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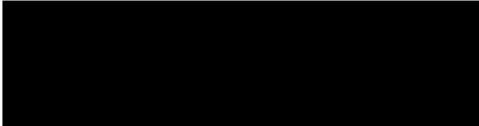
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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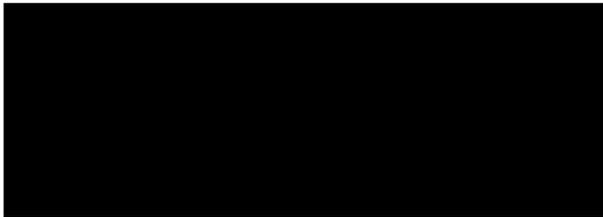
FILE:

SEP 01 2011

IN RE: Applicant

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Michael Shumway*

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic 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 one year or more and seeking readmission within 10 years of his last departure.<sup>1</sup> He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated September 16, 2010.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) was complicit in rendering the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act, as USCIS issued the applicant an Advance Parole travel document that suggested he could travel abroad without consequences. *Statement from Counsel on Form I-290B*, dated October 18, 2010. Counsel further asserts that the applicant has shown that his wife will endure extreme hardship should the present waiver application be denied.

The record contains, but is not limited to: briefs from counsel; statements from the applicant and his wife; a letter from a hospital confirming that the applicant’s wife was pregnant as of February 23, 2010; documentation of the applicant’s health insurance; a letter from the applicant’s accountant; documentation of the applicant’s taxes, bills, and assets; reports on the effects of deportation on children and families; and documentation associated with the applicant’s criminal history. The entire record was reviewed and considered in rendering this decision.

As a preliminary matter, in correspondence dated July 16, 2011 counsel asserts that the Form I-290B was filed as a “request for Reconsideration”, yet there is no indication that “reconsideration was ever provided.” It is noted that in Part 2 of Form I-290B, counsel checked box “B” to indicate that “I am

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<sup>1</sup> The record shows that on September 12, 2010 the applicant was arrested by Montgomeryville, Pennsylvania police for driving under the influence of alcohol or a controlled substance. The AAO lacks complete records of this incident, including documentation of whether he was convicted for this offense, and information regarding whether the offense involved a controlled substance, not alcohol. If the applicant was convicted of an offense relating to a controlled substance, he is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Except in the limited instance of individuals who have been convicted of a single offense relating to possession of 30 grams or less of marijuana, there is no available waiver of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and the present appeal is being dismissed, the AAO need not reach this issue at the present time. However, should the applicant seek admission at a future time when he is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act, he will be required to establish that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act or other provisions of the Act.

filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days.” Form I-290B, Part 2, has separate options to indicate that the applicant seeks a motion to reconsider, either box “E” or box “F”, neither of which counsel checked. Thus, counsel instructed USCIS that the filing was to be treated as an appeal, and the appeal was properly forwarded to the AAO.

As of July 15, 2011, the AAO had received no brief or additional evidence from counsel. Due to the fact that counsel indicated that his “brief and/or additional evidence will be submitted to the AAO within 30 days” of filing the appeal, the AAO contacted counsel on July 15, 2011 by facsimile to alert him that this office had received no new documentation. The AAO afforded counsel five business days within which to provide any missing documentation, if applicable. In his correspondence of July 16, 2011 counsel informed the AAO that he did not supplement the record and a decision should be made based on previously submitted documentation. Counsel takes issue with the generalized form of the AAO’s facsimile, the fact that a deadline was imposed for replacing any missing filings, and the indication that summary dismissal is possible without a response to the facsimile. It is noted that the facsimile was a courtesy to counsel and the applicant to ensure the record contains all submitted documentation before a decision is issued on the appeal, and there is no requirement in the Act or regulations that the AAO issue such correspondence. As correctly observed by counsel, the facsimile was general in nature, and reference to summary dismissal was an advisement that an incomplete record may lack adequate assertions or evidence to overcome the regulatory requirement of 8 C.F.R. § 103.3(a)(1)(v), to which the AAO is bound.

