



U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES, CA

Date: MAR 15 2007

IN RE:

Applicant:

APPLICATION:

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant [REDACTED] is a native and citizen of Mexico. He was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The applicant sought 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 U.S. citizen wife [REDACTED] and child, who is now 11 years old.

The district director concluded 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. *Decision of the District Director*, dated January 5, 2005.

On appeal, counsel states that the applicant was convicted of possessing less than one ounce of marijuana under Cal. Health and Safety Code § 11357(b). Counsel asserts that this is a first-time simple possession conviction that was expunged under state law on August 14, 2003, and consequently is not considered a conviction under immigration law. Counsel refers to the Ninth Circuit of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 740 (9th Cir. 2000), to support his assertion. Counsel maintains that the applicant has established extreme hardship to his wife and child if he is ordered to leave the country.

The AAO will first address in this decision the director's finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — Except as provided in clause (ii), any 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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

....

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of subsection (a)(2) . . . insofar as it relates to a single offense of simple

possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant entered a plea of guilty for two crimes, violation of Cal. Health and Safety Code § 11370.1(a) on June 9, 1994 and violation of Cal. Health and Safety Code § 11357(b) on April 20, 2001.

Cal. Health and Safety Code § 11370.1(a) states:

(a) Notwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

As used in this subdivision, "armed with" means having available for immediate offensive or defensive use.

(b) Any person who is convicted under this section shall be ineligible for diversion or deferred entry of judgment under Chapter 2.5 (commencing with Section 1000) of Title 6 of Part 2 of the Penal Code.

Cal. Health and Safety Code § 11357(b) states:

Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100). . . .

The record reveals that the Minute Order of the Superior Court of California, County of Los Angeles, reflects that on April 20, 2001, the court entered a dismissal in furtherance of justice per Cal. Penal Code § 1385¹ for the conviction under Cal. Health and Safety Code § 11370.1(a). The court stated that it read and considered the defendant's motion to vacate judgment under Cal. Penal Code § 1016.5.² It stated that the people do not object, the motion is granted. Pursuant to stipulation, the court ordered the plea of guilty be vacated and set aside and dismissed pursuant to Cal. Penal Code § 1385. *Minute Order of the Superior Court of California, County of Los Angeles*, entered April 20, 2001.

It is noted that the defendant's motion to vacate the judgment under Cal. Penal Code § 1016.5 included a memorandum of points and authorities. The memorandum sought to vacate the judgment on the grounds that the court failed to admonish the defendant of the immigration consequences of his plea, as required by Cal. Penal Code § 1016.5, and that applicant's counsel did not advise the applicant of the immigration consequences of his plea. *Motion to Vacate the Judgment Under Penal Code Section 1016.5; Memorandum of Points and Authorities*.

The record shows that on August 14, 2003 the Superior Court of the State of California, County of Los Angeles, ordered that the plea, verdict, or finding of guilty of the applicant of the misdemeanor offense of violating Cal. Penal Code § 11357(b) on April 20, 2001 be set aside and vacated and a plea of not guilty be entered, and that the complaint be dismissed. *CR-49, Petition and Order Under P.C. 1203.4 or 1203.4a*. On April 20, 2000, the Municipal/Superior Court of the State of California for the County of Los Angeles ordered that the plea, verdict, or finding of guilty for the violation of Cal. Health and Safety Code § 11370.1(a) be set

¹ Cal. Penal Code § 1385, paragraph (a), provides that the judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

² Cal. Penal Code § 1016.5, paragraphs (a) and (b) state the following:

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

aside and vacated, and a plea of not guilty be entered and the information be dismissed. *Petition and Order Under P.C. 1203.4.*

The Board of Immigration Appeals (BIA) has held that vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See, e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006)(where the criminal court failed to advise defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a conviction for immigration purposes because the guilty plea has been vacated as a result of a “defect in the underlying criminal proceedings” and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a “conviction” at section 101(a)(48) of the Act, “there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships”); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute). *See also, Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)(under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

It is noted that the instant case arises in the jurisdiction of the Ninth Circuit Court of Appeals. With regard to vacated convictions, that court has held that a vacated conviction remained a conviction for deportation purposes where the state court's action, pursuant to a writ of *audita querela*, was undertaken “solely in order to prevent deportation and the subsequent hardship to [the alien] and his family.” *Beltran-Leon v. INS*, 134 F.3d 1379, 1380-81 (9th Cir. 1998). The *audita querela* and the All Writs Act are unavailable to undo a conviction in order to avoid deportation on equitable grounds where there is no legal defect in the conviction *cf. United States v. Bravo- Diaz*, 312 F.3d 995, 998 (9th Cir. 2002) (District courts do not have jurisdiction, under the All Writs Act, to vacate convictions on solely equitable grounds). *United States v. Tablie*, 166 F.3d 505, 506 (2d Cir. 1999) (All Writs Act is not an independent source of jurisdiction to equitably undo a valid judgment of conviction in order to avoid deportation); *Doe v. INS*, 120 F.3d 200, 204 (9th Cir. 1997) (the writ of *audita querela* may not issue to vacate a conviction on solely equitable grounds).

