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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

H1

[redacted]

FILE: [redacted] (CDJ 2004 787 123) Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: JAN 07 2010

IN RE: [redacted]

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant was found to be inadmissible to the United States under section 212(a)(1)(A)(iii), 8 U.S.C. 1182(a)(1)(A)(iii), as an alien classified as having a mental disorder with associated harmful behavior and 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 and seeking admission within ten years of his last departure. The applicant is married to a United States citizen. He is seeking a waiver under sections 212(g) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose an extreme hardship on a qualifying relative, his U.S. citizen spouse, or that a favorable exercise of discretion was warranted, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 29, 2007.

On appeal, the applicant's spouse asserts that she is unable to obtain any information with regard to the applicant's arrest for Battery, which was referenced by the District Director in his decision, and requests additional time to submit this documentation. She submits a summary of other court cases involving the applicant, as well as documentation relating to some of the applicant's arrests. As of this date, no additional evidence has been received concerning the applicant's arrest for battery and the appeal will be considered complete.

The AAO turns first to a consideration of the grounds barring the applicant's admission to the United States.

On June 27, 2006, a consular officer determined that the applicant was inadmissible to the United States under section 212(a)(1)(A)(iii) of the Act, based on a medical exam conducted by an overseas panel physician that found him to have a history of alcohol abuse with associated harmful behavior. The consular officer also determined that, as the applicant had accrued more than one year of unlawful presence in the United States prior to leaving for his immigrant visa interview in Mexico, he was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. In his May 29, 2007 decision, the District Director stated that the consular officer had also determined that the applicant was inadmissible under section 212(a)(2)(A)(i) of the Act for having been convicted of crimes involving moral turpitude. He further stated that, as the applicant had failed to inform the consular officer of several arrests, he was also inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for fraud or the willful misrepresentation of a material fact in seeking admission to the United States.

The AAO finds the record to establish that the applicant entered the United States without inspection in March 1999 and remained until he departed voluntarily in June 2006. As the applicant resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The record also demonstrates that the applicant has a physical disorder with associated harmful behavior and is barred from entering the United States by section 212(a)(1)(A)(iii) of the Act. The

record contains a Form DS-2053, Medical Examination for Immigrant or Refugee Applicant, that indicates that the applicant has a Class A medical condition. A Form DS-3026, Medical History and Physical Examination Worksheet, indicates that this Class A inadmissibility is alcohol abuse, with associated harmful behavior, based on an evaluation by a psychological consultant in Mexico who found that the applicant's alcohol-related harmful behavior could not be considered to be in full remission.

The AAO does not, however, find the record to support the District Director's findings regarding the applicant's inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act. There is no indication in the record that the consular officer found the applicant's criminal history to bar his admission to the United States. Neither is there proof in the record to establish that the applicant intentionally failed to provide information concerning his criminal history to the consular officer. The AAO notes that in the Form DS-3026, Medical History and Physical Examination Worksheet, the examining physician indicates that the applicant provided information on his arrests relating to his abuse of alcohol.[1]

The AAO now turns to a consideration of whether the record establishes the applicant's eligibility for waivers of his inadmissibility under sections 212(a)(1)(A)(iii) and 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a), states, in pertinent part:

> (a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> (1) Health-related grounds.—
>
> (A) In general.-Any alien-
>
> . . .
>
> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—
>
> (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
>
> (II) to have had a physical or mental disorder and a history of behavior associated with the

[1] The AAO observes that should the applicant establish eligibility for a waiver of his unlawful presence under section 212(a)(9)(B)(v) of the Act, any inadmissibility under section 212(a)(2)(A)(i)(I) or 212(a)(6)(C)(i) of the Act would also be waived. Sections 212(h) and (i) of the Act impose the extreme hardship requirement as does section 212(a)(9)(B)(v).

> disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.
>
> (B) Waiver authorized.—For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

Section 212(g) of the Act, reads, in pertinent part:

> (g) The Attorney General may waive the application of—
>
> > (3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

A review of the record fails to find that the applicant has complied with the requirements for filing a waiver under section 212(g) of the Act. These requirements are found in the "Specific Instructions, 4. Applicants with Physical or Mental Disorder and Associated Harmful Behavior" that accompany the Form I-601, Application for Waiver of Grounds of Inadmissibility. Individuals who, like the applicant, have been found to have a physical disorder with associated harmful behavior must, in addition to submitting the Form I-601, provide a complete medical history and a report that addresses his or her physical disorder, and the behavior associated with the disorder, including details of any hospitalization, institutional care or other treatment received in relation to the disorder; findings regarding his or her current physical health; findings regarding his or her physical disorder, including a detailed prognosis; and a recommendation concerning treatment that is reasonably available in the United States and that can reasonably be expected to significantly reduce the likelihood that the physical disorder will result in harmful behavior in the future. This medical report will be referred to the U.S. Public Health Service for review and, if found acceptable, the applicant will be required to submit such additional assurances as the U.S. Public Health Service decides are necessary. In that the record does not establish that the applicant has submitted such a report or that it has been favorably reviewed by the U.S. Public Health Service, he remains inadmissible pursuant to section 212(a)(1)(A)(iii) of the Act.

