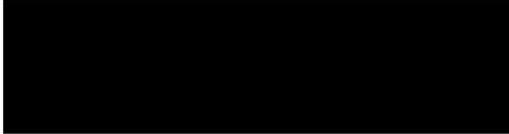




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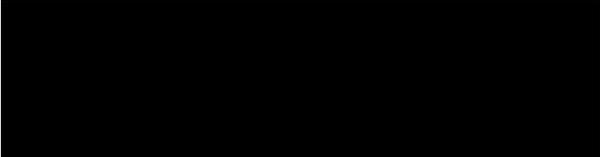


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FILE:  Office: PHOENIX, ARIZONA Date: **AUG 29 2007**

IN RE: Applicant: 

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, 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 over one year. The applicant filed a self-petition, Form I-360, pursuant to section 204(a)(1)(B)(ii) of the Act; 8 U.S.C. § 1154(a)(1)(B)(ii). She 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 hardship to a qualifying relative was not established. *Notice of Decision, dated July 12, 2006.* Counsel 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.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

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 on November 9, 1989 with a passport and a nonimmigrant visitor visa; after the authorized stay expired, the applicant remained in the United States, accruing unlawful presence. The applicant married her spouse, a lawful permanent resident, on July 30, 1991. She filed the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) and accompanying documents on June 12, 1996; it was approved on January 14, 1997. The documents in support of the Form

¹ 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).

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

I-360 include the Domestic Violence Temporary Orders and Notice of Hearing issued on March 31, 1994, the Domestic Violence Petition, the Domestic Violence Final Orders, the Investigation Report, documents from a women's shelter, and letters. The applicant filed the Form I-485, Application to Register Permanent Resident or Adjust Status, on March 24 2000, by which time she had accrued more than one year of unlawful presence. She departed from the United States and re-entered on advance parole on May 2, 2001, triggering the ten-year-bar. *Notice of Decision, Form I-610, dated July 12, 2006*. Consequently, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

Certain periods of presence in the United States are not considered unlawful. Section 212(a)(9)(B)(iii) of the Act, as amended by section 301(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), provides an exception to unlawful presence for battered women and children. It states that unlawful presence shall not apply to spouse or children subjected to battery or extreme cruelty, if there is a relationship between the battery or cruelty and the violation of the term of the spouse or child's nonimmigrant stay. IIRIRA § 301(c)(2).

There is no evidence in the record that demonstrates a relationship between the battery or cruelty inflicted upon the applicant and the violation of the term of her nonimmigrant stay. The applicant entered the United States in 1989 with a valid passport and nonimmigrant visa, and remained in the United States after the expiration of authorized stay. The incidents that gave rise to the Domestic Violence Temporary Orders occurred in 1994; thus, the battery or cruelty did not have any connection with the violation of the term of nonimmigrant stay, which occurred at an earlier date.

IIRIRA § 301(c)(2) included a "transition for battered spouse or child provision," which reads as follows:

The requirements of subclauses (II) and (III) of section 212(a)(6)(A)(ii) of the Immigration and Nationality Act, as inserted by paragraph (1), shall not apply to an alien who demonstrates that the alien first arrived in the United States before the title III-A effective date (described in section 309(a) of this division).

The transition period provided at IIRIRA § 301(c)(2) applies to section 212(a)(6)(A) of the Act, Aliens present without admission or parole. The transition period does not apply to section § 212(a)(9)(B) of the Act (Aliens Unlawfully Present), the applicant's ground of inadmissibility.

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 U.S. citizen child is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying

relative, which in this case is [REDACTED] the applicant's father. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In a March 9, 2006 letter, the applicant states that her son is a U.S. citizen; that he will have more opportunities in the United States than Mexico; and that she needs to support and guide him. In a letter from the applicant's son, who is now 15 years old, he states that he does not want to go to Mexico; his friends, family, and school are in the United States. The applicant's father, who is 72 years old and a lawful permanent resident of the United States, indicates in a letter that his daughter owns her own home and is hard working and law abiding. He states that it would be bad for his grandson to live in Mexico. The applicant is employed as a full-time operator. Letter from [REDACTED] Triumph LLC, dated February 27, 2006.

The record contains pay stubs, income tax records, W-2 Forms, a marriage license, school records, mortgage statements, a deed of trust, letters from the applicant's friends, a letter from Friendly House (dated March 28, 2006), court records, photographs, the decision *Acosta vs. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and other documents.

"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 Board of Immigration Appeals (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 father 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.

Courts in the United States have stated that "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).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA’s finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *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.

The record fails to establish that the applicant’s father would endure extreme hardship if he remained in the United States without the applicant.

█ makes no claim of relying on his daughter’s earnings to meet his basic household expenses. Furthermore, U.S. courts have universally held that economic detriment alone is insufficient to establish extreme hardship. *See, e.g., INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship) and *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

█ is very concerned about separation from his daughter. The AAO is thoughtful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. However, the AAO finds █ situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship to be endured by █, while separated from his daughter, is unusual or beyond that which is normally to be expected upon removal. *See Hassan and Perez, supra*.

█ makes no hardship claim about joining his daughter in Mexico. However, he expresses concern about this grandson living with the applicant in Mexico. Unlike section 212(h) of the Act where children are included as a qualifying relative, they are not included under section 212(i) of the Act. Thus, hardship to the applicant’s child will be considered only to the extent that it results in hardship to her father. █ states that if his grandson goes to Mexico, it would be “pitiful for him because he will loose [sic] all he has here and will be around bad people.”

With regard to the education of a child, in *Prapavat v. I.N.S.*, 638 F.2d 87, 89 (9th Cir.1980), the Ninth Circuit stated that the hardship to the petitioners' United States citizen daughter, who was about five years old at the time of the Board's decision and is now almost six, must be considered. It stated that:

The child, born in this country, has spent her entire life here. She is enrolled in school, a factor of significance. *See, e. g., Wang*, 622 F.2d at 1348 n.7; *Jong Shik Choe v. I. N. S.*, 597 F.2d 168, 170 (9th Cir. 1979); *Urbano de Malaluan v. I. N. S.*, 577 F.2d 589, 595 n.5 (9th Cir. 1978). If her parents are deported, this American citizen child will be uprooted from her

native country where she has spent her entire life, and taken to a land whose language and culture are foreign to her.

In *Ramos v. I.N.S.*, 695 F.2d 181, 187 n. 16 (5th Cir.1983) the Fifth Circuit noted the “great difference between the adjustment required” of infants going to a parent's homeland and school age children facing the same fate. In *Jara-Navarrete v. I.N.S.*, 813 F.2d 1340, 1342 (9th Cir.1986) the Ninth Circuit stated that U.S. citizen children must be given individualized consideration. In *Ravancho v. I.N.S.*, 658 F.2d 169, 175-77 (3d Cir.1981) the court stated that consideration must be given to the effect of a move to the Philippines would have on an eight-year-old American citizen. In *In Re Kao & Lin*, 23 I&N Dec. 45 (BIA 2001), the BIA held that to uproot the respondent's 15-year-old daughter at this stage in her education and her social development and to require her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship to her.

The AAO finds that the record indicates that the applicant's 15-year-old son would endure extreme hardship at this stage in his education and social development if he lives in Mexico. However, this finding is not sufficient, in itself, to establish extreme hardship to the applicant's father; additional hardship factors are missing.

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.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that 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).

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.