The AAO finds that the record in the instant proceeding indicates that the criminal court failed to advise the applicant defendant of the immigration consequences of his plea pursuant to Cal. Health and Safety Code § 11370.1(a). In applying the reasoning in the Ninth Circuit and BIA decisions to the facts presented here, the AAO concludes that the subsequent vacatur is not a conviction for immigration purposes because the guilty plea was vacated as a result of a “defect in the underlying criminal proceedings,” that is, the applicant defendant had not been advised of the immigration consequences of his plea.

It is noted that the court ordered that the plea pursuant to Cal. Health and Safety Code § 11357(b) be set aside and vacated and a plea of not guilty be entered. However, the AAO finds that the record does not establish that the guilty plea for this charge was vacated as a result of a “defect in the underlying criminal proceedings,” i.e., the applicant defendant had not been advised of the immigration consequences of his plea. Thus, regarding the Cal. Health and Safety Code § 11357(b) conviction, the vacatur is a conviction for immigration purposes.

The AAO will now address whether the applicant is inadmissible based on his conviction pursuant to Cal. Health and Safety Code § 11357(b).

Counsel argues that the conviction under Cal. Health and Safety Code § 11357(b) may not be used as a basis for inadmissibility based on the Ninth Circuit's holding in *Lujan*.

The consolidated petitions in *Lujan* involved legal residents who had been convicted of their first offense relating to a controlled substance. The Ninth Circuit held that the definition of "conviction" at section 101(a)(48)(A) of the Act did not repeal the Federal First Offender Act (FFOA), a rehabilitation statute that applies exclusively to first time drug offenders who are guilty only of simple possession, or the rule that no alien may be deported based on an offense that could have been tried under the FFOA, but was instead prosecuted under state law, if the findings were expunged pursuant to a state rehabilitative statute. *Id.* at 749. In a footnote, the Ninth Circuit stated: "In short, if the person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Id.* at 738

The applicant here has two convictions in which the plea, verdict, or finding of guilty was ordered set aside and vacated and a plea of not guilty entered. The AAO has already determined that the vacatur of the plea pursuant to Cal. Health and Safety Code § 11370.1(a) is not a conviction for immigration purposes.

However, the AAO finds that based on the provisions of the FFOA and the court's reasoning in *Lujan*, the Cal. Health and Safety Code § 11370.1(a) conviction would remain a conviction for purposes of section 3607(a) of the FFOA.

The relevant portions of section 3607 the FFOA provide that:

- (a) ... If a person found guilty of [simple possession of a controlled substance]
 - (1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and
 - (2) has not previously been the subject of a disposition under this subsection; the court may ... place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation...

In *Lujan*, the Ninth Circuit stated that persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the federal Act if they had been prosecuted under federal law. *Id.* at 738. The First Offender Act is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. *Id.* at 735. *See also, Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

The record in this proceeding reflects that the applicant could not have received the benefit of the FFOA had he been prosecuted under federal law. The FFOA requires a person found guilty of simple possession of a

controlled substance to have no prior conviction of violating a federal or state law relating to controlled substances and to have not previously been accorded first offender treatment under any law. The applicant here had, prior to the commission of the Cal. Health and Safety Code § 11357(b) offense, a conviction for violating Cal. Health and Safety Code § 11370.1(a), which is a state law relating to controlled substances. Because of the prior conviction in violation of a state law relating to controlled substances, the AAO finds that the applicant could not have received the benefit of the FFOA, had he been prosecuted under federal law. Thus, the AAO finds unpersuasive counsel's reliance on *Lujan* to establish that the conviction under Cal. Health and Safety Code § 11357(b) may not be used as a basis for inadmissibility.

Finally, the AAO will address counsel's assertion that the applicant is eligible for a waiver under section 212(h) of the Act and that he has established extreme hardship to his qualifying relatives.

