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U.S. Citizenship
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FILE:

Office: PHOENIX, AZ

Date: JUL 06 2006

IN RE:

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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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, AZ. 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 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 and seeking readmission within 10 years of her last departure from the United States. The applicant's spouse is a U.S. citizen and the applicant is seeking a waiver of inadmissibility in order to reside in the United States with her family.

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 March 30, 2004.

On appeal, the applicant asserts that Form I-601 should not have been required and that its requirements, if necessary, were met. *Applicant's Statement*, at 1, dated May 14, 2004.

The record includes, but is not limited to, statements from the applicant and her spouse, statements from their family and friends, letters regarding the applicant's children and various government memorandums. The entire record was reviewed and considered in rendering a decision on the appeal.

The record indicates that the applicant entered the United States without inspection in 1988 and she filed an application to adjust status based on marriage to her U.S. citizen spouse on June 7, 2002. Subsequently, the applicant departed the United States using an advance parole document in August 2002 and returned on September 13, 2002. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until June 7, 2002, the date of her proper filing of the Form I-485. The ten-year bar was triggered by the applicant's departure from the United States. She is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year prior to departure from the United States.

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.

The applicant asserts that an application under section 245(i) of the Act, 8 U.S.C. § 1255(i), is to be approved in spite of illegal entry and presence, that section 245(i) of the Act cures past illegal presence and that the filing of Form I-485, Application to Register Permanent Residence or to Adjust Status, places one in a period of “authorized stay.” *Applicant’s Statement*, at 5.

Section 245(i) of the Act states, in pertinent part:

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-

(A) who-

- (i) entered the United States without inspection; or
- (ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary ...of-

- (i) a petition for classification under section 204 that was filed with the Attorney General [now, Secretary, Homeland Security, “Secretary”] on or before April 30, 2001;

...may apply to the Attorney General [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

(2) Upon receipt of such an application, and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

- (A) the alien is eligible to receive an immigration visa and is admissible to the United States for permanent residence...

The AAO notes that section 245(i) of the Act permits adjustment of status despite an illegal entry (i.e. entry without inspection) and inclusion in section 245(c) of the Act (which includes those having unlawful presence, but not departing the United States after accruing the unlawful presence). However, section 245(i) of the Act does not exempt the applicant from section 212(a)(9)(B)(i)(II) which deals with departure from the

United States preceded by one year or more of unlawful presence. The AAO notes that the filing of Form I-485 results in a period of “authorized stay,” but neither the filing of the application nor the provisions of 245(i) erase the accrual of unlawful presence prior to the filing. Therefore, accrual of one year or more of unlawful presence followed by a departure from the United States still triggers the ten-year bar to admission under section 212(a)(9)(B)(i)(II).

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. 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 Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include, but are not limited to, 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant’s spouse must be established in the event that the applicant’s spouse relocates to Mexico or in the event that he remains in the United States, as he is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he relocates to Mexico. The applicant’s spouse has three U.S. citizen children and two U.S. citizen brothers. The applicant’s spouse has no family or relatives in Mexico, but he does speak Spanish. The applicant states that her attorney spouse would not be able to work as an attorney without years of work in obtaining credentials and he has inquired about employment opportunities without success. *Applicant’s Statement*, at 9. The applicant also states that her spouse is of “advanced age” and employment opportunities are extreme limited at his age. *Id.* at 10. The applicant states that her spouse is unable to perform substantial physical work due to a lower back condition and a herniated nerve in his neck vertebra. *Id.* Although the applicant’s spouse may not be able to work as an attorney in Mexico, the record does not reflect that he is unable to obtain employment in another field which does not require physical labor. Based on the record, the AAO finds that extreme hardship has not been established in the event that the applicant’s spouse relocates to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. The applicant states that if her children are left in the United States, her spouse will have to support them, both financially and otherwise. *Id.* at 11. The applicant states that hardship to her and her children constitutes hardship to her spouse, especially considering the exposure of the children

to past domestic violence. *Id.* The AAO notes that this will be difficult for the applicant's spouse, however, these difficulties do not rise to the level of extreme hardship.

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.