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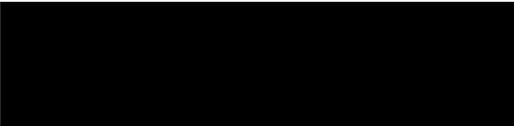


FILE: 

Office: LOS ANGELES (SANTA ANA), CA Date: AUG 10 2005

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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, Director  
Administrative Appeals Office

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

The applicant is a native and citizen of the Mexico who was found to be inadmissible to the United States for having been unlawfully present in the United States for more than one year. 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), the applicant is inadmissible to the United States for a period of 10 years since her last departure from the United States. The AAO notes that the district director failed to mention the relevant section of the Act under which the applicant is inadmissible. The applicant is married to a United States citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse under section 212(a)(9)(B)(v) of the Act. The application was denied accordingly. *Decision of the District Director*, dated June 23, 2004.

On appeal, counsel asserts that hardship to the applicant's children should be considered, a balancing act of favorable and unfavorable factors was not performed by the district director and the evidence submitted warranted a I-601 waiver. *See Form I-290B*, dated July 26, 2004.

In support of these assertions, counsel submits a variety of documents in support of the claim of extreme hardship. These documents include, but are not limited to, a statement from the applicant's spouse, evidence of home ownership and physical presence for the applicant's spouse, tax returns for the applicant's spouse, report cards for the applicant's children, birth certificates for the applicant's children and evidence of family ties and property ownership in the United States for the applicant's spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in June 1989, filed Form I-485, Application to Register Permanent Residence or Adjust Status, on August 23, 1999 and departed the United States between April 21, 2000 and May 25, 2000. The exact date of departure is not in the record.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of authorized stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until August 23, 1999, the date of her proper filing of the Form I-485. In applying to adjust her status to that of lawful permanent resident, the applicant is seeking admission within 10 years of her departure from the United States between April 21, 2000 and May 25, 2000. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The AAO notes that the district director erroneously stated that the applicant accrued unlawful presence from April 1, 1997 until the date she left the United States in 2000. *Decision of the District Director*, at 2.

The applicant was found admissible under Section 212(a)(9)(B)(i)(II) of the Act which 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 relevant waiver provision is located in section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act provides:

(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.

Counsel asserts that a balancing act of favorable and unfavorable factors must occur in order to grant an I-601 waiver. *Brief in Support of Appeal*, at 2, dated October 19, 2004. A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. The district director analyzed this part of the case. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). As the district director did not make a finding of extreme hardship, he did not analyze the discretionary part of the case.

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors are applicable to section 212(a)(9)(B)(v) waiver proceedings and include the presence of lawful permanent resident or United States citizen family ties to 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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The record indicates that the applicant's spouse has three United States citizen children who are residing in the United States. *Statement of Applicant's Spouse*, at 4, dated September 30, 2004. Proof of U.S. citizenship was submitted for two sisters of the applicant's spouse. The record does not include documentation of country conditions in Mexico. The record does indicate any ties to Mexico. The record shows that the applicant's spouse is employed as a foreman with health insurance, owns a car and home, has several investments and a retirement plan. The applicant's spouse states that it would be very difficult for him to find a job in Mexico and support his family. *Statement of Applicant's Spouse*, May 3, 2001. Counsel mentions that the applicant's spouse is the sole wage earner in the family, the applicant cares for the children and deportation of the applicant would cause severe problems with her spouse's employment. *Brief in Support of Appeal*, at 2-3. The record does not include any documentation on any significant conditions of health, particularly when tied to an unavailability of suitable medical care in Mexico. Counsel states that the applicant's spouse will suffer extreme psychological and emotional hardship, but no documentation is provided to verify this claim. *Id.* at 3.

Counsel asserts that not considering evidence regarding the children is plain error as their hardship is tied to the hardship of the applicant's spouse. *Id.* at 2. The AAO notes that the relevant waiver statute does not include children as qualifying relatives. Furthermore, the record does not include any documentation establishing that the applicant's spouse will face extreme hardship based on his children's hardship.

The record reflects that the applicant's spouse would face emotional and financial hardship based on separation from the applicant, however, the record does not establish extreme hardship to the applicant's spouse in the event that the applicant is refused admission to the United States. Extreme hardship must be shown to the applicant's spouse if he relocates to the Mexico or if he remains in the United States, as there is no requirement to reside outside of the United States as a result of denial of the applicant's waiver request

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that 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. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record 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 she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.