Section 212(a)(9)(B) 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-

> (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 [now the 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 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, in this case the U.S. citizen spouse of the applicant. 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; s*ee also Matter of Mendez*, 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. 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.

> 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).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The evidence of record includes, but is not limited to: statements from the applicant's spouse, one of which is in Spanish;[2] school records; printouts from the 16th Street Community Health Center, in Milwaukee, Wisconsin, for office visits made by the applicant's spouse on April 9, 2004, May 14, 2004, and July 29, 2004; a statement from U.S. Senator Russell D. Feingold concerning the financial and emotional hardship being experienced by the applicant's spouse; an employment letter for the applicant; and a statement from the assistant pastor at the applicant's church attesting that he is a member in good standing.

A statement by the applicant's spouse asserts that she is suffering from depression, and that the applicant's children deserve to have their father with them in the United States. She states that she and the children are currently residing with her father, who is not charging them for rent or food. She also states that her children are suffering emotionally, that the applicant's daughter misses her father, and that their youngest child, six months old, is growing up without a father. She concludes by asserting that her emotional hardship, the emotional hardship of her children, and the financial hardship on them all has resulted in extreme hardship for her.

The record also contains a letter from U.S. Senator Russell Feingold, who states that the applicant's spouse is experiencing emotional and financial hardship as a result of the applicant's exclusion, that he has seen evidence of her financial hardship, specifically documentation of her limited income and the family's expenses, and is submitting proof of her financial obligations.[3]

The record, however, does not include documentation sufficient to establish the claims of financial and emotional hardship. The only evidence related to the applicant's spouse's claim of emotional hardship are the medical records from the 16th Street Community Health Center for three office visits in the summer of 2004. While the records indicate that the applicant's spouse was being treated for depression in 2004, they do not establish the current state of her mental health. Moreover, the records fail to indicate that the diagnosis of depression was made by a licensed mental health practitioner and, for this reason as well, are not sufficiently probative to establish that the applicant's spouse suffers from any mental health condition.

While the AAO acknowledges Senator Feingold's statements about the applicant's spouse's financial hardship and the submitted documentation, it does not find the record to contain any financial documentation relating to the applicant's spouse. There is no documentation of the applicant's or his spouse's income, no indication of accrued debt or impending financial crisis, and

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[2] Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), any document submitted to U.S. Citizenship and Immigration Services (USCIS) in a foreign language must be accompanied by a certified English-language translation. Accordingly, USCIS will not consider the Spanish-language statement of the applicant's spouse.

[3] Senator Feingold also states that the applicant was a victim of ineffective assistance of counsel. The record, however, does not include documentation that indicates that the applicant, whose case was pending prior to January 7, 2009, has complied with the requirements for establishing the deficient performance of counsel, as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In that the record does not include documentation that complies with these requirements, the AAO will not consider whether the applicant's case was prejudiced by the ineffective assistance of counsel. Cases filed subsequent to January 7, 2009 are subject to the requirements established by *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009), which has superseded *Lozada*.

no indication that the applicant's spouse is unable to meet her current financial needs. Instead, the record indicates that the applicant's spouse's father has been able to assist her financially by providing her with a residence and food. As such, the record does not contain sufficient evidence to establish that the applicant's spouse is experiencing emotional or financial hardship in the applicant's absence. The record also fails to include documentation, i.e., birth certificates, that demonstrates that the applicant and his spouse have children. Accordingly, the AAO does not find the applicant to have established that his spouse would suffer extreme hardship if he were to be found excludable and she remained in the United States.

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. In this case, the applicant's spouse has asserted that her children would suffer hardship if they had to relocate to Mexico with the applicant, and has submitted school records for her oldest son. However, as previously noted, the record does not contain any evidence that demonstrates that the applicant and his spouse have children. Further, even if the record established that the applicant had children, hardship to the applicant's children is not directly relevant to a determination of extreme hardship in section 212(a)(9)(B)(v) proceedings and the record fails to document how any hardship the applicant's children might encounter upon relocation would affect his spouse, the only qualifying relative. Neither the applicant nor his spouse asserts any other impacts if she were to relocate to Mexico with him. As such, the record fails to establish that the applicant's spouse would experience extreme hardship if she were to join the applicant in Mexico.

The hardship factors in the record, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, do not support a finding that the applicant's spouse would face extreme hardship if he is refused admission. The AAO recognizes that the applicant's spouse would suffer hardship as a result of the applicant's inadmissibility. The record, however, fails to distinguish her hardship from that commonly associated with removal or exclusion, and it does not, therefore, rise to the level of "extreme" as informed by relevant precedent. 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). 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. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden. He has not satisfied the requirements to waive his medical inadmissibility under section 212(a)(1)(A)(iii) or his unlawful presence inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.