

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Massachusetts Ave. N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

H4

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 Acting 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 more than one year. The applicant is married to a naturalized citizen, [REDACTED]. He 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). The Acting District Director denied the waiver application, finding that the applicant failed to establish hardship to a qualifying relative. *Decision Acting District Director, dated October 31, 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 documents in the record indicate that the applicant entered the United States in January 1985 without inspection. *Application for Employment Authorization, Form I-765*. On November 10, 1999, he filed the Application to Register Permanent Residence or Adjust Status, Form I-485. When he filed the Form I-485, he had been in unlawful status for more than one year. In November 2000, the applicant voluntarily departed

---

<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.

from the United States, triggering the ten-year-bar. Consequently, the Acting District Director was correct in finding him inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(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 is not a consideration under the statute; and unlike section 212(h) of the Act where a child is included as a qualifying relative, a child is not included under section 212(i) of the Act. Thus, hardship to the applicant and his children will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant’s wife. 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 addition to income tax records, pay stubs, W-2 Forms, employment letters, a naturalization certificate, a marriage certificate, birth certificates, medical records, and other documents, the record contains letters from the applicant and his wife and children.

The letter from [REDACTED] indicates the following. She has been living with her husband for 15 years; she has been married to him for 13 of those years. She would be destroyed and lost without her husband, who is very responsible and a great man. Her children, especially her young son who is 13 years old, need their father. Her husband is the football coach’s assistant where her son plays. She cannot imagine taking her children away from their lifestyle and bringing them to Mexico. She and her husband help the community through the Marriage Encounter of the Church, where they help couples to learn the beauty of marriage.

In his letter, [REDACTED] states the following. He left the United States because his mother had a cerebral hemorrhage and needed a blood transfusion; he is the only one with the same type of blood type. He cannot imagine being separated from his wife and children. His children are his pride and his happiness, and he has a very close relationship with them.

The letters from the applicant’s children (now 17 and 13 years old) express the need to have their father with them.

On appeal, counsel states that the applicant provided evidence to establish extreme hardship to his U.S. citizen wife if the waiver is denied. Counsel states that “extreme hardship” is defined in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978) and *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 564 (BIA 1999). He states that according to *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9<sup>th</sup> Cir. 1987), all factors must be considered

determining hardship and that failure to consider all factors or to articulate the reasons for denial constitutes an abuse of discretion according to *Turri v. INS*, 997 F.2d 1306 (10<sup>th</sup> Cir. 1993), and *Jara-Navarette v. INS*, 813 F.2d 1340 (9<sup>th</sup> Cir. 1986). Counsel states that the applicant has resided in the United States with his wife for 15 years and they have two U.S. citizen children. Counsel claims that the applicant's wife and children are significant ties that are closer and stronger than his family tie to Mexico, which is his mother. Counsel states that the applicant's wife spent most of her adult life in the United States; that she does not possess skills to find employment or adjust to life in Mexico; that she has no family ties to Mexico; and that she is entitled to live in the United States. Counsel states that Citizenship and Immigration Services (CIS) relies on *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965) in denying the waiver application; but the BIA in *Matter of Mansour* granted the waiver application, finding that a temporary two-year separation would result in extreme hardship to the spouse. Counsel states that in *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8<sup>th</sup> Cir. 1984), economic hardship alone may be sufficient to establish extreme hardship where there is a complete inability to find work. According to counsel, in *Santana-Figueroa v. INS*, 644 F. 2d. 1354 (9<sup>th</sup> Cir. 1981), the Ninth Circuit held that the inability to find work often results in the inability to treat illness, malnutrition, or starvation. Counsel asserts that it is unlikely that the applicant and his wife will find work in Mexico. He states that the applicant's wife and children are guaranteed basic health services in the United States; but in Mexico healthcare is virtually non-existent because of cost. Counsel states that the applicant's wife is a United States citizen and is not entitled to any governmental health benefits in Mexico. He states that *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984), indicates that the complete lack of access to medical facilities in a foreign country should be considered in determining suspension of deportation. Counsel asserts that the applicant's integration into the community should be considered in determining hardship, and he states the submitted evidence reflects the applicant's participation in his church and community, and his friendship with neighbors. The loss of the applicant's position in the community, counsel claims, must be considered in determining hardship. Counsel points to *Salcido-Salcido v. INS*, 138 F.3d 1292 (9<sup>th</sup> Cir. 1998), to show the importance of family in the hardship determination.

This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, therefore decisions from the Ninth Circuit will be given appropriate weight in this proceeding.

