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U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES DISTRICT OFFICE

Date: NOV 21 2006

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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, 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 applied for a waiver under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v). The applicant was found to be inadmissible to the United States 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 one year or more. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with his wife.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director*, dated February 15, 2005.

On appeal, counsel asserts that [REDACTED] is not inadmissible because he was physically present in the United States on December 21, 2000, which, pursuant to the Legal Immigration Family Equity Act (LIFE Act) allows him to adjust status in the United States under section 245(i) of the Act, 8 U.S.C. 1255(i), and no waiver should be required. *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B)*, submitted March 18, 2005. Counsel adds if that even if a waiver of inadmissibility were required, it should be granted because otherwise [REDACTED] wife would suffer extreme hardship, as [REDACTED] removal would crush [his wife's] dreams and cause her to experience extreme mental and emotional hardship." *Id.* Counsel indicated on Form I-290B that he would send a brief and/or evidence to the AAO within 30 days of filing the appeal. On October 18, 2006, the AAO sent a facsimile to counsel giving notice that no brief or additional evidence had been received, and affording five days in which to provide a copy of any missing filing. On October 25, 2005 counsel responded that he will rely on his Notice of Appeal filed on March 18, 2005, stating that "if the AAO disagrees and decides ... that a Form I-601 is necessary, then we are requesting an additional 30 days to submit evidence of hardship." The regulations do not allow an applicant an open-ended or indefinite period in which to supplement an appeal once it has been filed. The record for purposes of this appeal is deemed complete. The entire record was reviewed and considered in rendering a decision.

Section 245 of the Act, 8 U.S.C. § 1255, states in pertinent part:

(a) Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification. . . may be adjusted by the Attorney General [now Secretary, Homeland Security, ("Secretary")], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

....

(i) (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States -

(A) who -

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d) of--

(i) a petition for classification under section 204 that was filed with the [Secretary] on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

....

(2) Upon receipt of such an application and the sum hereby required, the [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

Section 212(a)(9) 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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 [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.

I. Unlawful Presence

The AAO finds that the applicant was properly found to be inadmissible under section 212(a)(9)(B) of the Act. As there are significant inconsistencies in the record, however, it is appropriate to elaborate on this finding.

Regarding the ground of inadmissibility in this case, the District Director stated;

A review of your record reveals that you entered the United States without inspection sometimes (sic) in 1996. You also admitted at the time of the interview before the Service that you have resided between 1997 and February 1999 (sic), and accrued over one (1) year of unlawful presence. You left the United States and reentered the United States without inspection on or about March 1999. Therefore, you are inadmissible under Section 212(a)(9)(B)(i) of the Act.

Decision of the District Director, supra. The evidence in the record, however, contradicts this statement. There are no interview notes in the applicant's file that record the applicant's statements at the time of the interview referenced by the District Director. There are however handwritten notes, presumably by the interviewer, in black ink, and additional added notes in red ink, on the adjustment of status Processing Sheet (Form I-468) (noting action taken on November 19, 2001). Under "Eligibility Issues" the remarks in black ink read "1992 entered with B2 visa. However left U.S. two times. In 1995 & 1999. These times, he was EWied. Filed I-485A with penalty \$1,000." In red ink, "2/99" was written above the reference to 1999; and "after these trips" was added above the reference to "These times." Following the interview, on December 6, 2001, the applicant was sent the following request from the Los Angeles District Office:

During the interview on 11/19/2001, you stated that your first entry to the U.S. was in 1992 without inspection and then you had made two more trips to Mexico in 1995 and 1998. After these two trips you entered U.S. without inspection in 1995 and 3/1999. You married in 2/1999 in Mexico and entered U.S. on 3/1999 after the wedding. Please submit a sworn statement of the above fact.

submitted the following response on December 19, 2001:

Regarding the statements made at the time of my interview on 11/19/2001, I would like to amend them to the following:

My first entry into the U.S. was in 1992 with inspection. I have attached a copy of my stamped passport dated 01/25/1992. I then made two more trips to Mexico in 1995 and 1997. After these two trips, I entered the U.S. without inspection in 1995 and 03/1999. I married in 02/1999 in Mexico and entered U.S. on 03/1999 after the wedding.

