

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

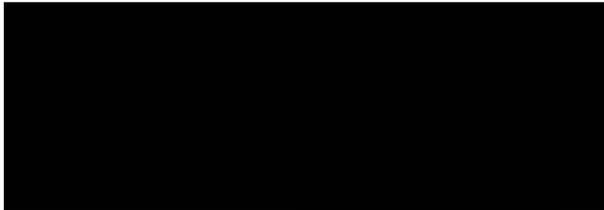
U.S. Department of Homeland Security
20 Mass. Ave, N.W. Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H3



FILE:



Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: APR 03 2008

(CDJ 2003 864 278)

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), and section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City (Ciudad Juarez), Mexico. The matter came before the Administrative Appeals Office (AAO) on appeal. The AAO rejected the appeal as untimely filed. The AAO will reopen the matter sua sponte based on new evidence that the appeal was filed within 33 days of the district director's denial. Upon review of the appeal on the merits, 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 his last departure from the United States. The applicant was further found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility in order to enter the United States and reside with his permanent resident wife and other family members.

The district director found that, based on the evidence in the record, the applicant failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated April 10, 2006.

On appeal, counsel for the applicant asserts that the applicant's prior counsel provided ineffective assistance, thus the applicant did not make a complete waiver application. *Brief in Support of Appeal*, dated May 11, 2006. Counsel further asserts that the district director applied an erroneous standard of hardship, requiring the applicant to show "extraordinary" hardship instead of "extreme" hardship. *Id.* at 3. Counsel contends that the applicant has shown that his wife will experience extreme hardship should the waiver application be denied. *Id.* at 2-4.

The record contains correspondence from counsel; statements from the applicant's wife, the applicant's grandchildren, the applicant's daughter, the applicant's friends, the applicant's employer, and the applicant's sisters; a copy of the applicant's marriage certificate; a copy of the applicant's wife's permanent resident card; copies of the applicant's children's birth certificates; copies of titles for two automobiles in the applicant's name; a letter from a doctor regarding the applicant's wife's health; a copy of a deed to real property, in the applicant's and his wife's names, and; a tax bill for real property in the applicant's and his wife's names. It is noted that the applicant provided some documents in a foreign language without English translations. Because the applicant failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the application. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The entire record was reviewed and all English-language documents were considered in rendering a decision on the appeal.

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.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant entered the United States in approximately 1978 using a false identity. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. He resided in the United States without a legal immigration status from 1978 until he voluntarily departed in May 2005. Accordingly, he accrued unlawful presence from the date of the enactment of the unlawful presence provisions, April 1, 1997, until May 2005, approximately eight years. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been

unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant does not contest his inadmissibility on appeal.

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. A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is also dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon being found inadmissible is not a direct concern in section 212(a)(9)(B)(v) and 212(i) 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 Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) or 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.

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 case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's wife would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The applicant's wife stated that she and the applicant have been together for over 40 years. *Statement from Applicant's Wife*, dated April 28, 2006. She provided that she has resided legally in the United States since 1977, and that all of her children and grandchildren reside in the San Diego area. *Id.* at 1. She expressed that she would face "a great of mental anguish" if she is compelled to choose between living with the applicant or near her children and grandchildren. *Id.*

The applicant's wife stated that she has medical conditions, including hypertension and depression, and that she relies on the applicant's employment for health insurance and medication. *Id.* She provided that she requires monthly doctor visits, but that she has been unable to go since the applicant has been unable to work. *Id.*

The applicant's wife indicated that she has never worked out of the home, and she is unable to do so. *Id.* She stated that she would be unable to support herself without the applicant, and she would be unable to work in Mexico due to her age and medical condition. *Id.* She stated that she would lose her home without the applicant's financial assistance. *Id.* at 2.

The applicant's wife attested to the applicant's good moral character. *Id.* at 1-2. She further indicated that the applicant's children and grandchildren would endure emotional hardship if the applicant is not permitted to return to the United States. *Id.* at 2.

The applicant submitted a brief letter from his wife's doctor that reports that the applicant's wife "has uncontrolled hypertension and depression exacerbated by [the applicant's] pending deportation." *Letter from* [REDACTED] dated April 27, 2006. The letter further states that the applicant's wife's "health status would improve if she could be reunited with [the applicant]." *Id.* at 1.

