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U.S. Citizenship
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FILE:

Office: SAN FRANCISCO, CA

Date:

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IN RE:

APPLICATION:

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

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, San Francisco, denied the waiver application, and it 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. § 212(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is the husband of a U.S. citizen spouse and the father of two U.S. citizen sons and a U.S. citizen stepson. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and children.

The district director noted the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act and found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. He denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated September 23, 2004.

The record reflects that, on January 25, 1998, the legacy Immigration and Naturalization Service (INS), voided the Form I-186, Border Crossing Card, issued to the applicant in 1996. On March 1, 2000, the applicant married his spouse, [REDACTED] and she subsequently filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved on May 7, 2001. The applicant concurrently filed the Form I-485, Application to Register Permanent Residence or Adjust Status. On August 3, 2001, the district director denied the adjustment application as he determined that the record did not establish that the applicant had been inspected, admitted or paroled into the United States. On July 11, 2000, the applicant was granted advance parole and, thereafter, departed the United States. The applicant was paroled back into the United States on July 26, 2000. On November 26, 2001, the applicant filed a second Form I-485 under the provisions of the Legal Immigration and Family Equity (LIFE) Act, which was initially denied on January 14, 2003 because the applicant had not established his presence in the United States on December 12, 2000, as required for eligibility. Thereafter, the matter was reopened in response to the applicant's motion for reconsideration. On September 24, 2004, the district director again denied the Form I-485, finding the applicant to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

On appeal, counsel alternately contends that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act but that, if he is found inadmissible, the district director applied the wrong legal standards to the applicant's waiver request and based his decision on erroneous factual conclusions. *See Form I-290B* dated October 22, 2004.

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 AAO first turns to a consideration of whether the applicant, as claimed by counsel, was lawfully admitted to the United States on January 5, 1998. *Counsel's brief*, dated October 22, 2004.

In support of the motion to reconsider he filed following the district director's initial denial of the Form I-485 filed on November 26, 2001, the applicant submitted a declaration regarding his entry to the United States in 1998. In that declaration, he stated the following:

I had a border crossing card which I used several times starting in 1996, and I would stay in the U.S. for a few hours or sometimes up to a day. On January 5, 1998, I came to the U.S. as I had the other times, but after I got to the U.S. my relatives asked me to accompany them on a trip. I agreed to go with them, but I left my border crossing card with my sister. When it was about to expire, I asked my sister to have it extended, but when she tried to do so it was confiscated by the INS

While the AAO notes the applicant's claim to have entered the United States following inspection on January 5, 1998, it does not find the record to support this contention. Instead, the record offers evidence, the Form I-180 issued to the applicant in 1998, that his border crossing card was confiscated on January 25, 1998 at the Fabens, Texas port-of-entry following the presentation of false documents. Although the applicant states that the legacy INS may have voided the Form I-186 because it was close to its expiration date and his sister was seeking to have it extended, the AAO does not find this explanation to be persuasive. Pursuant to the regulations then in effect, Form I-186s issued to Mexican citizens did not require extension, but were valid until revoked or voided.¹ The applicant would not have needed to have his sister seek an extension of his Form I-186 based on its imminent expiration. Accordingly, the AAO does not find the record to establish that the applicant lawfully entered the United States on January 5, 1998. Rather, it points to an unsuccessful attempt to enter the United States on January 25, 1998, one that involved the presentation of fraudulent documents.

¹ See 8 C.F.R. § 212.6(c), revised as of January 1, 1996.

Counsel, on appeal, contends that unauthorized stay for nonimmigrants includes only the periods of time beyond the date specified on the Form I-94s or the Form I-797s issued to them. He asserts that an individual like the applicant who entered the United States on a border crossing card and was not admitted with a Form I-94 until a specific date would not have accrued unlawful presence, except upon a finding by an immigration judge or legacy INS that he had violated his status. However, as previously indicated, the record fails to establish that the applicant entered the United States using his border crossing card or other lawful means. Accordingly, the AAO will not address counsel's assertions that the applicant did not accrue unlawful presence after entering the United States.

For the purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act, the proper filing of an affirmative application for adjustment of status has been designated as a period of stay authorized by the Attorney General (now Secretary). See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. While the record does not establish when or how the applicant entered the United States, the Form G-325A, Biographical Information sheet, submitted by the applicant in connection with the Form I-485 he filed on May 5, 2000, reflects that he was living and working in the United States as of March 1998. Therefore, the AAO finds the applicant in the present case to have accrued unlawful presence beginning in March 1998, the point at which he claims to have begun residing in the United States, until May 5, 2000, when he filed the first Form I-485. At the time he departed the United States on advance parole in July 2000 and triggered the unlawful presence provisions of the Act, the applicant had been unlawfully present in the United States for more than two years. In applying for adjustment of status, the applicant is seeking admission within ten years of his 2004 departure from the United States and is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act.

