

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H 4



FILE:



Office: PHOENIX, ARIZONA

Date:

AUG 06 2008

IN RE:



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:

SELF-REPRESENTED

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 that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Mexico who was found 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 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 March 23, 2006.* 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.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).*

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.

The record reflects that the applicant entered the United States from Mexico in February 1989 without inspection and filed an adjustment application on September 23, 1999. While the applicant's adjustment application was pending, the record shows that she departed from the United States, returning on advance parole on April 4, 2000. The applicant's adjustment application was denied on August 12, 2004 and she filed a second adjustment application on June 1, 2005. *Form I-485, Application to Register Permanent Residence or Adjust Status, filed September 23, 1999 and June 1, 2005.*

For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence from April 1, 1997 to September 23, 1999, the date she filed her initial Form I-485. The applicant accrued approximately two years of unlawful presence prior to filing the adjustment application, and when she departed from the United States on April 4, 2000, she triggered the ten-year-bar. The finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is therefore correct.

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, who is the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child 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(a)(9)(B)(v) 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. [REDACTED] Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

“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* here, extreme hardship to the applicant's husband must be established in the event that he remains in the United States without the applicant, and in the alternative, that he joins the applicant to live in Mexico. 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 contains, among other documents, employment letters, letters by family members and friends, birth certificates, a marriage license, income tax records, photographs, school records, and a letter by [REDACTED]

The letter by [REDACTED] in dated September 18, 2007, indicates that he saw [REDACTED] on August 8, 2007 and that [REDACTED] remained neurologically asymptomatic with a normal brain MRI and an EEG which was reportedly abnormal secondary to occasional generalized outbursts of sharp waves. [REDACTED] indicated that [REDACTED] is s/p synopal episode and he stated that the findings were discussed at length with [REDACTED]. The AAO notes that the record contains no documentation which explains the findings.

The letter by [REDACTED] with Metal Form confirms [REDACTED] employment; as does the letter dated May 20, 2008 by [REDACTED] with [REDACTED] corroborate [REDACTED] employment as a Distribution Center Lead with an hourly rate of \$18.61, which is \$38,508.80 annually.

The income tax records for 2004 show the [REDACTED] household income as \$51,918; the Form W-2 shows Mr. [REDACTED]s having income of \$32,767 and his wife's income as \$19,151.

The April 22, 2006 letter by [REDACTED] is summarized as follows. Of [REDACTED]s four children, two were born in the United States and two are legal permanent residents of the United States. [REDACTED] indicated that her family has lived in a house they have owned for 15 years, and her children have attended school in the United States since kindergarten and do not now any other educational system and will find language a barrier in Mexico. She indicated that she has held the same job for more than 5 years and her husband as been employed as a supervisor with [REDACTED] for the same length of time. It would be impossible, according to [REDACTED] for her husband to find a similar job in Mexico, and that he would have to start in a more junior position because technology is not the same in Mexico as in the United States. She stated that

her family would experience extreme emotional and financial hardship, especially to her children, if the waiver application were denied. *Letter by [REDACTED] dated April 22, 2006.*

The letters by [REDACTED]'s children commend their mother's character and convey their close relationship with her. Letters by [REDACTED]'s friends and neighbors convey that she has a good character.

Two of the applicant's children were born in the United States, on June 28, 1991 and January 25, 1993; her sons, twins, were born in Mexico on August 26, 1987. *State of Arizona, Certificate of Live Birth; Form I-485, Application to Register Permanent Residence or Adjust Status.*

The record fails to establish that the applicant's husband would endure extreme hardship if he remains in the United States without his wife.

[REDACTED] indicated that her family would experience extreme financial hardship if the waiver application were denied. [REDACTED] earns \$32,767 annually. However, the applicant submitted no documentation of the [REDACTED] household expenses, therefore the AAO cannot conclude that [REDACTED] income is insufficient to meet monthly expenses. 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)).

With regard to family separation, courts 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 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). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The AAO is mindful of and sympathetic to 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, the AAO finds that

the situation of [REDACTED] if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by the applicant's husband, is unusual or beyond that which is normally to be expected upon removal. *See Hassan, Shoostary, Perez, and Sullivan, supra.*

In his document, [REDACTED] provides an assessment of [REDACTED] but does not explain the assessment or findings in any detail. Consequently, the AAO cannot determine whether [REDACTED] has a serious health condition which requires the care of his wife.

In considering the hardship factors, both individually and cumulatively, the AAO finds that they fail to show that the applicant's husband would experience extreme hardship if he were to remain in the United States without his wife.

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

The conditions in the country where [REDACTED] would live if he joined his wife 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).

[REDACTED] stated that her husband would not be able to find employment in Mexico comparable to the job he now holds. But the record does not contain any documentation in support of her claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra.*

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 husband, as a result of his concern about the well-being of his children, is a relevant consideration. The AAO finds that [REDACTED]'s statement about her children, which is essentially that they are accustomed to schools in the United States and would have a language barrier in Mexico, establishes extreme hardship to her children but fails to demonstrate extreme hardship to Mr. [REDACTED]

As previously stated, because the document by [REDACTED] fails to sufficiently describe the health condition of [REDACTED], the AAO cannot determine whether [REDACTED] has a serious health condition.

The hardship factors raised here, considered both individually and cumulatively, fail to establish extreme hardship to [REDACTED] in the event that he were to join his wife to live in Mexico.

The record fails to support a finding of significant hardships over and above the normal economic and social disruptions involved in removal 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 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.