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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

[Redacted]

H6

Date: **JUN 02 2011**

Office: BALTIMORE

FILE: [Redacted]

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:

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, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The matter will be returned to the district director for continued processing.

The record reflects that the applicant, a native and citizen of Liberia, entered the United States with a valid B-2 nonimmigrant visa on June 7, 1996, with permission to remain until December 6, 1996. The record establishes that in May 2003, the applicant was granted Temporary Protected Status (TPS) for the first time. *See Form I-821, Application for Temporary Protected Status*, dated March 20, 2003. The applicant received TPS status renewal in September 2004 and again in December 2005, valid until October 1, 2006. In November 2006, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Form I-130, Petition for Alien Relative, submitted on the applicant's behalf by her U.S. citizen mother.¹ On September 14, 2006, the applicant was issued the Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States. The applicant's Form I-485 was consequently denied on December 6, 2007. The applicant submitted a second Form I-485 application in March 2008, which was denied in November 2008. Pursuant to the record, the applicant continues to reside in the United States.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until she was granted TPS in March 2003. Thus, the applicant 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 does not contest this finding of inadmissibility. Rather, she seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen mother.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative, specifically, her U.S. citizen mother, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated November 6, 2008.

In support of the appeal, counsel for the applicant submitted the following: a statement, dated November 2, 2008; a letter from the applicant's sibling, dated November 18, 2008; a letter from the applicant, dated November 15, 2008; and a letter from the applicant's cousin, dated November 17, 2008. On appeal, counsel asserts that USCIS erred in failing to consider evidence or hear testimony concerning the medical condition of the applicant's mother, who was suffering from end-stage renal disease and died shortly after the waiver application was denied. *See Counsel's Statement in Support of Form I-290B*. The entire record was reviewed and considered in rendering this decision.

¹ The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

Section 212(a)(9)(B)(i)(II) 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 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...

On December 15, 2008, counsel for the applicant sent a letter to the USCIS-Baltimore and the AAO advising that the applicant's U.S. citizen mother, [REDACTED], had died on November 26, 2008. A copy of the State of Maryland Certificate of Death was submitted.

With respect to the applicant's mother's death in November 2008 and its impact on the applicant's Form I-601, the new section 204(1) of the Act, which became effective on October 28, 2009, before the instant appeal was adjudicated, states as follows:

1) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable

discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);
- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 01(a)(15)(U)(ii); or
- (F) an asylee (as described in section 208(b)(3)).

The applicant qualifies for relief under section 204(l) of the Act, as the record indicates that she was residing in the United States when her mother died, she continues to reside in the United States at this time and she is the beneficiary of an approved family-based visa petition. Consequently, the applicant is eligible to obtain a waiver based on extreme hardship to her mother, the petitioner of the Form I-130 on behalf of the applicant, who is now deceased.

Pursuant to the Policy Memorandum issued on December 16, 2010, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, the fact that the qualifying relative has died will be "deemed to be the functional equivalent of a finding of extreme hardship...." See *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, dated December 16, 2010. Consequently, a review of the record reflects that the applicant has established extreme hardship. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of

equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardships the applicant and her U.S. citizen sister and child would face if the applicant were to reside in Liberia, regardless of whether they accompanied the applicant or remained in the United States, community ties, gainful employment, the applicant's apparent lack of a criminal record, and the passage of more than fourteen years since the applicant's commencement of unlawful presence in the United States. The unfavorable factors in this matter are the applicant's periods of unauthorized presence and employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.