

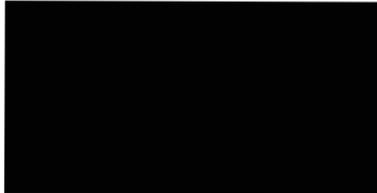
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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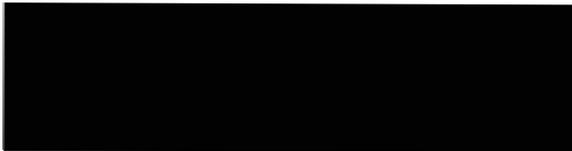
FILE: [REDACTED] Office: [REDACTED]

Date: **MAY 28 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:



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
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Accra, Ghana. 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 Senegal who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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 her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative. The field office director further found that the applicant appears to have married her spouse for immigration purposes only and denied the application accordingly. *Decision of the Field Office Director*, dated March 20, 2009.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, Mr. ■■■, indicating they were married on August 13, 2006; a copy of Mr. ■■■ naturalization certificate; a letter from Mr. ■■■; a letter from the applicant; a letter from an attorney indicating Mr. ■■■ filed for bankruptcy; a letter indicating that the bank foreclosed upon Mr. ■■■ house; a letter from the couple's children's physician and copies of their prescriptions; documentation from the children's school; copies of Mr. ■■■ medical records; letters from Mr. ■■■ physicians; tax and financial documents; copies of photos of the applicant and her family; 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 field office director found, and the applicant admits, that she entered the United States (in an unknown status) in February 1995 and remained until June 2004. *Brief in Support of Applicant's I-601 Waiver Appeal* at 3, dated April 28, 2009. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure from the United States in June 2004. She now seeks admission within ten years of her 2004 departure from the United States. Accordingly, she is 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 one year or more and seeking admission to the United States within ten years of her last departure.

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. § 1182(a)(9)(B)(v). An applicant must establish extreme hardship to his or her qualifying relative should the qualifying relative choose to join the applicant abroad, as well as should the qualifying relative choose to remain in the United States and be separated from the applicant. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. See *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996) (considering hardship upon both separation and relocation). 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. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals 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 husband, Mr. ■■■, states that he has owned his own business for eighteen years. He states that he and his wife have three children and that it really hurts that they are growing up without their mother. According to Mr. ■■■, since his wife departed the United States, he has suffered “incalculable” emotional, psychological, and financial hardship. He states that he and his children are depressed and that his children’s grades have suffered. Mr. ■■■ contends he often relies on friends to take care of his children while he works and has hired countless babysitters. In addition, Mr. ■■■ claims that two of his children have very severe asthma, are on daily medication, and that he often must stay home to care for them. He states that one of his sons was recently hospitalized for several days. Furthermore, Mr. ■■■ states he worries about his wife in Senegal because she is developing depression and anxiety symptoms. Moreover, Mr. ■■■ contends he cannot move to Senegal to be with his wife because his three children do not speak the language there and he would be forced to abandon his business and sell his home. In addition, he states he has loans and bills that he must pay back and fears he would be unable to find employment in Senegal to cover all his expenses. Mr. ■■■ further contends he was recently diagnosed with glaucoma and that he has hypertension. He states his health has deteriorated because of the continuous stress and anxiety of his wife’s immigration status. *Letter from* ■■■ dated October 28, 2008.

A letter from the applicant states that she has been out of the United States for almost five years and that she has missed many birthdays and other events, causing her husband, children, and herself extreme financial and emotional hardship. The applicant states that her two younger children have severe asthma and are sometimes taken to the emergency room or hospitalized. In addition, she states that their achievement at school has been affected by her departure. Furthermore, the applicant contends that she has not been working since she returned to Senegal and that she has been completely dependent on her husband financially for all of her needs. She states that Mr. ■■■ has been sending her money on a regular basis and that maintaining two households has been very expensive. Moreover, the applicant contends Mr. ■■■ is self-employed and that combining his work and taking care of the children has put a lot of stress on him which has affected his health. In addition, the applicant contends Mr. ■■■ has

heavily depended on friends and paid help in order to keep up with the children and the house. *Letter from* [REDACTED], dated October 28, 2008.

