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U.S. Citizenship and Immigration Services

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DEC 21 2004

[redacted]

FILE: [redacted] Office: SEATTLE DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1182(i), 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Seattle. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the husband of a U.S. citizen. He seeks a waiver of inadmissibility in order to remain in the United States with his wife and adjust his status to that of a lawful permanent resident under INA § 245, 8 U.S.C. § 1255, as the beneficiary of an approved immediate relative petition filed on his behalf by his U.S. citizen wife.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly.

On appeal, counsel contends that the applicant is not inadmissible and, in the alternative, that he established that refusal of his admission would result in extreme hardship to his U.S. wife. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's admitted submission of fraudulent evidence of lawful admission to the United States in connection with a petition for alien relative. *Decision of the District Director* (October 23, 2003) at 2-3. Section 212(i) provides for a waiver of inadmissibility under this section, as follows:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1).

The applicant was also found inadmissible under section 212(a)(9)(B) of the Act, which provides, in pertinent part:

> (B) Aliens Unlawfully Present.—

> (i) In general.—Any alien (other than an alien lawfully admitted for permanent residence) who—
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> . . .
>
> (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.
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> . . .
>
> (v) Waiver.—The Attorney General [now Secretary of 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 U.S. citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B). In the present application, the record indicates that the applicant entered the United States without inspection on or about April 15, 1991. On March 28, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). In 2003, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to twice depart and reenter the United States. He last entered the United States on March 15, 2003. After having presented an expired Form I-512, his inspection was deferred and he was later paroled into the United States on or about March 29, 2003.

The proper filing of an affirmative application for adjustment of status has been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997. The applicant accrued unlawful presence from April 1, 1997, until March 28, 2001, the date the Form I-485 was properly filed, or a period of nearly four years. In applying to adjust his status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of his 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Counsel contends that the applicant is not inadmissible because the applicant was twice permitted to re-enter the United States after having traveled to Mexico. Counsel cites operating instructions related to INA § 235(b)(2)(A), which states:

> In general.—Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining officer determines that an alien

> seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240.

8 U.S.C. § 1225(b)(2)(A). Counsel asserts that the provision that the alien "shall be detained" means that, because the applicant was not detained and placed into proceedings, he was lawfully admitted. Counsel further contends that CIS cannot now find the applicant inadmissible without initiating a "new exclusion proceeding." *Applicant's Brief and Motion for Reconsideration* (December 18, 2003), at 2-3.

Counsel's contentions that CIS cannot properly find the applicant inadmissible are without merit. Contrary to counsel's contentions, the applicant was not "admitted" to the United States when he entered pursuant to a grant of advance parole. Parolees, such as the applicant, are not admitted to the United States, but merely permitted to enter temporarily for humanitarian reasons without regard to admissibility. The authorizing statute specifically provides, "such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served . . . thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Even if the applicant had previously been lawfully admitted by immigration inspectors at a port-of-entry, CIS is nevertheless required to examine the applicant's admissibility anew before adjusting his status to that of a lawful permanent resident. INA § 245(a)(2), 8 U.S.C. § 1255(a)(2) ("The status of an alien . . . having an approved petition for classification under . . . section 204(a)(1) . . . may be adjusted by the Attorney General [now Secretary of Homeland Security], in his discretion . . . to that of an alien lawfully admitted for permanent residence if . . . the alien is . . . admissible to the United States"); *see also Matter of Alarcon,* 20 I&N Dec. 557 (BIA 1992) ("As he is seeking to adjust his status to that of a lawful permanent resident, the respondent in this case is assimilated to the position of an applicant for entry into the United States.") (citations omitted). The district director's determination of inadmissibility is therefore affirmed. The question remains whether he is entitled to a waiver of inadmissibility.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are dependent upon a showing that the bar to admission imposes an extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the alien himself is not a permissible consideration under either statute. The sole qualifying relative in this case is the applicant's U.S. citizen spouse.

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 alien 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. 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). 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 evidence of hardship in the instant case consists solely of a single-page affidavit from the applicant's spouse stressing the emotional hardship she would face if the applicant were refused admission. She also states, "Financially, I could not continue my life, as it is, without his economic support. I would loose [*sic*] my place to live, our car and numerous belongings." *Affidavit of Kelly Warden Alfaro* (December 19, 2003). Finally, she states that she was diagnosed with hypoglycemia and sometimes suffers symptoms including extreme weakness, shakes, and fainting. *Id.*

The AAO notes that there is no supporting evidence documenting the medical condition of the applicant's wife. Ms. Alfaro's statement lacks details such as how long she has had her condition, when it was diagnosed, her prognosis, and any treatment plan. The AAO concludes that her statement alone is insufficient in this case to support a finding of a significant health condition contributing to hardship, and therefore no weight is accorded to this factor in the overall hardship determination.

The record reflects that is 22 years old and was born in the United States. Her mother and father are U.S. citizens. Her mother lives in Washington State; the record is unclear as to where her father resides. Form G-325, *Biographic Information for Kelly Jo Warden* (February 28, 2001). The applicant's mother and father reside in Mexico. The applicant works as a roofer for $17.00 per hour. works as a waitress for $7.01 per hour. Their monthly rent is $630. Also on record are copies of utility bills, apparently incurred in connection with living in the apartment.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that faces extreme hardship if the applicant is refused admission. Rather, the record demonstrates that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

appears to be a young and reasonably healthy adult, and capable of supporting herself in the United States if she chooses to remain here. The record is silent as to whether she would suffer extreme hardship if she relocated with the applicant to Mexico. Therefore, the applicant's spouse faces, as all spouses facing deportation or refusal of admission of a spouse, the decision of whether to remain in the United States or relocate to avoid separation from her spouse. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965). Further, separation from her parents alone is insufficient to establish that extreme hardship would result if she relocated with the applicant to Mexico, where his parents currently reside.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required both under INA § 212(i), 8 U.S.C. § 1186(i) and § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v). Inasmuch as the applicant has been found statutorily ineligible for a waiver, no purpose would be served in discussing whether the applicant merits a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.