The applicant provided statements from his grandchildren, his daughter, his friends, his employer, and his sisters, in which they attested that the applicant himself would experience hardship should he be prohibited from returning to the United States. These individuals further attested to the applicant's good moral character and supportive position in his family. They indicated that the applicant's wife depends on him for financial support, including for her medical needs. They explained that life is harder in Mexico, and employment opportunities are not as plentiful as in the United States. In a statement from the applicant's friend, [REDACTED], [REDACTED] indicated that the applicant may lose his home in Chula Vista, California, as well as his Putero, California property should he be unable to work in the United States. *Statement from Rodolfo A. Ornelas*, dated April 26, 2006.

Upon review, the applicant has not submitted sufficient evidence to show that a qualifying relative will experience extreme hardship should he be prohibited from entering the United States. The applicant has shown that he has one qualifying relative, his permanent resident wife. The record contains references to hardship the applicant himself would experience, as well as his children and grandchildren. However, as noted above, only hardship to the applicant's wife may be considered in the present waiver proceeding. Sections 212(a)(9)(B)(v) and 212(i) of the Act. While the AAO acknowledges that the applicant, his children, and his grandchildren will endure emotional hardship if the present waiver application is denied, only hardship to the applicant's wife may properly be considered. *Id.*

The record contains references to the applicant's wife's health status. The applicant's wife indicated that she requires monthly doctor visits. However, the record does not contain sufficient evidence for the AAO to fully evaluate the applicant's wife's health condition or physical ability. The brief letter from the applicant's wife's doctor does not indicate the impact the applicant's wife's hypertension and depression have on her daily functioning. Her doctor did not provide whether she is able to care for herself or whether she is able to work. Her doctor did not indicate what, if any, ongoing treatment and medication is required for the

applicant's wife, such that the AAO can assess her economic needs related to her health status. While the applicant's wife indicated that she relies on the applicant's employment in the United States for medical insurance, the applicant has not submitted any evidence of medical insurance or medical bills. The statements from the applicant's other family members and friends are not deemed adequate evidence to clearly show the applicant's wife's health status.

The applicant's wife indicated that she relies on the applicant for economic support, and that she is unable to work. However, while the AAO understands that the applicant's wife has not before accepted employment outside the home, the record does not support that she is unable to do so. Further, the applicant has not submitted adequate evidence for the AAO to determine what financial resources are available to the applicant's wife, such as savings or investments. The record contains references to two different real properties owned by the applicant, including his home and a property in Putero, California. It is understood that the applicant's wife does not wish to sell her residence. Yet, the applicant has not shown the value of his property in Putero, California or whether it may be sold to meet his and his wife's economic needs. The applicant has not submitted an accounting of his wife's regular household expenses such that the AAO can assess her economic needs. It is further observed that the applicant's wife has children residing nearby. The applicant has not stated whether his and his wife's children are capable and willing to assist the applicant's wife financially if needed.

The applicant's wife indicated that she and the applicant have been together for a very long time, over 40 years. It is understood that the applicant and his wife would experience emotional hardship if they continue to be separated. However, the applicant has not shown that his wife would experience extreme hardship should she relocate to Mexico with him. Other than general references to the hardship of residing in Mexico, the applicant has not submitted any description of his life in Mexico, such his housing situation, whether he is able to work and generate income, and whether he has the support of friends or family there. The statements from the applicant's family members reflect that the applicant receives weekly visits from his family members, thus it is evident that the applicant's wife would not lose the opportunity to visit with her children and grandchildren should she join the applicant.

In *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the Board of Immigration Appeals 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 wife will endure hardship as a result of separation from the applicant should she remain in the United States, or should she relocate to Mexico with the applicant. However, her situation is common to the family members of those deemed inadmissible. The applicant has not provided sufficient documentation and explanation to show by a preponderance of the evidence that his wife will experience extreme hardship should she remain in the United States or relocate to Mexico.

Counsel indicates that the applicant received poor assistance from an attorney in preparing his initial Form I-601 waiver application. It is noted that all evidence provided by the applicant has been fully considered on appeal, and the applicant has had the opportunity to supplement the record with documentation that was omitted in the initial filing. Further, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has not met the standard for a claim based on ineffective assistance of counsel.

The AAO acknowledges counsel's claim that the district director applied an erroneous standard of hardship. The AAO reviews appeals on a *de novo* basis, thus the applicant has had an opportunity to meet the appropriate extreme hardship standard in the present proceeding. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Based on the foregoing, the applicant has not submitted sufficient evidence to show that the instances of hardship that will be experienced by his wife, should the applicant be prohibited from entering the United States, considered in aggregate, rise to the level of extreme hardship. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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.