On January 7, 2002, the applicant was notified by the Los Angeles District Office that he had been found inadmissible for being unlawfully present in the United States for one year or more, but that he was eligible to file a waiver as the spouse of a U.S. citizen. filed his Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 1, 2002. On Form I-601, the applicant lists the dates he was previously in the United States as 1/25/1992 to 1995; 1995 to 1997; and 3/1999 to the present, consistent with his written statement, though failing to indicate that the 1992 entry was lawful. However, the applicant submitted Biographic Information (Form G-325A), signed and dated April 29, 1999, in which he lists residence in the United States from 1994 to 1999 and continuous employment in the United States from 1996 to 1999, which does not reflect the dates of the applicant's several exits and entries since 1992. The applicant's subsequent written statement of December 19, 2001 (supra) clarifying that he entered the United States in 1992 lawfully and made two trips back to Mexico, in 1995 (returning to the United States in 1995, entering without inspection) and 1997 (returning to the United States in March 1999 after his wedding, entering without inspection) contradicts the biographic information and is therefore not fully credible.

To summarize, based on a thorough review of the record, including the applicant's statements and the various conclusions of the District Office, the evidence of the applicant's accrued unlawful presence is contradictory and inconsistent. If the applicant resided in the United States in 1998 and 1999 before his marriage in Mexico in February 1999, as he stated on Form G-325A, then clearly he accrued more than a year of unlawful presence; if he left the United States before April 1998 and did not return until after his marriage, he accrued less than a year. If the former, he is inadmissible for ten years; if the latter, he is inadmissible for three years. The District Director found the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more.

On appeal, counsel asserts that no waiver should be required because the applicant is applying for adjustment of status under the LIFE Act. Counsel does not, however, contest the District Director's finding regarding the applicant's dates of departure or entry into the United States and does not address the inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent

objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of a petition. *Id.*, at 591. Based on the record and the unresolved inconsistencies, the District Director found that the applicant accrued unlawful presence in the United States for a period of more than one year before his last departure in February 1999. Lacking a credible explanation or evidence in the record to the contrary, the AAO agrees with this decision. In applying to adjust status to that of Lawful Permanent Resident, the applicant is seeking admission within 10 years of his last departure from the United States.¹ He is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

II. Adjustment of Status and the LIFE Act Amendments

As noted above, counsel asserted in his Notice of Appeal that no waiver should be required in the applicant's case because the applicant is applying for adjustment of status under the LIFE Act. In support of his assertion, counsel states that "the LIFE Act's extension of INA 245(i) appears to contradict some of the inadmissibility provisions contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 'IIRAIRA.'" Counsel also cites *Perez-Gonzalez v. Ashcroft*, 379 F3d 783 (9th Cir. 2004), for the proposition that "it is illogical to conclude that INA section 245(i) awarded illegal entrants the right to apply for adjustment of status, but then made it statutorily impossible for the Attorney General to grant it to them because they would never be considered admissible under the provisions of INA section 212(a)..." Contrary to these assertions, it is clear that all applicants for adjustment of status, whether under section 245 of the Act, 8 U.S.C. § 1255, or under section 245(i) of the Act, 8 U.S.C. § 1255(i), as amended by the LIFE Act Amendments, must be admissible to the United States or, if inadmissible, all grounds of inadmissibility must have been waived. See *Memorandum by Michael D. Cronin, Acting Executive Associate Commissioner, Office of Programs*, dated January 26, 2001.

In *Perez-Gonzalez*, the U.S. Ninth Circuit Court of Appeals held that an applicant 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) to order to obtain consent to reapply for admission. *Perez-Gonzalez*, at 793-94. If, as a matter of discretion, CIS approves the Form I-212, the approval would open the way for an application 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 the applicant of inadmissibility under section 212(a)(9)(C)(i) of the Act. Rather, *Perez-Gonzalez* concerned "the availability of adjustment of status once a favorable determination of permission to reapply has been made." *Id.*, at 795.

The AAO also notes that, in the present case, unlike the ground of inadmissibility at issue in *Perez-Gonzalez*, the applicant was found inadmissible under section 212(a)(9)(B) of the Act; the same analysis, however, is applicable to the relevant waiver, in this case Form I-601 rather than Form I-212.

¹ An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). As the final determination on Mr. Gonzalez's I-485 is dependent on the I-601 waiver application, which is the subject of this appeal, the I-485 application is still pending and ten years have not passed since his 1999 departure.

