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FILE:



Office: PHOENIX, AZ

Date: **APR 29 2008**

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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Phoenix, Arizona. 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 is married to a U.S. citizen and has four U.S. citizen children. She seeks a waiver of inadmissibility in order to reside in the United States.

The acting district director found that the applicant failed to show that a qualifying relative would suffer extreme hardship if she were removed from the United States. The application was denied accordingly. *Decision of the Acting District Director*, dated November 15, 2005.

On appeal, counsel asserts that the acting district director erred in denying the applicant's adjustment of status application. He contends that, even if she is subject to section 212(a)(9) of the Act, under Ninth Circuit precedent she should be eligible to adjust under section 245(i) of the Act. Counsel also asserts that even if the applicant is subject to 212(a)(9)(B) of the Act, she has met her burden of establishing extreme hardship to her U.S. citizen spouse and children. *Counsel's Brief*, dated December 15, 2005.

The AAO notes counsel's assertions regarding the acting district director's denial of the Form I-485, Application to Register Permanent Residence or Adjust Status. It does not, however, have the authority to review the acting district director's decision. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub.L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO does not have jurisdiction over this type of I-485 filed under section 245 of the Act. Therefore, the findings of the acting district director with regard to the applicant's ineligibility to adjust her status under section 245 of the Act are final.

The AAO observes, however, that counsel errs in asserting that, despite her unlawful presence, the applicant is automatically eligible to adjust status under section 245(i) of the Act, based on the decision reached by the Ninth Circuit Court of Appeals in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-94 (9th Cir. 2004). In *Perez-Gonzalez*, the Ninth Circuit Court held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may file, in conjunction with an adjustment of status application, a Form I-212 (Application for Permission to Reapply for Admission into the United States after Deportation or Removal) in order to obtain consent to reapply for admission. If Citizenship and Immigration Services were to approve the Form I-212 as a matter of discretion, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. The AAO notes that *Perez-Gonzalez* did not hold that section 245(i) of the Act, of itself, relieved an alien of inadmissibility under section 212(a)(9) of the Act. Rather, *Perez-Gonzalez* concerned "the availability of adjustment of status once a favorable determination of permission to reapply [had] been made." *See Perez-Gonzalez* at 795. Accordingly, *Perez-Gonzalez* does not exempt individuals seeking adjustment under section 245(i) of the Act from an inadmissibility determination under section 212(a)(9)(B) of the Act.

In the present application, the record indicates that the applicant entered the United States on October 19, 1993 on a B-2 visitor's visa with an authorized period of stay until April 18, 1994. The applicant filed a Form I-485 on March 3, 2000. The applicant then departed the United States in December 2000 and re-entered using advance parole on January 11, 2000.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [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.* Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until March 3, 2000, the date her application to register permanent residence was filed. In applying for an immigrant visa, the applicant is seeking admission within ten years of her December 2000 departure from the United States. Therefore, the applicant is 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.

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.

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 and/or parent of the applicant. Hardship experienced by the applicant or her children due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

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 applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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.

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).

This matter arises in the Phoenix district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has 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 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th 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 *Salcido*, the court remanded to the Board of Immigration Appeals (BIA) for failure to consider the factor of separation despite respondent’s testimony that if she were deported her U.S. citizen children would remain in the United States in the care of her mother and spouse. *See also Babai v. INS*, 985 F.2d 252 (6th Cir. 1993) (failure to consider hardship to U.S. citizen child if he remained in the United States is reversible error). Separation of family will therefore be given appropriate weight 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 AAO notes that extreme hardship to the applicant’s spouse must be established in the event that he resides in Mexico or in the event that he resides 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 AAO will consider the relevant factors in adjudication of this case.

Counsel states that the applicant’s children will suffer extreme hardship as a result of the applicant’s inadmissibility because they will have to choose between being separated from their mother or living in Mexico where they will face the hardships of adapting to a new life. *Counsel’s Brief*, dated December 15,

2005. As noted above, the hardship the applicant's children experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it is shown that the hardship experienced by the children causes hardship to the applicant's spouse. The current record does not establish that the difficulties that would be experienced by the applicant's children would cause hardship to the applicant's spouse.

Counsel also asserts that if the applicant's spouse relocates to Mexico with his family it will be extremely difficult for him to provide the same quality of life to his four U.S. citizen children. *Id.* Counsel states that it is well established that the economic conditions in Mexico are less favorable than those in the United States. *Id.* However, no documentation was submitted to support this statement. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition to counsel's brief, the record also includes a psychological evaluation from [REDACTED] a psychotherapist. In her evaluation, [REDACTED] describes the town in Mexico where the applicant and her family would return based on statements made by the applicant. *Psychological Evaluation*, dated January 1, 2004. She states that the applicant's 70-year-old ill mother, her brother and his family still live in Mexico. She states that they live in impoverished conditions with sub-standard medical care and schooling for the four children. She also states that the only employment in the town involves seasonal farm labor where workers earn a meager wage. [REDACTED] also describes how the applicant's spouse has no ties to Mexico and how the couple works at a cleaning business together earning \$64,410 a year. She also states that the applicant's spouse had a serious drinking problem in the past, resulting in two DUI arrests. She states that he has been sober for the last five years and credits his wife with helping him to stop drinking.

In her conclusion, [REDACTED] describes what could happen to the family if they relocate to Mexico or if they stay in the United States without the applicant. She states that if the family relocates to Mexico they would be homeless and the adults would be unemployed; they would be exposed to health and safety hazards without access to medical care; the children would not receive a quality education and they might grow to resent their mother for placing them in this situation. She further suggests that this unforgiving environment would cause the applicant and her spouse to argue and the applicant's spouse could relapse into alcoholism setting the stage for domestic violence, and child abuse and neglect. Ms. [REDACTED] also describes what might happen to the family if they are separated from their mother. She states that the family would suffer psychologically and financially. She states that the applicant's spouse would have to locate and pay for childcare and he would have to hire a housekeeper and someone to prepare meals. She explains that the applicant's spouse would also have to emotionally console his four children and might become depressed himself and begin to drink heavily. If the applicant's spouse relapsed into alcoholism, [REDACTED] states, the children would be at a high risk for child abuse and neglect. A relapse into alcoholism would also hurt the ability of the applicant's spouse to maintain gainful employment. *Id.*

The AAO notes that, although the input of any mental health professional is respected and valuable, the submitted report is based on one interview with the applicant's family. Accordingly, the conclusions reached in the report do not reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional and are of diminished value to a determination of extreme hardship.

Moreover, no documentation was submitted to support [REDACTED]'s assertions regarding conditions in Mexico, the applicant's spouse's problems with alcohol or the family's financial situation. Therefore, the AAO finds that the current record does not establish that the applicant's spouse would experience extreme hardship as a result of her inadmissibility to the United States.

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 his separation from the applicant. However, the record does not distinguish his situation from that of other individuals separated as a result of removal and, therefore, does not establish that he will suffer extreme hardship if the applicant's waiver request is denied.

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.