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. The Act is very clear, however, that the section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the applicant's conviction pursuant to Cal. Health and Safety Code § 11370.1(a) has been vacated for immigration purposes. As already discussed, his conviction pursuant to Cal. Health and Safety Code § 11357(b), however, is a conviction for immigration purposes. Because Cal. Health and Safety Code § 11357(b) criminalizes possession of not more than 28.5 grams of marijuana, the section 212(h) waiver is available to the applicant.

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, son, or daughter of the applicant. Hardship to the applicant himself is not relevant to section 212(h) waiver proceedings and will be considered only to the extent that it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, 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).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 564 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) lists the factors that it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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.* at 564. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the

case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I & N Dec. 880, 882 (BIA 1994).

U. S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“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). Separation from one’s family will therefore be given appropriate weight in evaluating the hardship factors in the present case.

The AAO will now apply the *Cervantes-Gonzalez* factors to the present case to the extent they are pertinent in determining extreme hardship to the applicant’s wife and son. It is noted that extreme hardship to [REDACTED] and their son must be established in the event that they accompany the applicant; and in the alternative, that they remain in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record reflects that the applicant’s wife was born in the United States, and her parents live here. *Form G-325*. She and the applicant have an 11-year-old son. *Form I-130*. She and the applicant have been married for 10 years. *Form I-130*. [REDACTED] has been employed by Inland Concrete Constructors, Inc. as a carpenter since May 20, 2000. *Letter from Mitch Lowe*, dated May 24, 2001. He worked for Corner Construction, W-2 for 1998, 1999, and 2000 (earning \$7,936 in 2000); Inland Concrete Constructors, Inc., W-2 for 2000 (earning \$22,406 in 2000); and his parents live in Mexico, *Form G-325*. [REDACTED] worked for G & L Furniture Mfg., W-2 for 1998; Initial Staffing Services of California, Inc., W-2 for 1999 (earning \$3,891); G & L Furniture Mfg., W-2 for 1999 (earning \$1,817); Talent Tree Staffing Services of California, Inc., W-2 for 2000 (earning \$5,713); and Talent Tree Staffing Services of California, Inc., annual salary of \$18,720, *Form I-864*, dated June 11, 2001.

The record contains letters attesting to the applicant’s good character, documents pertaining to his son, and family photographs.

The letter from the applicant’s wife states the following. Her husband’s presence is crucial for their son and she relies on him for emotional support. Raising a child as a single parent would be devastating emotionally and economically. She will not join her husband to live in Mexico, as she does not want to deprive their son of living in the United States. Their son has extended family here: his grandparents and aunts and uncles are in close proximity and he spends lots of time with his grandmother. Her mother relies on the applicant to take her to work whenever he is not carpooling. Nieces look to her husband as a role model. Her husband takes their son to soccer practice. She and her husband plan to buy a house. *Letter from* [REDACTED] dated August 15, 2003.

On appeal, counsel makes the following statements. The applicant’s spouse and eight-year-old child would endure extreme hardship if his 212(h) waiver is not granted. [REDACTED] has worked steadily and presently earns \$40,000 annually. [REDACTED] and his family are renting a residence, for which he pays from his employment in the United States. If [REDACTED] departs from the country his family would have to seek public assistance and move to public subsidized housing. [REDACTED] would be forced to find employment,

separating her from her child and necessitating hiring a babysitter to raise her son. Their son currently lives in a loving and nurturing family with a stay-at-home mother who takes him to school, volunteers in his activities, cares for the child after school and ensures he completes his homework. The child is extremely close to his maternal grandparents, and lawful permanent resident aunt and U.S. citizen cousins. [REDACTED]'s parents are separated and are financially assisted by her siblings; they have no home to share with [REDACTED] and her child. [REDACTED] provides for his wife and child; if he is forced to leave the United States, however, his future and that of his child will be jeopardized. His child could not continue to receive the emotional and financial support he currently receives if his mother was forced to seek public assistance. The applicant has very few family ties in his native country, Mexico. He cannot support his wife and son if he returns to Mexico. [REDACTED] sends money to his family in Mexico; they are not financially able to assist him if he returns there. [REDACTED]'s wife and son will not accompany him to Mexico because his son is attending school where instruction is in English; it would be difficult to uproot him from his friends and family to attend school in a foreign country. His child has a strong support system in the United States with friends and family; he has only briefly visited Mexico and has no close family ties there. [REDACTED] will not force his family to live in poverty in Mexico. His child relies on medical care in the United States to treat his asthma and bronchitis; without proper medical attention, his condition could be life-threatening. [REDACTED] son would suffer significant medical, emotional, and financial trauma if uprooted from his native country, family, friends, community, and school to live in an impoverished country. The medical condition, emotional trauma, and financial hardship, taken cumulatively, would cause extreme and exceptionally unusual hardship for this eight-year-old child.

