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U.S. Citizenship
and Immigration
Services

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FILE:

Office: PHILADELPHIA (PITTSBURGH)

Date:

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IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, [REDACTED], a 64-year old citizen of Mexico, was found to be inadmissible to the United States pursuant to section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for multiple criminal convictions. The record indicates that the applicant's wife, [REDACTED] ([REDACTED]), is a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife.

The District Director based his finding of inadmissibility under section 212(a)(2)(B) of the Act on the applicant's multiple convictions for the offense of Driving While Under the Influence in Pennsylvania, dating from 1988 to 2002; and the offense of Trespass After Warning in 1985 in Florida. *District Director's Decision*, dated March 23, 2004.

The District Director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, the applicant's U.S. citizen wife contends that she will suffer extreme hardship if her husband is prohibited from residing in the United States. *Statement from Dianne Reyes in Support of Appeal*, dated November 16, 2004.

The record contains a copy of the marriage certificate of Mr. and [REDACTED] copies of their birth certificates; a statement from [REDACTED] *supra*, noting that due to her medical problems moving to Mexico would present an extreme medical hardship for her; that her pain is sometimes debilitating and, at those times, she requires assistance with normal activities of daily living that her husband provides; various medical records for [REDACTED] (dated from 1998-2003) indicating that she has had numerous exams and treatment for knee and lower back pain and sleep apnea; two letters from the Executive Director of Multicultural Health Evaluation Delivery System, one (dated January 7, 2003) stating that [REDACTED] has been employed there since 1988, earning \$11.74 an hour, 35.5 hours per week, as an Office Coordinator, and the other (dated November 5, 2004) stating that [REDACTED] has worked as a seasonal farmworker in regional vineyards for a number of years and volunteers at the agency particularly with snow shoveling, grass cutting and leaf gathering; a letter (dated November 5, 2004) from Abiding Hope Lutheran Church attesting to Mr. [REDACTED] good character and to the couple's strong marriage. Documentation of the applicant's criminal history is also included. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part, that:

- (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

...

(B) Any alien **convicted of 2 or more offenses** (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, **for which the aggregate sentences to confinement were 5 years or more** is inadmissible (emphasis added).

Section 212(h) of the Act provides, in pertinent part, that:

(h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . of subsection (a)(2)

. . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [now the Secretary of Homeland Security (Secretary)] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The District Director notes that [REDACTED] was convicted of six crimes between 1985 and 2001. In 1985, he was convicted of Trespass After Warning, in Okeechobee County, Florida, for which he was sentenced to ten days confinement; in 1988, 1990, 1992, 2001, and 2002 he was convicted in Erie County, Pennsylvania, of Driving Under the Influence (DUI), for which he was sentenced to confinement for 2 days to 18 months, 30 days to 23.5 months, six to 12 months, and six to 24 months respectively. An indeterminate sentence is considered by the Attorney General (AG) and the Board of Immigration Appeals (BIA) and some courts to be a sentence for

the maximum term of imprisonment. *Matter of Jean*, 23 I&N Dec. 373, 386 n.14 (AG 2002); *Matter of S-S*, I&N Dec. 900 (BIA 1997); *Bovkun v. Ashcroft*, 283 F.3d 166, 170-71 (3rd Cir. 2002). The aggregate sentences to confinement for [REDACTED] therefore amount to 89.5 months plus ten days. The AAO notes that the final disposition and sentence for the most recent arrest in the record, DUI in August 2001, are not included in the record; however, without including the 12-month sentence listed by District Director for that conviction, the aggregate sentences remain over five years. Thus [REDACTED] was convicted of two or more offenses for which the aggregate sentences to confinement were five years or more, and the District Director correctly concluded that he is inadmissible under section 212(a)(2)(B) of the Act. The applicant does not contest his inadmissibility on appeal.

