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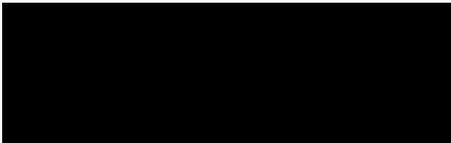
Date: FEB 18 2005

IN RE:



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

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, San Francisco. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse and parent of a U.S. citizen. She seeks a waiver of inadmissibility to remain in the United States with her family and adjust her status to that of a lawful permanent resident under INA § 245, 8 U.S.C. § 1255, as the beneficiary of an immediate relative petition filed on her behalf by her U.S. citizen husband.

The district director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse and denied the application accordingly.

On appeal, counsel contends that the applicant is not inadmissible and that refusal of her admission will result in extreme hardship to her spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B)(v) 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.

...

(v) Waiver.—The Attorney General [now 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 U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present application, the record indicates that the applicant married the petitioner, then a lawful permanent resident, in Mexico on December 11, 1999. She was admitted to the United States on January 11, 2000, on a combination B-1/B-2 visa and Border Crossing Card, authorized to remain until July 10, 2000. Her husband filed a relative petition on her behalf on February 14, 2000. The petition was approved February 5, 2002, after the petitioner naturalized on December 4, 2001. On January 8, 2002, an additional petition for alien relative was filed. It was approved on August 29, 2002. The applicant also filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on January 8, 2002. The applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to twice depart the United States, reentering on March 7, 2002 and May 27, 2002.

The proper filing of an affirmative application for adjustment of status has been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The applicant accrued unlawful presence from July 11, 2000, until January 8, 2002, the date the Form I-485 was properly filed, or a period of approximately one year and six months. In applying to adjust status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of her last departure from the United States, in 2002. 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.

Counsel argues that the applicant is not inadmissible because her travel and return to the United States was pursuant to advance parole issued by the former Immigration and Naturalization Service (INS) and she was not advised of the effect of her departure on her admissibility.

Based on the plain language of the statute at issue, the three elements necessary to find an alien inadmissible under § 212(a)(9)(B)(i) are present in this case. *See Memorandum of INS Office of Programs, Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days* (Washington, DC: 26 November 1997). First, the alien must be unlawfully present for the applicable period of time, in this case, over one year. As the applicant admittedly overstayed her authorized period of admission, her unlawful presence in the United States after January 10, 2000, is not contested. Second, the applicant must have departed voluntarily. The applicant does not dispute having departed the United States of her own volition. Finally, the applicant must be seeking re-admission to the United States within the applicable period, in this case, within 10 years from her 2002 departure. By applying to adjust her status as a lawful permanent resident, the applicant is seeking admission. There is no provision in the statute for an exception to inadmissibility, once found, based on the granting of advance parole or otherwise. CIS is not authorized to modify the statutory provisions, but only to implement the statute and carry out the intent of Congress as expressed in the language of the statute itself. In light of the serious adverse consequences of departure from the United States after periods of unlawful presence, the advance parole document itself includes the following warning, as it appears on both of the applicant's own I-512 continuation forms:

**NOTICE TO APPLICANT:** Presentation of this authorization will permit you to: resume your application for adjustment of status upon your return to the united states. If your adjustment application is denied, you will be subject to removal proceedings under section 235(b)(1) or 240 of the act. *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 proceedings 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.*

Form I-512, (reverse) (emphasis added). The application of the terms of this statute as described above, including in cases where advance parole was granted, were thereby specifically and personally identified to affected aliens prior to their departure from the United States. Counsel's contention that inadmissibility under this section does not apply where the alien was granted advance parole therefore is inconsistent with the law and will not be adopted in this case. Further, counsel's assertion that the applicant was not advised on the consequences of her departure is also not supported by the evidence.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from 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. Hardship to the alien herself is not a permissible consideration under the statute. The AAO notes that the record contains references and documentation addressed to the hardship that the applicant's children would suffer if the applicant were refused admission. A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is applicable solely where the applicant establishes extreme hardship as to his or her U.S. citizen or lawful permanent resident spouse or parent. Hardship to the applicant's children will therefore be taken into account only as it contributes to the overall hardship faced by the only qualifying relative in this case for whose benefit the waiver can be granted, the applicant's U.S. spouse.

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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present 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).

The record reflects that the applicant’s spouse, [REDACTED] is a 35-year-old naturalized U.S. citizen born in Mexico. As noted above, he and the applicant married in Mexico in 1999. He and the applicant had their first child, now age 4, in 2000 in California. At the time the appeal was filed, the applicant was pregnant and expected to give birth on December 14, 2003. The record has not been updated to reflect the birth of the applicant’s second child. [REDACTED] father is deceased. The record reflects that his mother is 74 years old and lives in Mexico, but that he filed a relative petition on her behalf. The record has not been updated to show whether she has immigrated to the United States, although there are statements on the record to the effect that she had a heart attack in early 2002, prompting the applicant’s departure from the United States to visit her with her daughter. The applicant’s parents are also in their 70’s and reside in Mexico.

Financial documentation submitted in connection with the *Affidavit of Support* (Form I-864), show that the applicant does not work and [REDACTED] supplies 100% of the household income of approximately \$41,500. The record reflects that he has worked his way up from the vineyards to become a Senior Winery Worker. His employer submitted a letter on his behalf, attesting to the quality of his work, his commitment to the winery, and characterizing him as “truly one of the cornerstones of our department.” He also does part-time landscaping work to supplement the family’s income. [REDACTED] states that he would be unable to pursue his winemaking career in Mexico, and that he would be more unemployable than the average Mexican in his position because he would be considered disloyal for having become an American citizen, and because of his lack of family ties and connections in Mexico. The record does not contain supporting evidence of country conditions in Mexico. [REDACTED] also states that his rotating 10-hour shifts at all hours of the day and night at the winery would make it impossible to care for his children without the assistance of his wife, presumably because the hours are not conducive to traditional day care arrangements. The flexibility of his schedule is not addressed in the letter from the winery.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant’s spouse faces extreme hardship if the applicant is refused admission. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of “extreme hardship,” Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. This principle is well-established in the law and is not superseded by the letter in the record from the [REDACTED] Member of Congress, in support of the waiver application. U.S. court decisions have repeatedly held that the common results of removal, such

as those faced by the applicant's husband, are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship). While the Ninth Circuit places particular emphasis on consideration of the impact of separation of the family, the waiver is nevertheless not to be granted in every case where possible separation is at issue. The record in this case does not demonstrate extreme hardship if the applicant's spouse relocated to Mexico to avoid separation from the applicant or if he remained in the United States without the applicant and sought to mitigate the effects of separation by periodic visits to Mexico. Inability to pursue one's chosen career or reduction in standard of living does not necessarily result in extreme hardship. See *Ramirez-Durazo v. INS*, 794 F.2d 491, 499 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.") The record does not contain sufficient supporting evidence to show that the particular hardship faced by the applicant's spouse in this case rises beyond common difficulties of separation or relocation to the level of extreme. See *Ramirez-Durazo, supra*.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.