The AAO is mindful of and sensitive to [REDACTED] and his wife's concern about maintaining their family and the hardship they will endure hardship if separated from the applicant. However, [REDACTED] and her son's situation, if they remain in the United States, is typical of individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship, based on the record. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See, e.g. Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991)(upholding the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission); *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996)(holding that the common results of deportation are insufficient to prove extreme hardship and defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); and *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980)(severance of ties does not constitute extreme hardship). The record reflects that [REDACTED] and her son have close family ties in the United States, that of her parents and siblings; they therefore have a strong support system of family members in the event they remain in the United States.

The AAO notes that the applicant has a U.S. citizen child. The BIA has stated that an "alien illegally in the United States does not gain a favored status by the birth of a child in this country" and "the fact that an alien has a United States citizen child does not of itself justify suspension of deportation." *Matter of Pilch*, 21 I. & N. Dec. 627, 632 (BIA 1996).

Counsel on appeal indicates that if [REDACTED]'s waiver is denied, his wife will be forced to find employment, separating her from her child and necessitating the need to hire a babysitter to raise their son. The applicant indicates that he will be unable to financially support his wife and son if he leaves the country. However, the record reflects that [REDACTED] currently is employed by Talent Tree Staffing Services of California, Inc., earning \$18,720 annually, *Form I-864*, dated June 11, 2001; that she is sponsoring her husband's residency

application; and that since 1998 she has been employed by various companies. Thus, the record does not establish that [REDACTED] and her son would endure extreme economic hardship if the applicant's waiver of inadmissibility is denied. No evidence was submitted to show that [REDACTED]'s earnings are inadequate to meet her and her son's monthly household expenses. No evidence substantiates counsel's assertion that the applicant's family will need to seek public assistance and move to public subsidized housing if he leaves the country. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Furthermore, the applicant's loss of a job and the concomitant financial loss incurred does not rise to the level of extreme hardship. *Matter of Ige, supra* at 883, citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985). Economic hardship endured by the applicant's wife and son is relevant in determining whether extreme economic hardship exists; however, such hardship alone is insufficient to constitute extreme hardship under the Act. See, e.g., *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (U.S. Supreme Court found that economic detriment alone is insufficient to establish extreme hardship).

Although [REDACTED] stated that she and her son will not relocate to Mexico to be with her husband, the AAO notes that no evidence in the record establishes that she and her son would suffer extreme hardship if they were to join the applicant in Mexico. There is no evidence in the record about Mexico's economic, social, and political conditions. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978). There is no evidence that shows that the applicant and his wife would be unable to earn a living wage in Mexico. No evidence reflects that [REDACTED] has any physical or mental impairment which would restrict his employment or limit the type of employment he could perform in Mexico. There are no unique reasons why [REDACTED] will be unable to find employment upon returning to Mexico. Furthermore, a claim of difficulty in finding employment and inability to find employment in one's trade or profession, although a relevant factor, is not sufficient to justify a grant of relief in the absence of other substantial equities. *In Matter of Piltch, supra* at 631. Counsel states that [REDACTED] son requires medical attention for asthma and bronchitis. There is no evidence conveying how serious his medical problems are or what treatment is necessary. No evidence establishes that his son will not receive adequate treatment in Mexico. No evidence in the record suggests that the applicant's wife and son would not be able to adjust to life in Mexico. Counsel states that their son's school instruction is in the English language. Neither the applicant nor his wife indicates that their son does not speak the language of his father's country; they did not present any facts suggesting educational hardship. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, see *In Matter of Piltch, supra*, upholding deportation of parents where three young U.S. citizen children speak the language of their parent's country.

The AAO finds that even though the applicant's son may face difficulties adjusting to life in his father's homeland, these problems do not materially differ from those encountered by other children who relocate with their parents, especially at a young age. See *Matter of Ige, citing Marquez-Medina v. INS, supra*. The fact that economic and educational opportunities for the child are better in the United States than in the alien's homeland does not establish extreme hardship. See *Matter of Kim*, 15 I & N Dec. 88 (BIA 1974); see also *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986) (stating that the disadvantage of reduced educational

opportunities is insufficient to constitute extreme hardship). Finally, the fact that medical facilities in the alien's homeland may not be as good as they are in this country does not establish extreme hardship to the child. *Matter of Correa*, 19 I & N Dec. 130 (BIA 1984).

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors, both individually and in the aggregate, it is concluded that the factors in this case do not constitute extreme hardship to a qualifying family member for purposes of relief under 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.