Section 245 of the Act allows an alien to apply for adjustment of status to that of a lawful permanent resident while in the United States if certain conditions are met. The alien must have been inspected and admitted or paroled, be eligible for an immigrant visa and admissible for permanent residence, and, with some exceptions, have maintained lawful nonimmigrant status. The alien must also not have engaged in unauthorized employment. Section 245(i) of the Act allows an alien to apply to adjust status under section 245 notwithstanding the fact that he or she entered without inspection, overstayed, or worked without authorization.

See *Memorandum by Michael D. Cronin, supra* (addressing section 245(i) as amended by the LIFE Act Amendments of 2000). In the present case [REDACTED] is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act and eligible to apply for a waiver of inadmissibility.

III. Waiver of Inadmissibility

A section 212(a)(9)(B)(v) waiver of the bar to admission under section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself would experience is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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. In examining whether extreme hardship has been established, 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). 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. Separation of family will therefore be considered in the assessment of hardship factors in the present case.

The record in this case indicates that [REDACTED] was born in Zapotitan, Mexico in 1970; he entered the United States in 1992 on a visitor visa and resided in this country since then, with several breaks in his residency when he returned to Mexico. His father has been a Lawful Permanent Resident since 1988. The applicant’s wife was born in California in 1975; they were married in Zapotitan on February 6, 1999 and returned to the United States the following month. The applicant states that his wife depends on him financially, that he is her only source of income and that she does not work because she attends a community college. He states that his wife would suffer if she were separated from him because she is used to a certain standard of life and they want to own their own home and give their future children a better life than what they had. See *Applicant’s Statement*, January 23, 2002. The couple’s Biographic Information indicates that they have resided together since 1994 and that [REDACTED] has been employed for many years as a carpenter. In 2001, [REDACTED] employer stated that he earned \$13.00 per hour as a carpenter; two employers wrote letters of support in 2001 indicating that [REDACTED] wife was employed as a seasonal farm worker at \$6.25-\$6.30 an hour. The couple reported a joint income of \$23,400 in 1999 and \$31,200 in 2000, of which [REDACTED] earned approximately \$22,000; before they were married, the applicant’s wife indicated an income of approximately \$12,000 in 1998. Rental receipts show monthly payments of \$460-475 from March 1999 to May 2000. The record is silent regarding the applicant’s wife’s family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, and country conditions in Mexico; the record is also silent regarding the availability of employment in Mexico for either [REDACTED] or his wife. Although the applicant’s father is a lawful resident and therefore also a qualifying relative for purposes of a section 212(a)(9)(B)(v) waiver, the applicant did not claim that his father would suffer hardship if the applicant were denied a waiver; therefore this decision only addresses hardship to [REDACTED] wife.

Although the record reflects that the couple has dreams of building a sound financial future in the United States and that they would indeed suffer financially if [REDACTED] were forced to give up his work in the United States, there is no evidence that they would not be able to adjust to these changes or that [REDACTED] wife would suffer extreme hardship. The evidence indicates that [REDACTED] wife was able to support herself before the couple was married and there is no indication that she would be unable to do so now in his absence or that [REDACTED] would be unable to supplement their income through work available in Mexico. Carpentry is a movable skill, and the record reflects that [REDACTED] had sufficient ties to his place of birth to get married there in 1999, indicating some community support. If [REDACTED] wife decides to remain in the United States separated from her husband, clearly she will suffer hardship due to the absence of her spouse. However, there is no evidence to suggest that she will be unable to provide for herself or that she would be unable to adjust to life in Mexico, should she choose to accompany her spouse there to avoid the hardship of separation.

Upon review, the applicant has not established that his wife will experience extreme hardship if he is prohibited from remaining in the United States. The AAO recognizes that, as with any marriage, the applicant's wife will endure hardship as a result of separation from the applicant should she remain in the United States; and that a move to Mexico will also present difficulties, including the challenge of finding work and the hardship that results from separation from a customary lifestyle and surroundings. However, based on the record, her situation is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility 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 individuals who are deported.

Based on the foregoing, if the applicant is prohibited from remaining in the United States, the instances of hardship that will be experienced by his wife, considered in aggregate, do not 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.