



U.S. Citizenship  
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FILE:

Office: CUIDAD JUAREZ, MEXICO

Date: APR 11 2007

IN RE:

Applicant:

APPLICATION:

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

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge (Acting OIC), Ciudad Juarez, Mexico, 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 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. [REDACTED] a lawful permanent resident, is the husband of the applicant. 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). The OIC found the applicant failed to establish that she merits the grant of a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and denied the application, accordingly. On appeal, the applicant indicates that her family is affected by her inadmissibility to the United States.

The AAO will first address the director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (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, 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.

...

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).<sup>1</sup> For purposes of section

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<sup>1</sup> Memo, Virtue, Acting Assoc. Comm. INS, *Grounds of Inadmissibility, Unlawful Presence, June 17, 1997* INS Memo on *Grounds of Inadmissibility, Unlawful Presence* (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup> The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra*. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The OIC was correct in finding that the applicant was unlawfully present in the United States for more than one year. The Form I-601 and the decision of the OIC, dated September 20, 2005, indicate that the applicant accrued unlawful presence in the United States from April 1, 1997 to November 28, 2001, when she submitted an adjustment of status application; and the OIC states that the applicant subsequently departed from the United States in March of 2005, triggering the ten-year bar.

The OIC found the applicant did not merit a waiver of inadmissibility. In his decision, he described the extreme hardship factors that must be present in order to waive inadmissibility for unlawful presence. The OIC concluded that the submitted letters from the applicant's husband and the letter from her attorney reflected the normal problems associated with separation and consequently did not rise to the level of extreme hardship as required by the Act.

The AAO will now address the OIC's conclusion that a waiver of inadmissibility is not warranted in the present case.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 or parent of the applicant. Hardship to the applicant and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband is the only qualifying relative here. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *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). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors 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

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<sup>2</sup> DOS Cable, *supra*.; and IIRIRA Wire #26, HQIRT 50/5.12.

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).

The AAO will now apply the *Cervantes-Gonzalez* factors in its consideration of hardship to the applicant's husband. Extreme hardship to the applicant's husband must be established in the event that he remains in the United States; and in the alternative, that he joins the applicant. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The letter from counsel, dated August 9, 2005, indicates that [REDACTED] is not able to work as much as he was before because his wife is not there and he has spent a lot of money traveling back and forth to Mexico to see his wife, who has been staying with a family friend. The earlier letter from counsel, dated May 20, 2005, states that the applicant, who has been married for 14 years to her husband, has two sons, aged 13 and 2, and a 9-year-old daughter.

The affidavit, signed on May 19, 2005, by [REDACTED] states the following. He and his children suffer great hardship because his wife is not present. His children stopped many of the activities they were involved in because he cannot do all of them without his wife. His nine-year-old daughter cries for her mother. He does not know what he will do this summer without his wife when the children are out of school; she had planned to stay with them. This is the only home his children have ever known. He works in construction and they own two lots and a trailer, where they live. In 2004, his wife earned \$20,000 in income and he earned \$28,000, but his income was reduced to only \$2,000 as a result of business expenses and deductions. His son [REDACTED] and daughter [REDACTED] speak English and Spanish and are honor roll students. His son is in the school band and he and his wife attended school concerts. His wife was responsible for the children, waking them up to get ready for school, having a snack for them when they returned home, and picking up Josue at the end of her work day. They regularly attend Cristoviene Church, and his wife makes meals for different church activities. His children are involved in youth group activities. They do everything as a family and are very close. His wife did nearly all of the household chores, and when she left the country his aunt was paid to do them. However, he could not afford to pay her for more than two weeks. He has been driving to Mexico as often as possible to spend time with his wife. He is trying to keep their life as normal as possible, but it is not the same without his wife and he cannot keep doing this much longer. He expresses the love he and his children have for his wife.

The record contains birth certificates; a marriage certificate; a Form 1040 for 2004; W-2 Forms for 2004; photographs; a letter from the applicant's church; and two letters from the applicant's employer, one of which indicated that she was is the lead daytime cook.