To seek a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act, the applicant must establish that a qualifying relative would suffer extreme hardship were his waiver application to be denied. Hardship to the alien himself is not a permissible consideration under the statute. A section 212(a)(9)(B)(v) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. It is noted that Congress specifically did not include hardship to an applicant's children as a factor to be considered in assessing hardship under section 212(a)(9)(B)(v) of the Act. Therefore, hardship to the applicant's children will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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 at 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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

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 first part of the extreme hardship analysis requires the applicant to establish extreme hardship to Ms. [REDACTED] in the event that she relocates to Mexico. In his brief on appeal, counsel asserts that [REDACTED] has lived in the United States since she was four years old and that all of her immediate family members reside in the United States, including her U.S. citizen children, her lawful permanent resident mother, and her siblings, nieces and nephews, who are either U.S. citizens or lawful permanent residents. He contends that the district director failed to consider the emotional and psychological hardship to [REDACTED] if she is separated from her family. Counsel also notes that [REDACTED] has physical custody of a child from a previous marriage and that she shares legal custody of this child with her former husband who is unwilling for the child to relocate to Mexico with [REDACTED]. [REDACTED]'s mother, counsel asserts, is undergoing treatment for breast cancer and relies on her daughter for financial, emotional and logistical support. Counsel also indicates that [REDACTED] does not speak fluent Spanish and that she would be unable to continue her employment as an escrow coordinator in Mexico since she is able to review only English-language real estate documents and her real estate knowledge is limited to northern California. *Counsel's brief*, dated October 22, 2004.

In support of counsel's claims, the record offers the divorce judgment terminating [REDACTED]'s previous marriage, which places the child born to this marriage in the physical custody of [REDACTED] but requires her to share legal custody with her former husband. *Judgment, Superior Court of California, Alameda County*, filed September 14, 1993. It also includes a sworn statement from [REDACTED]'s former husband who states that he is unwilling to allow their son to move to Mexico. *Statement of [REDACTED]* dated October 13, 2004. It also includes a psychological evaluation prepared by [REDACTED], who concludes that relocation to Mexico would create a major disruption that would have adverse psychological consequences for [REDACTED]. *Letter from [REDACTED] Ed.D.*, dated October 20, 2004.

In a statement submitted with the Form I-601, [REDACTED] indicates that it would be impossible for her to accompany the applicant to Mexico. Her reasons include her former husband's unwillingness to allow their child to relocate to Mexico, the loss of her real estate career should she move to Mexico, her mother's health and the separation from her U.S. family members. *Statement*, January 2, 2004. [REDACTED]'s mother [REDACTED] reports that she has been diagnosed with breast cancer and that she lives in a house provided by [REDACTED] because she cannot afford housing on her social security income. [REDACTED] states that [REDACTED] cannot relocate to Mexico because she cannot remove her oldest son from the United States. [REDACTED] also notes that [REDACTED] does not want to move to Mexico because of her cancer diagnosis. *Statement from [REDACTED]*, dated December 12, 2003. The statement from [REDACTED]'s mother is accompanied by her medical records, which indicate that she was treated for breast cancer from

September 2003 to October 2003. *Statement from [REDACTED], Seton Medical Center, dated December 30, 2003.*

While the AAO has carefully considered the issues raised by counsel and [REDACTED] it finds the record to provide insufficient evidence to establish that relocation to Mexico would constitute an extreme hardship for her. The divorce judgment included in the record indicates that the joint custody agreement that has previously prevented [REDACTED] from removing her oldest son from the United States remains in effect only until he reaches his 18th birthday or is attending high school and reaches 19 years of age, "whichever first occurs." As [REDACTED]'s son will be 18 years old on March 23, 2008, less than one month from the date of this decision, the joint custody agreement no longer appears to be an impediment to [REDACTED] relocating to Mexico with her oldest son.

The medical evidence related to the health of [REDACTED] indicates that her cancer treatment was administered from September to October 2003, and that, during the course of this treatment and for some weeks thereafter, [REDACTED] required "some care" by her daughter. On appeal, the applicant submits no evidence to establish the status of [REDACTED]'s health, that she continues to require medical treatment or that she needs her daughter's care. Moreover, as noted by [REDACTED] in her January 2, 2004 statement, she has two sisters who live with her mother and three other siblings who also live in the San Francisco Bay area. Although [REDACTED] indicates that the sisters who live with her mother have learning disabilities and require a great deal of help themselves and that she and the applicant live nearer to her mother than her other siblings, the record does not establish that her five brothers and sisters could not adequately care for their mother, both in financial and physical terms, in [REDACTED] absence. Letters submitted by three of Ms. [REDACTED]'s siblings in support of the Form I-601 do not indicate that they are unable or unwilling to provide such care. *Letters written by [REDACTED] and [REDACTED] dated December 15, 17, and 20, 2003 respectively.* The record also fails to provide evidence that demonstrates that the two daughters who live with [REDACTED] are incapable of acting as her care givers. Further, the record does not establish that the applicant and [REDACTED] would be unable to obtain employment in Mexico that would allow them to continue to assist [REDACTED] financially.

