U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [redacted] Office: [redacted] Date: JAN 15 2003

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), and under Section 212(i) of the Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT: SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, London, United Kingdom, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the United Kingdom who was found by a consular officer to be inadmissible to the United States under 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 a period of one year or more, and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for having sought to procure a visa for admission into the United States by fraud or willful misrepresentation. The applicant is married to a United States citizen and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to travel to the United States to reside with her spouse.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, the applicant's spouse states that he has suffered two strokes and has uncontrolled hypertension and diabetes; that his eyesight is failing, his condition is deteriorating and he has been declared disabled; and that he urgently needs the applicant to be with him so that she can assist him in his day-to-day activities. He states that while he has been separated from the applicant for four years, he is not managing without her and is suffering extreme hardship as a result of the separation. The spouse further asserts that the applicant did not willfully disregard the laws of the United States and that the officer in charge failed to consider all of the relevant factors in the case and mischaracterized the negative factors.

The issue of inadmissibility is not the purpose of this proceeding. Issues of inadmissibility are to be determined by the consular officer when an alien applies for a visa abroad. This proceeding must be limited to the issue of whether or not the applicant meets the statutory and discretionary requirements necessary for the exclusion ground to be waived. 22 C.F.R. 42.81 contains the necessary procedures for overcoming the refusal of an immigrant visa by a consular officer.

The record reflects that the applicant entered the United States as a nonimmigrant visitor on March 13, 1986, and with the exception of two brief returns to the United Kingdom in 1991 and 1996, remained in the United States longer than authorized. She was unlawfully present in the United States from April 1, 1997, the date the calculation for unlawful presence begins, until her departure to the United Kingdom on April 26, 1998 in order to apply for an immigrant visa based on an approved petition filed in her behalf by

her naturalized United States citizen sister. The application for an immigrant visa was denied based on the grounds of inadmissibility noted above. No waiver of inadmissibility was available to the applicant at the time because she did not have the requisite qualifying relationship.

On November 25, 2000, the applicant and her spouse were married in London, United Kingdom. The applicant's spouse filed a petition for alien relative on the applicant's behalf on January 1, 2001 and the petition was approved by the Service on July 12, 2001. The applicant subsequently reapplied for issuance of an immigrant visa and was, as noted above, determined to be inadmissible. The current application for waiver of inadmissibility was filed on January 24, 2002.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> * * *
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> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
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> * * *
>
> (C) MISREPRESENTATION.-
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> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
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> (9) ALIENS PREVIOUSLY REMOVED.-
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> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-
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> * * *

> (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 from the United States, is inadmissible.
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> * * *
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> (v) WAIVER.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(i) of the Act states:

> ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-
>
> (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.
>
> (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar

in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground of inadmissibility for unlawful presence after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

It is noted that the requirements to establish extreme hardship in section 212(a)(9)(B)(v) waiver proceedings do not include a showing of hardship to the alien as did former cases involving suspension of deportation. Waiver proceedings under section 212(a)(9)(B)(v) require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under section 212(i) of the Act, 8 U.S.C. 1182(i).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for section 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

In Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under section 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) 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; (4) the financial impact of departure from this country; (5) and finally, 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 support of the initial waiver application, the applicant submitted a statement from her spouse indicating that she cared for him prior to her departure from the United States in 1998, that he has medical problems, that he does not want to leave his children in the United States and relocate to the United Kingdom, and that he needs the applicant to care and comfort him. However, the record reflects that when the applicant originally applied for an immigrant visa in 1998, she indicated on her application that she had been residing in the United States with her sister and was employed as a secretary.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that

"extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

There are no laws that require a United States citizen to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

A review of the documentation in the record fails to establish the existence of hardship to the applicant's spouse (the only qualifying relative in this matter) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to travel to the United States to reside. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) and section 212(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.