Tax documents in the record show that Mr. [REDACTED] earned \$16,198 in 2008 from his clothing store. *U.S. Individual Income Tax Return (Form 1040)*, dated January 7, 2009. Documentation in the record also shows that Mr. [REDACTED] has become delinquent with several bills. *See, e.g., Letter from* [REDACTED] *Services*, dated February 6, 2009 (indicating Mr. [REDACTED] car payment was past due); *Letter from* [REDACTED] *Mortgage*, dated February 10, 2009 (stating the mortgage payment was in default); *Letter from* [REDACTED] *Mortgage Corporation*, dated April 2, 2009 (same). More recent letters indicate that the bank foreclosed upon the couple's house and that Mr. [REDACTED] filed for bankruptcy. *Letter from* [REDACTED] dated January 9, 2010; *Letter from* [REDACTED] dated February 26, 2010.

A letter from Mr. [REDACTED] physician states that Mr. [REDACTED] has been under his care since 1999. According to Mr. [REDACTED] physician, Mr. [REDACTED] suffers from depression, glaucoma, and hypertension, which are ongoing and chronic conditions. The physician states Mr. [REDACTED] has been prescribed Wellbutrin for depression, Lisinopril for hypertension, and Travatan for glaucoma. The physician further contends that due to Mr. [REDACTED] medical problems, it is "difficult for him to work." *Letters from Dr.* [REDACTED] dated April 13, 2009, and October 30, 2008.

Documentation in the record indicates the couple's two younger children have ongoing, chronic asthma. The couple's youngest son takes one medication daily and has four "rescue medications." *Letter from* [REDACTED] dated April 10, 2009. The couple's second oldest child takes a different daily medication and has three "rescue medications." *Id.* The record further shows that he was hospitalized in August 2008 for an asthma episode, also takes allergy medication, and was seen by a physician on January 27, 2010. *Letter from* [REDACTED], undated; *Office Visit Notes of Dr.* [REDACTED] dated January 27, 2010. The record indicates that both boys need to see their doctor at least every three months. *My Asthma Action Plan*, undated.

A copy of the second oldest child's report card indicates he failed language arts and a letter in the record states that the couple's oldest child was suspended from school for three days due to fighting. *Comprehensive Progress Report*, dated March 3, 2010; *Letter from* [REDACTED] dated April 2, 2009.

Upon a complete review of the record, the AAO finds that the applicant has established her husband has suffered, and will continue to suffer, extreme hardship if her waiver application is denied.

Documentation in the record shows that Mr. [REDACTED] is a single parent to three minor children, two of whom have severe asthma that requires daily medication, regular doctor visits, and sometimes hospitalization. In addition, the record indicates that one of the children was suspended from school for fighting and that another had failed one subject in school. Furthermore, the record shows that Mr. [REDACTED] has depression, glaucoma, and hypertension and that he has been prescribed medications to treat these conditions. Moreover, the record indicates that the bank foreclosed upon Mr. [REDACTED] house and that he recently filed for bankruptcy in February 2010. Considering these unique factors cumulatively, the AAO finds that

the effect of separation from the applicant on Mr. ■ goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility and rises to the level of extreme hardship.

Moreover, moving to Senegal to avoid separation would be an extreme hardship for Mr. ■. The record shows that Mr. ■ is currently fifty-six years old and has lived in the United States for at least twenty years. The record further shows that his U.S. citizen children, the youngest of whom is eight years old, do not speak the language in Senegal proficiently. Furthermore, the record shows that Mr. ■ is being treated for depression, glaucoma, and hypertension, and that two of his sons are being treated for severe asthma. Moving to Senegal would disrupt the continuity of health care they have been receiving. In addition, according to the U.S. Department of State, the treatment of major and minor injuries and illnesses is available only in Senegal's capital, Dakar, as "medical facilities outside Dakar are extremely limited." *U.S. Department of State, Country Specific Information, Senegal*, dated May 3, 2010. Therefore, Mr. ■ would need to adjust to a life in Senegal, a difficult situation made even more complicated considering that he would be limited to living and staying within the boundaries of Dakar given his and his children's health problems. In sum, the hardship Mr. ■ would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with inadmissibility. 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 Mr. ■ 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 factor in the present case is the applicant's unlawful presence in the United States. The AAO notes that although the field office director found that a favorable exercise of discretion was not warranted because the Form I-130 "appears [to have been] approved in error," the record does not support such a finding. The Form I-130 was approved on May 10, 2007, and there is no indication it has been revoked. In addition, there is no evidence in the record showing that the marriage was entered into for the purpose of circumventing immigration laws. Moreover, the record contains a memorandum dated November 13, 2009, from the Accra Field Office concluding that a further review of the file does not substantiate a finding of marriage fraud.

The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission; family ties in the United States including her U.S. citizen husband and children; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when 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.

[REDACTED]

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ORDER: The appeal is sustained.