Counsel further contends that the record suggests that denial of the applicant’s Form I-601 application for a waiver was pre-determined based on observed dates of events in the applicant’s immigration history and the fact that the applicant was placed into removal proceedings. However, the field office director’s decision was very detailed, specific to the facts of the applicant’s case, and well-reasoned based on applicable legal standards. The AAO finds no support in the record that the applicant was prejudiced by a pre-determined conclusion in these proceedings. Counsel further asserts that “this decision is an example of an unconstitutional and unlawful pattern or practice to deny waiver applications to arriving aliens such as [the applicant].” However, counsel provides no factual or legal support for this statement, and the AAO is unable to conclude that this assertion has a bearing on the present matter.

Section 212(a)(9) 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.

The record shows that the applicant entered the United States without inspection in or about 1982 and he remained until or about 1987. He reentered without inspection in 1987. On April 30, 2001 he filed a Form I-485 application to adjust his status to lawful permanent resident. He filed a second Form I-485 application on November 29, 2001. On or about March 13, 2002 the applicant departed the United States. He was paroled back into the country on March 22, 2002 pursuant to an Advance Parole travel document. The applicant departed again on or about July 5, 2002, and he was paroled back into the country on July 15, 2002 pursuant to an Advance Parole travel document. He departed on or about March 18, 2005, and he was paroled back in on March 25, 2005 pursuant to an Advance Parole travel document.

Based on the foregoing, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until he filed his first Form I-485 application on April 30, 2001. This period totals over four years. As he subsequently departed the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure.

On appeal, counsel asserts that the actions of USCIS "served to entice [the applicant] in to [sic] leaving the U.S. with advance parole", and that USCIS's "complicity in creating the alleged violation of section 212(a)(9)(B) should prohibit it from asserting inadmissibility in that ground." Counsel suggests that the applicant's lack of representation rendered him unable to understand the warning on the Advance Parole document against traveling after accruing unlawful presence.

On the face of the applicant's advance parole document, it clearly and prominently stated:

NOTICE TO APPLICANT: . . . If, after April 1, 1997, you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act when you return to the United States to resume the processing of your application. If you are found inadmissible, you will need to qualify for a waiver of inadmissibility in order for your adjustment of status application to be approved.

Thus, the applicant had notice of the risk of departure from the United States, and he was made aware that issuance of a Form I-512 Advance Parole travel document would not shield him from inadmissibility under section 212(a)(9)(B)(i) of the Act. He was found inadmissible for precisely the reason presented in the warning on the document. It is noted that the applicant had entered the United States without inspection on multiple occasions, and he had remained without an unlawful status for many years. The record supports that he knew he had accrued over 180 days of unlawful presence after April 1, 1997, as specifically discussed in the warning. Further, the AAO lacks discretion to choose not to apply the provisions of the Act. Further, the applicant has not shown that USCIS action caused him to transgress U.S. immigration law, or that he was erroneously deemed inadmissible. Thus, the applicant requires a waiver under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “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.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

On appeal, counsel renews his assertion that the field office director applied an outdated legal standard of extreme hardship. Specifically, counsel asserts that reliance on the decision of the Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* is incorrect. Counsel bases this assertion primarily on the fact that the BIA cited prior decisions that predate the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). However, *Cervantes-Gonzalez* was decided in 1999, after the enactment of IIRIRA, and it remains binding precedent on AAO decisions. The BIA was interpreting relatively new law, and the fact that it referenced matters that predated the law in question did not undermine the value of their analysis. Further, the AAO lacks authority to overrule or decline to follow the published precedent decisions of the BIA in effect at the time of a given appeal. *See* 8 U.S.C. § 1103(a)(1). Counsel has not cited any precedent Federal court or administrative decisions that overrule *Cervantes-Gonzalez*. As discussed above, the AAO finds that *Cervantes-Gonzalez* remains instructive regarding the proper analysis of factors when assessing extreme hardship.

In a statement dated March 1, 2010, the applicant asserted that his family will suffer hardship if he is compelled to reside outside the United States. He indicated that he runs businesses including a beer distributor with a store attached, two grocery stores in Philadelphia, and one grocery store in Allentown, Pennsylvania. He stated that he owns these businesses with his wife, though he performs most of the management work. He added that his wife works in the stores but she mostly cares for their house and children. He asserted that his wife would be unable to maintain the businesses in his absence, and they would likely have to sell them at a loss. He expressed concern for his family’s ability to pay their mortgage and maintain health insurance. He noted that one of his children requires asthma medicine.

