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U.S. Citizenship
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H2,

FILE:



Office: PHOENIX, AZ

Date: JUN 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiermann".

Robert P. Wiermann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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), for having been unlawfully present in the United States for more than one year. The applicant is married to a naturalized United States citizen and is the beneficiary of an approved Petition for Alien Relative (WAC-92-271-52332). The applicant 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 with her husband and children.

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 husband. The application was denied accordingly. *See District Director Decision, Attachment I-292*, dated February 26, 2003. The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO*, dated January 5, 2004.

On motion to reconsider, counsel asserts that the applicant was unfamiliar with the evidence needed to support her application and therefore did not provide sufficient documentation. Counsel indicates that the record on motion to reconsider demonstrates the requisite level of hardship to warrant a grant of the applicant's request for a waiver. *Letter from [REDACTED]* dated February 5, 2004.

On motion to reconsider, counsel provides a letter, dated February 5, 2004. The record also contains a report from Addiction Services, PC, dated March 10, 2003; a statement from the applicant, dated August 2, 2002; copies of the naturalization certificate, Arizona Driver License, and Social Security Card for the applicant's spouse; copies of the U.S. birth certificates for the applicant's children; a translation of the Mexican birth certificate of the applicant; verification of employment for the applicant's spouse and copies of financial and income tax return documents for the couple. The entire record was reviewed and considered in rendering a decision.

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

8 C.F.R. § 103.5(a)(2) (2002) states in pertinent part:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

8 C.F.R. § 103.5(a)(3) (2002) states in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In the present application, the record indicates that the applicant entered the United States without inspection in 1988. On May 7, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). In April 1999, the applicant obtained advance parole authorization and departed and re-entered the country.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (Secretary)] as a 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 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 May 7, 1998, the date of her proper filing of the Form I-485. 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.

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 the alien herself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(a)(9)(B)(v) of the Act. These 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.

Counsel states that the applicant's spouse has maintained employment at his current job for the past 23 years. *Letter from [REDACTED]* Counsel states that he is a hardworking and law-abiding citizen who is motivated by his love for his family and the benefits that life in the United States provides for the applicant and their children. *Id.* Counsel indicates that the applicant's spouse would be unable to obtain employment sufficient to support his family in Mexico. *Id.* Counsel further contends that adequate medical care is not available in the area of Mexico from which the applicant hails. *Id.* Counsel indicates that the applicant's spouse does not have ties outside of the United States. *Id.*

While counsel articulates contentions regarding hardship imposed on the applicant's spouse as a result of relocation to Mexico, counsel fails to establish extreme hardship imposed on the applicant's spouse as a result of remaining in the United States in order to maintain his employment and access to adequate medical care. Counsel states that the applicant's spouse would likely develop feelings of despair and depression as a result of separation from the applicant. *Id.* The AAO notes that counsel cites a report from a psychotherapist to support this proposition, however, the letter fails to establish whether the evaluating psychotherapist is familiar with the applicant's spouse beyond one visit and whether the spouse has a history of depression.

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. Moreover, the U.S. Supreme 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. The AAO recognizes that the applicant's spouse would 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.

The applicant fails to provide evidence that was not available previously and could not have been discovered during the prior proceedings under this application. Further, the applicant fails to establish that the prior decision of the AAO was based on an incorrect application of law or CIS policy.

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 previous decisions of the district director and the AAO will not be disturbed.

ORDER: The motion is granted. The decision of January 5, 2004 dismissing the appeal is affirmed.