The AAO notes counsel's assertion that relocating to Mexico would require [REDACTED] to give up her career in real estate since she is not fluent in Spanish and her real estate expertise is limited to northern California. The loss of current employment or the ability to pursue a chosen profession do not, however, constitute extreme hardship. *Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).* Accordingly, the evidence of record does not establish that relocation to Mexico would result in extreme hardship for [REDACTED]

The second part of the analysis requires the applicant to establish extreme hardship in the event that Ms. [REDACTED] remains in the United States. On appeal, counsel contends that the applicant's family is dependent on both the applicant's and [REDACTED]'s incomes, and that [REDACTED] would suffer extreme economic detriment if the applicant's waiver request were denied. He also asserts that [REDACTED] and her children would lose their health care coverage, which is now provided through the applicant's union membership, if he is removed from the United States. Further, he notes that [REDACTED] would be emotionally devastated if she were separated from the applicant. *Counsel's Brief, dated October 22, 2004.*

[REDACTED], in her January 2, 2004 statement, asserts that without the applicant, she would not be able to pay the mortgages on the two homes that she and the applicant own and would lose her dream of a home for their children. She also contends that the loss of the homes would create additional stress for her sick mother as [REDACTED] lives in one of them. [REDACTED] states that she cannot imagine trying to raise three sons without the applicant and that it would break her heart if the applicant's sons grew up without their father. She further contends that she is worried that the applicant's removal from the United States would result in a loss of good health care coverage for her children since she is unable to obtain health insurance through her employment. [REDACTED]'s statement, dated January 2, 2004.

The AAO finds that, although the record establishes that both [REDACTED] and the applicant work to support their family, it does not demonstrate that the applicant's removal would result in extreme economic hardship for [REDACTED]. In that the record contains no information on economic conditions in Mexico, specifically those conditions that would directly affect the applicant, it does not support a finding that he would be unable to find employment in Mexico and be prevented from providing some level of financial support to his family from outside the United States. Moreover, although the family's health insurance is now provided through the applicant's union membership, the record does not document that health insurance would be unavailable to [REDACTED] through her own job. [REDACTED] statement regarding her inability to obtain health insurance is insufficient proof that this would be the case. Going on record without supporting documentary evidence is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the AAO acknowledges [REDACTED] concerns about her ability to pay two mortgages in the applicant's absence, economic loss, by itself, is not a basis for a finding of extreme hardship. *See Matter of Pilch*, 21 I&N Dec. 627, 630 (BIA 1996).

In support of counsel's claims that [REDACTED] would be emotionally devastated by the applicant's removal, the record offers a psychological evaluation prepared by [REDACTED], a licensed marriage and family therapist, who finds [REDACTED] to show symptoms consistent with a major depressive disorder, including difficulty with concentrating, attention and memory. [REDACTED] indicates, also suffers from anxiety, daily insomnia and nightmares, and is emotionally unstable. He reports that a discussion with her employer confirmed that [REDACTED]'s job performance has deteriorated considerably and that she may face termination as a result. [REDACTED] notes that he has recommended that [REDACTED] seek psychotherapy in order to treat her symptoms and that her prognosis for recovery is excellent provided that she does not have to be separated from the applicant. *Psychological evaluation*, dated October 20, 2004.

Although the input of any mental health professional is respected and valuable, the AAO notes that the evaluation prepared by [REDACTED] is based on interviews conducted over a two-day period with [REDACTED] the applicant and her oldest son. Based on the limited amount of interview time available to [REDACTED], the AAO does not find the conclusions reached in his evaluation to reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. [REDACTED] findings must, therefore, be considered speculative, thus diminishing their value to a determination of extreme hardship. Further, the AAO notes that the record does not support [REDACTED] characterization of the effect that the applicant's potential removal has had on [REDACTED]'s ability to perform her job. The record contains a December 17, 2003 letter from [REDACTED]'s employer that finds her to be an exemplary employee. While [REDACTED] reports that [REDACTED]'s employer no longer holds this opinion of her, the record offers no

documentary evidence to this effect, e.g., statements from [REDACTED]'s employer or her coworkers regarding her poor job performance. Going on record without documentary evidence to support the claim is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici, supra.*

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 hardship experienced by the families of most individuals who are removed from the United States.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant's waiver application were to be denied. Rather, the record demonstrates that [REDACTED] would experience the distress and difficulties routinely created by the removal of a spouse removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and emotional and social interdependence. Congress, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. While the AAO acknowledges that the separation from an immediate family member nearly always results in considerable hardship to the individuals and families involved, it finds the record to contain insufficient evidence to establish that the denial of the applicant's waiver request would result in extreme hardship to [REDACTED] if she remains in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by a denial of the applicant's waiver application. 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. Accordingly, the appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) 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.

ORDER: The appeal is dismissed.