant's son "is making gains each week." In an affidavit dated November 9, 2007, the applicant's wife states her son could not receive speech therapy in the Bahamas because they would have to pay for it. The AAO notes that it has not been established that the applicant and his wife could not afford speech therapy for their son in the Bahamas. Additionally, the AAO notes that there is no documentation in the record that the applicant's son could not receive speech therapy in the Bahamas or that he has to remain in the United States to receive speech therapy. Furthermore, the AAO notes that the applicant's children may experience some hardship in relocating to the Bahamas; however, the applicant's children are not qualifying relatives for a waiver under section 212(a)(9)(B)(v) of the Act.

Counsel states the applicant's wife is "emotionally distraught at the prospect of a continued separation." In a letter dated November 7, 2007, Dr. [REDACTED] states she has been treating the applicant's wife for approximately three years when she has "episodes of acute anxiety with some depressive symptoms." Counsel states the applicant's wife's "family and therapist are very concerned about the continuing absence of [the applicant] and [the applicant's wife's] critical need to have him with her to cope with her mounting responsibilities." The AAO notes that since it appears that the applicant's wife's anxiety and depression are primarily caused by the separation from the applicant, if the applicant's wife joins the applicant in the Bahamas then the anxiety and depression would presumably no longer be an issue.

The applicant's wife states she wants to become a registered nurse, but she had to put those plans on hold when she became pregnant with her twin daughters. The applicant's wife further states that she could not attend school in the Bahamas "because of the costs of education there." The AAO notes that it has not been established that the cost of education in the Bahamas exceeds the cost of education available to the applicant's wife in the United States, or that the applicant's wife could not afford this education. Additionally, the AAO notes that the applicant has not established that his wife has no transferable skills that would aid her in obtaining a job in the Bahamas and that there are no employment opportunities for her there. The AAO finds that the applicant failed to establish that his wife would suffer extreme hardship if she joined him in the Bahamas.

The AAO finds that counsel has demonstrated extreme hardship to the applicant's wife if she remains in the United States without the applicant; however, it has not been established that the applicant's wife would suffer extreme hardship if she joined the applicant in the Bahamas. The AAO notes that the record fails to demonstrate that the applicant will be unable to contribute to his wife's financial wellbeing from a location outside of the United States. In fact, the AAO notes that the applicant is employed in the Bahamas. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The AAO, therefore, finds the applicant has failed to establish extreme hardship to his wife if she joins him in the Bahamas.

In limiting the availability of the waiver to cases of “extreme hardship,” Congress provided that a waiver is not available in every case where a qualifying family relationship exists. The AAO recognizes that the applicant’s wife has endured hardship as a result of separation from the applicant; however, she has not demonstrated extreme hardship if she were to join the applicant in the Bahamas.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s wife caused by the applicant’s inadmissibility to the United States. 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) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.