The AAO finds that the evidence in the record reflects that [REDACTED] husband would endure hardship if he remains in the United States with his children and without his wife. The submitted financial documents

reflect that the applicant's wife made a significant financial contribution to the household. In 2004, she earned \$20,259. That same year [REDACTED] earned gross receipts of \$26,194 from his business, but this was reduced to \$2,806 after expenses. Thus, the income of the applicant's wife is required to financially sustain the family.

U.S. courts have universally held that economic detriment alone is insufficient to establish extreme hardship. *See, e.g., INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship); *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9<sup>th</sup> Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider); and *Ramos v. INS*, 695 F.2d 181 (5<sup>th</sup> Cir. 1983) (It is only when other factors such as advanced age, illness, *family ties*, etc. combine with economic detriment that deportation becomes an extreme hardship). Thus, although the financial straits of the applicant's husband constitute a hardship, it alone is not sufficient to establish extreme hardship.

Personal and emotional hardships which result from deportation must be considered in the hardship determination. *Mejia-Carrillo, supra*, at 522. 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 (9<sup>th</sup> Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9<sup>th</sup> 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). In *Urbano de Malatuan v. INS*, 577 F.2d 589, 594 (9<sup>th</sup> Cir. 1978), the court reversed an order of the BIA denying a motion to reopen deportation proceedings emphasizing that "(t)he separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

The AAO finds that the evidence in the record establishes that [REDACTED] would endure hardship raising his children without the support of his wife. The applicant was actively involved in caring for the three young children, attending school concerts, getting them ready for school, picking up one of the children at the end of the day, and taking them to church and to youth group activities. [REDACTED] states that he is trying to keep his family's life as normal as possible, but it is not the same without his wife and he cannot keep doing this much longer without her. The record reflects that, should [REDACTED] and his children remain in the United States, he will not be able to afford a care giver for the children.

The AAO finds that the record does not establish that [REDACTED] would endure extreme hardship if he were to join his wife in Mexico.

There is no evidence that [REDACTED] and his wife would be completely unable to find employment in Mexico. In *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8<sup>th</sup> Cir. 1984), the court stated that the BIA improperly characterized as mere "economic hardship" [REDACTED] claim, which was supported by evidentiary material, that he would be completely unable to find work in Mexico. The court stated that "[a]lthough economic hardship by itself cannot be the basis for suspending deportation, *Immigration and Naturalization Service v. Wang*, 450 U.S. at 144, 101 S.Ct. at 1031, we agree with the Ninth Circuit that there is a distinction between economic hardship and complete inability to find work. *Santana-Figueroa*, 644 F.2d at 1356-57."

No evidence in the record reflects that [REDACTED] a family member suffers from significant health problems and that suitable treatment is unavailable in Mexico. The record contains no information about Mr. [REDACTED] family ties to Mexico or the United States, other than his children.

U.S. courts have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. In *Re. Kao-Lin*, 23 I. & N. Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of a 15-year-old girl were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American lifestyle. Uprooting her at a later stage in her education and social development to survive in a Chinese-only environment was considered extreme hardship by the BIA. In *Ramos v. INS*, 695 F.2d 181, 186 (5<sup>th</sup> Cir. 1983), the Fifth Circuit states that in determining whether extreme hardship exists, one must consider the imposition "on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language." In *Prapavat vs. INS*, 638 F. 2<sup>nd</sup> 87, 89 (9<sup>th</sup> Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

Although hardship to the applicant's children is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by the applicant's husband as a result of his concern about the well-being of his children is a relevant consideration. [REDACTED] asserts that this is the only home his children have ever known. He states that [REDACTED] are honor roll students, are in school and outside activities, and speak English and Spanish. His youngest child is four years old. The AAO finds that uprooting [REDACTED] children from the country where they have lived their entire life and from a culture to which they are completely integrated and taken to a country where the culture is foreign would be difficult. However, the impact of this transition would be mitigated by the familiarity of his eldest children with the Spanish language and by his youngest four-year-old child not being of grade school age.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. With the present case, the AAO finds that the totality of the record establishes that [REDACTED] would suffer extreme hardship if he were to remain in the United States with his children. However, as previously stated, the applicant must also establish that her husband would endure extreme hardship if he were to join her in Mexico. The AAO finds that the record before it is not persuasive in establishing extreme hardship to [REDACTED] if he joined his wife in Mexico.

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)(6)(C) 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.



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**ORDER:** The appeal is dismissed.