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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:



Office: ATLANTA

Date: JUL 01 2010

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, and 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 Nigeria 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 her last departure from the United States. The record indicates that the applicant is married to a United States citizen and she 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 her United States citizen husband and children.

The 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. The director noted that the applicant failed to submit evidence of extreme hardship. *Decision of the District Director*, dated September 25, 2006.

On appeal, the applicant, through counsel, asserts that the applicant's husband will suffer extreme hardship if the applicant is forced to relocate to Nigeria. Counsel submits a brief and additional evidence. Counsel concedes that the applicant accrued unlawful presence in excess of a year, and is therefore, subject to a 10 year bar. *See, Form I-290B and counsel's appeal brief.*

The record includes counsel's appeal brief and supporting evidence, including letters from Dr. [REDACTED] and supporting documentation pertaining to the medical history of the applicant's husband, and a letter from [REDACTED]. *See letters from Dr. [REDACTED] and supporting medical records, and [REDACTED]* 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.

In the present application, the record indicates that the applicant initially entered the United States on October 8, 1990, on a Transit Without A Visa, which expired on October 20, 1990. On December 13, 1996, the applicant's husband (then a permanent resident) filed a Form I-130 on behalf of the applicant. On February 15, 1997, the applicant's Form I-130 was approved. On July 13, 2004, the applicant filed a Form I-485, Application to Adjust Status. While the Form I-485 application was pending, the applicant departed the United States sometime after August 20, 2004, and she returned on June 23, 2005 and was paroled until June 22, 2006. The applicant accrued more than a year of unlawful presence from April 1, 1997 to the filing of her Form I-485 adjustment application on July 13, 2004. The applicant triggered unlawful presence inadmissibility by departing sometime before June 23, 2005. On December 21, 2005, the applicant filed a Form I-601. On September 25, 2006, 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 her United States citizen spouse.

The applicant is attempting to seek admission into the United States within 10 years of her last departure. 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.

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 herself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. The AAO also notes that the record contains several 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)(v) of the Act provides that a waiver is applicable solely where the applicant establishes extreme hardship to her U.S. 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 husband 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. 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).

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. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, 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 also 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).

U. S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to 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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

Counsel states the applicant’s husband will endure extreme hardship in the United States if the applicant was forced to return to Nigeria. Counsel points out that the applicant’s husband has been suffering from a “severe (extreme) cardiac condition,” “[he] is unable to stay alive without the assistance of a Medtronic Biventricular Pacemaker implantation,” “he endured multiple operations on his heart over the years,” and, “[he] requires the provided assistance from his loving wife in order to live.” Counsel also points out that the applicant’s husband would be under additional emotional and financial stress having to care for their two teenage children, and provide financially for the family. Counsel notes that the applicant’s husband’s “driving ability is frequently limited,” and he is unable to perform functions such as attending the children’s school activities. In her letters, Dr. [REDACTED] confirms that since the year 2000, she has been treating the applicant’s husband for a serious heart condition and he has had an operation requiring the placement of a “special biventricular pacemaker with a defibrillator for monitoring and treatment of potentially life-threatening arrhythmias.” Dr. [REDACTED] also states that the applicant is needed to provide emotional care for her husband, and is “needed to provide daily care and

transportation if his condition worsens.” Dr. [REDACTED] further states that “Mr. [REDACTED] benefits from the presence of his wife, [REDACTED], and his family. His cardiac condition is severe and he is at risk for life threatening arrhythmias and sudden cardiac death.” The letter from [REDACTED] Licensed Professional Counselor, states that the applicant’s husband has “serious health issues that have created a great deal of stress in his life. This stress has exacerbated by a legal situation that involves the immigration status of his wife.”

Given the seriousness of his medical condition, the applicant’s husband would suffer extreme hardship as a result of separation from his wife, his primary caregiver. Combined with the increased financial and familial burdens that the applicant’s spouse will face if the applicant departs the United States, the cumulative hardship in this case is beyond that which is normally experienced in cases of removal.

Likewise, due to the nature of his heart condition, separating him from doctors he has seen for years and who are familiar with his heart condition would be extreme. The U.S. Department of State Overseas Advisory Council states, in pertinent part:

Emergency medical care is not readily available in Nigeria, including major cities. There are several hospitals and clinics located in Abuja and Lagos, but none are up to U.S. standards. Poor training, lack of equipment, and poor sterilization standards are issues for the majority of hospitals and clinics in Nigeria. All private hospitals and clinics require cash payment before receiving any care.

See, *U.S. Department of State Overseas Advisory Council, Nigeria 2010 Crime & Safety Report, Sub-Saharan Africa – Nigeria, March 24, 2010.*

Accordingly, the AAO finds that the applicant has established that her United States citizen husband would suffer extreme hardship if her waiver of inadmissibility application were denied.

The favorable factors presented by the applicant are the extreme hardship to her United States citizen husband and children, who depend on her for emotional and financial support; the applicant’s work history in the United States; letter of recommendation; and no criminal record.

The unfavorable factors include the applicant exceeding her authorized stay in the United States, and periods of unauthorized presence and employment.

While the AAO does not condone her actions, the applicant has established that the favorable factors in her application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. See *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The application is approved.