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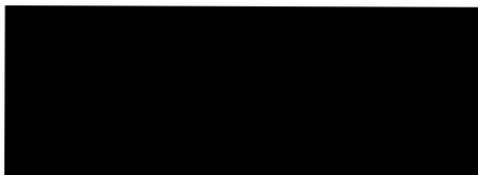
U.S. Department of Homeland Security  
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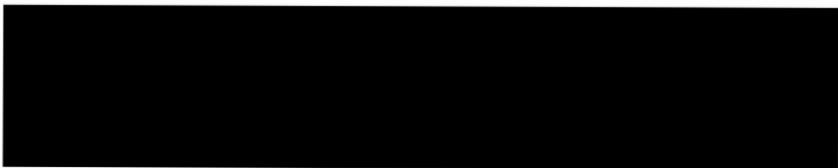


FILE: [Redacted] Office: CHICAGO, ILLINOIS Date: JAN 29 2008

IN RE: Applicant: [Redacted]

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:



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, Chicago, Illinois, 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. The applicant's spouse, [REDACTED] is a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the district director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the District Director, dated December 19, 2005.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes of section 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. *See* DOS Cable, note 1. *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 record reflects that the applicant entered the United States without inspection on October 16, 1995 and on October 21, 2003, she filed an Application to Register Permanent Residence or Adjust Status, Form I-485. The applicant remained in the United States until April 20, 2004, at which time she voluntarily departed from the United States, triggering the ten-year bar.. The applicant returned to the United States on an advance

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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).

<sup>2</sup> *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

parole on May 20, 2004. Consequently, the district director was correct in finding her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (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.

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 are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(i) of the Act. Thus, hardship to the applicant and her children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse. 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 record contains a marriage certificate, birth certificates, income tax records, W-2 Forms, and other documents.

The birth certificates reflect that the [redacted] have two sons, who are eight and five years old.

With regard to employment, the record shows that in July 2005, [redacted] the applicant’s husband, was employed by ManorCare, earning \$9.50 per hour by assisting patients with daily living activities. The letter dated July 2005 from [redacted] states that [redacted] earned \$12.00 per hour working 30 to 40 hours each week as a caregiver. The letter dated September 26, 2003 conveys that Mr. [redacted] has worked with Aramark Facility Services since 2001.

The income tax records for 2004 reflect wages, salaries, tips of \$49,348 for the [redacted] household. The W-2 Forms for 2004 reflect combined earnings of [redacted] as \$19,828 and [redacted]’ combined earnings as \$29,520.

The AAO has carefully considered all of the submitted evidence in rendering this decision.

“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, 565 (BIA 1999). The 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 country to which the qualifying relative would relocate. *Id.* at 565-566. 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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's husband must be established in the event that he joins the applicant; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant has established that her husband would endure extreme hardship if he remains in the United States without her.

The record conveys that [REDACTED] earned \$19,828 in 2004. The 2004 Poverty Guidelines requirement for a family unit of three is \$15,670, and 125 percent of that figure, which is a sponsor requirement as stated in the affidavit of support, is \$19,587. The AAO therefore finds that without his wife's financial assistance, Mr. [REDACTED] income, which equals the poverty line requirement, would not be sufficient to pay childcare for his two young sons; and as a consequence, he would experience extreme financial hardship if he were to remain in the United States without financial assistance from his wife.

The present record is insufficient to establish that the applicant's husband would experience extreme hardship if he joined the applicant in Mexico.

The applicant makes no hardship claim if her husband were to join her to live in Mexico.

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 removal.

The record establishes that the applicant's husband would experience extreme hardship if he were to remain in the United States without her, but it fails to support a finding of significant hardships over and above the normal economic and social disruptions if he were to join the applicant to live in Mexico. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that

[REDACTED]

these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

On appeal, counsel states that because [REDACTED] was paroled into the United States by an officer who acknowledged the humanitarian need for parole any subsequent interpretation inconsistent with that opinion is contrary to CIS' own interpretation. Counsel states that a situation is ripe for litigation when an agent of CIS evaluates a situation and finds requisite hardship for one benefit, in this case parole, and then another agent makes a contrary conclusion after the alien has relied upon the first agent's authority.

The AAO points out that a person granted advance parole who was unlawfully present in the United States for 180 days or longer prior to filing an adjustment of status application will be subject to the three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act. The advance parole document provides notice that the grant of advance parole authorizes the person to resume the application for adjustment of status upon return to the United States; however, it also informs the advance parole applicant that if after April 1, 1997 he or she were unlawfully present in the United States for more than 180 days before applying for adjustment of status, he or she may be found inadmissible under section 212(a)(9)(B)(i) of the Act upon return to the United States to resume processing of the adjustment application. Memorandum by Paul W. Virtue, Acting Executive, Associate Commissioner, dated November 26, 1997, Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days.

Counsel asserts that because the L.I.F.E. Act and section 245(i) of the Act waive the penalties of entry without inspection, they should also apply to waive unlawful presence and status violations. The AAO disagrees. Adjustment of status under 245(i)(1) of the Act allows an alien who entered the United States without inspection to pay a fee and to apply for adjustment of status to that of lawful permanent resident. Section 245(i)(1) of the Act, 8 U.S.C. § 1255(i)(1). To be eligible, the alien must be the beneficiary of a petition under 8 U.S.C. § 1154 that was filed before April 30, 2001, and if the petition was filed after January 14, 1998, he must have been physically present in the country on December 21, 2000. 8 U.S.C. § 1255(i)(1)(B)-(C). If an alien satisfies these criteria, the Attorney General must determine, among other factors, whether the alien is admissible to the United States for permanent residence. 8 U.S.C. § 1255(i)(2). While section 245(i) of the Act excuses entry without inspection, the applicant must still be admissible. Admissibility is defined by section 212(a) of the Act, 8 U.S.C. § 1182(a). It is noted that unlawful presence in the United States under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), is not excused by the provisions of 245(i).

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)(v) 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.

**ORDER:** The appeal is dismissed.