A section 212(h)(1)(B) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on a "qualifying relative," *i.e.*, the U.S. citizen or lawfully resident spouse, parent or son or daughter of the applicant. Hardship to the applicant himself is irrelevant to section 212(h) waiver proceedings and will be considered only insofar as it results in hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, in this case [REDACTED] U.S. citizen wife, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Morales*, 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 *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals 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.

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, U.S. courts have held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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). The applicant's wife has indicated that she would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The record indicates that [REDACTED] was born in Mexico in 1942 and entered the United States without inspection in 1981. [REDACTED] was born in Indiana in 1958; they were married in 2000. [REDACTED] contends that because of her medical problems she will suffer extreme hardship if [REDACTED] is prohibited from residing in the United States; that she will not be able to work or get proper medical care in Mexico and that she needs him in the United States, in part because she relies on him because of her physical problems and limitations. *Statement from [REDACTED] supra*. She states that she suffers from lower back and lower limb pain that can be quite severe and debilitating and that she has had one knee replacement and is awaiting replacement of the other knee; she also states that she suffers from sleep apnea, and that her husband responds to emergencies when she cannot breathe as a result. *Id.* In support of these statements, she has submitted medical records for exams conducted in 1998, 2000, 2001, 2002 and 2003 confirming that she has been diagnosed with a form of sleep apnea and treated for knee and back problems and that she has had knee replacement surgery and has significant problems with her other knee. She states that she is planning to undergo total knee replacement, which requires six weeks of recovery and in-home care that her husband can provide but which she could not afford in his absence. *Id.* Although the medical records do confirm that [REDACTED] suffers from and has been treated for the ailments she describes, the record does not contain any evidence that she will need extensive in-home care or that it is her husband who is uniquely qualified and needed to provide such care or other assistance; there are no doctors' reports indicating that [REDACTED] has been or is instrumental to his wife's medical well-being. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). [REDACTED] also states that she is receiving therapy for Clinical Depression because of her husband's pending deportation; again, there are no medical or hospital records that offer supporting documentary evidence of such a diagnosis or treatment. [REDACTED] adds that her medical insurance is provided by her current employer, making relocation to Mexico "most likely not possible due to medical conditions" and that she has come to rely on medical personnel with whom she has developed a relationship of trust; that she relies on [REDACTED] for physical help around the house and yard and that she could not maintain her home without him or without his income. *Statement from [REDACTED] supra*. The record, however, does not include any evidence that [REDACTED] contributes financially to the family; there are no income tax records, no letter from his employer, and no wage and earnings statements for him. In fact the only evidence relevant to the couple's finances is a letter from Mrs. Reyes' employer indicating that she earns a living wage and has been employed since 1988.

Upon review, the applicant has failed to show that his wife will suffer extreme hardship should he be prohibited from residing in the United States. The AAO recognizes that because of [REDACTED] medical problems, her reliance on her health insurance in the United States, and her lack of ties to Mexico, it would be difficult for her to relocate to Mexico to avoid separation from her husband. [REDACTED] can, however, choose to remain in the United States. Although she will suffer the emotional hardship of separation from a spouse, the evidence does not establish that these consequences go beyond those which are commonly experienced by the families of individuals deemed inadmissible. U.S. court decisions have 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). "Extreme hardship" has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996).

assertions that she needs her husband to take care of her and that she will need and cannot afford in-home care in his absence are not supported in the record. Although the assistance of a spouse is helpful, managed before their marriage; her treatments and her health insurance through her employment have been and will continue to be available to her regardless of the presence of and there is no evidence that her husband is gainfully employed.

Based on the foregoing, the applicant has not shown that, should he be prohibited from residing in the United States, his wife will suffer emotional hardship that is unusual or beyond that which would normally be expected in such circumstances. The applicant has not established that his wife's health status will result in extreme hardship due to his inadmissibility or that she will suffer financially if she remains in the United States. Thus, the documentation in the record, considered in the aggregate, fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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.