"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 wife must be established in the event that she joins the applicant; and in the alternative, that she 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 record fails to establish that the applicant’s wife would endure extreme hardship if she remained in the United States without her husband.

The record reflects that [REDACTED] was previously employed as a cafeteria worker with Yuma High School and as a manager with McDonalds. There is no documentation in the record of her current employment status and whether it is sufficient income to meet monthly household expenses for herself and her children. Furthermore, courts in the United States 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 (9<sup>th</sup> Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

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 (9<sup>th</sup> Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9<sup>th</sup> 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, the fact that an applicant has U.S. citizen children is not sufficient, in itself, to establish extreme hardship. The general proposition is that the mere birth of a deportee’s child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS*, 765 F.2d 673 (7<sup>th</sup> Cir. 1985), the Seventh Circuit has stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS*, 550 F.2d 554 (9<sup>th</sup> Cir. 1977). In a per curiam decision, *Banks v. INS*, 594 F.2d 760 (9<sup>th</sup> Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

In addition, in *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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 clearly reflects that [REDACTED] is very concerned about separation from her husband. The AAO is sympathetic to her situation and is mindful of the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of [REDACTED] if she and her children remain 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, which most certainly will be endured by the applicant's wife, is unusual or beyond that which is normally to be expected upon removal. *See Hassan and Perez, supra*. While the AAO is sympathetic to the plight of Ms. Pompa and her husband and children, the factors needed to categorize hardship as extreme are not present.

The record is insufficient to establish that the applicant's wife would endure extreme hardship if she joined her husband in Mexico.

The conditions in Mexico, the country where [REDACTED] and would live if she joins her husband, are a relevant hardship consideration. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted).

Counsel makes a claim of economic hardship for the Pompa family stemming from the economic conditions in Mexico. Court decisions have shown that the difficulties the Pompas may experience in obtaining employment in Mexico and the general economic conditions in that country are insufficient to establish extreme hardship. *E.g., Ramirez-Gonzales v. Immigration and Naturalization Service*, 695 F.2d 1208, 1211-13 (9th Cir.1983) (upholding BIA finding that [REDACTED] testimony and unsupported allegations are insufficient to establish inability to find employment in Guatemala); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980) (upholding the BIA's finding that hardship in finding employment in Mexico does not reach extreme hardship); *Kuciemba v. INS*, 92 F.3d 496, 500 (7th Cir. 1996), (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir.1985)) ("General economic conditions in an alien's native country will not establish "extreme hardship" in the absence of evidence that the conditions are unique to the alien."); *Bueno-Carrillo v. Landon*, 682 F.2d 143, 146 (7th Cir.1982) (claim by respondent that he had neither skills nor education and would be "virtually unemployable in Mexico" found insufficient to establish extreme hardship); and *Pelaez v. INS*, 513 F.2d 303 (5th Cir. 1975) (difficulty in obtaining employment is not extreme hardship).

Counsel asserts that *Matter of Correa, supra*, indicates that complete lack of access to medical facilities constitutes extreme hardship. However, there is no evidence in the record to show that the Pompas will have no access to medical care in Mexico. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The AAO notes that in *Matter of Correa* the BIA stated that "second class" medical facilities in foreign countries are not per se extreme hardship.

The AAO notes that the record conveys that the applicant's father, mother, and sister live in Mexico, which will help in transitioning the applicant and his family to life in Mexico.

Although hardship to the applicant's children is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by the applicant's wife, as a result of their concern about the well-being of their children, is a relevant consideration. The applicant's wife indicates that she cannot imagine taking her children away from their American lifestyle and bringing them to live in Mexico. The AAO notes that the record is silent as to whether the [REDACTED] children, who are 17 and 13 years old, read or write Spanish. The Ninth Circuit in *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), and cases cited therein, observed the difference between the adjustments required of very young children accompanying their parents to a foreign country and those faced by children already in school. *Matter of Andazola*, 23 I&N Dec. 319, 333 (BIA 2002). *In Re Kao & Lin*, 23 I&N Dec. 45 (BIA 2001), the BIA found extreme hardship requirement to a 15-year-old United States citizen who has spent her entire life in the United States, has been completely integrated into the American lifestyle, and is not sufficiently fluent in the Chinese language to make an adequate transition to daily life in her parents' native country of Taiwan. Furthermore, in *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982), the United States Supreme Court acknowledged the importance of the United States educational process. Both of the [REDACTED] children are of school age; no evidence indicates that they do not have sufficient knowledge of "academic Spanish." The AAO therefore finds that the record is insufficient to establish that the applicant's wife would endure extreme hardship on account of the adjustments her children would be required to make to attend school and transition to life 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.

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.