The applicant stated that his family would have difficulty adapting to life in the Dominican Republic, and that he would face challenges supporting them there. He provided that he has concern for his family’s access to medical care there. He stated that he may be unable to start businesses in the Dominican Republic, and he may have to sell his houses and businesses in the United States for less than he paid for them.

In a statement dated February 15, 2010, the applicant's wife stated that she would not be able to reside in the United States without the applicant, and that she and their children would relocate with him to the Dominican Republic. She asserted that she is unable to take care of their businesses by herself. She added that their children would face hardship residing apart from the applicant, and that two of them have asthma. She stated that she has diabetes and that she has no one else in the United States but the applicant and their children.

In a letter dated February 25, 2010, an accountant for the applicant's businesses, [REDACTED] stated that he has been performing the applicant's bookkeeping and tax filings since September 2006. He provided that the applicant has been the sole manager of the businesses and that the applicant's wife has been a stay-at-home mom. [REDACTED] explained that the applicant has made decisions for the businesses in his and his wife's name. [REDACTED] indicated that the applicant and his wife would be unable to recoup their original investment amount should they sell the businesses at the present time. [REDACTED] posited that the applicant's wife would face significant difficulty in the applicant's absence due to the cost of their primary mortgage and the need to support their three children.

Upon review, the applicant has not shown that his wife will suffer extreme hardship should the present waiver application be denied. The applicant has asserted that his wife will endure financial hardship should he reside outside the United States. The field office director conducted a detailed analysis of the applicant's family's economic circumstances based on the submitted documentation. Specifically, the field office director concluded that the applicant has a significant net worth due to his businesses and real property, and that the record does not support that his wife will face unusual financial difficulty should she join the applicant abroad or remain in the United States. Counsel and the applicant have not addressed the field office director's financial analysis on appeal, or otherwise supplemented the record with relevant documentation. In addition to the field office director's analysis, the AAO observes that the presence of multiple businesses suggests that the applicant has employees with the capability to act independently. The applicant has not shown that his wife would be without the assistance of experienced employees to assist her in the applicant's absence, or that the applicant and his wife would be compelled to sell their businesses should they reside abroad. The AAO has examined the general assertions from [REDACTED] yet they are not supported by financial records and they are not sufficient to establish that the applicant's family will encounter significant financial difficulty should the applicant depart the United States.

As the applicant has not shown that his family would endure a significant break in the continuity of their financial situation, he has not established that his wife or children would be without health insurance or that their residence would be jeopardized should he reside outside the United States. It is noted that, although the applicant expressed concern for his children receiving medical services for asthma, and his wife asserted that she suffers from diabetes, the record lacks medical documentation for the applicant's family members to show that they require unusual health care. The record does not support that his family members would face additional hardship in the United States or the Dominican Republic due to unmet medical needs.

The record does not show that the applicant's wife will endure extreme hardship in the Dominican Republic should she reside with the applicant there. It is noted that the AAO is limited to the assertions and evidence provided by the applicant in assessing the particular circumstances his wife will face. The statements from the applicant and his wife are brief, and he has not submitted any documentation on conditions in the Dominican Republic. The applicant's wife is a native of the Dominican Republic, suggesting that she will not face the challenges of adapting to an unfamiliar language or culture should she reside there. The record reflects that the applicant's wife does not have other relatives in the United States; thus, she would not endure separation from family should she relocate to the Dominican Republic. The AAO acknowledges that the applicant's children would face the challenges of adapting to life in a foreign country, and that their difficulty would impact the applicant's wife. Yet, the applicant has not shown that his children would suffer unusual consequences, or that their hardship would elevate his wife's challenges to an extreme level.

The AAO has examined the submitted reports on the effects of immigration enforcement and family separation on children and other family members. The AAO acknowledges that family separation and relocation often involve significant challenges. Yet each case must be assessed individually to determine whether the particular circumstances faced by the applicant's qualifying relatives can be distinguished from the common results of separation or relocation. As discussed above, in the present matter the record lacks sufficient evidence to show that the applicant's wife's challenges will rise to an extreme level.

Considering all stated elements of hardship in aggregate, the applicant has not shown that his wife will suffer extreme hardship should the present waiver application be denied. As such, no purpose would be served in assessing whether he merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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.