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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: NOV 21 2007

CDJ 1999 583 679

IN RE: Applicant: [redacted]

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Ciudad Juarez, Mexico, 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's spouse is a lawful permanent resident of the United States. 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 OIC denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the OIC, dated November 22, 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.[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 document in the record from the American Consulate General, Immigrant Visa, dated April 19, 2005, reflects that the applicant lived illegally in the United States from February 1997 to April 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 on April 1, 1997. From April 1, 1997 to April 2005, she accrued eight years of unlawful presence. When the applicant voluntarily departed from the country, she triggered the ten-year-bar.

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[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.

Consequently, the OIC was correct in finding her inadmissible under 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 and her children is 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) 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. The qualifying relatives in this case are the applicant's husband. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The record contains letters, birth certificates, a list of household expenses, earnings statements, invoices, employment letters, and other documents.

In a letter dated December 12, 2005, [redacted] states that he has been married nine years and he and his wife have four children, who are seven, six, four, and one year old. He describes his close relationship with his wife and her care of their children and his concern about the well-being and education of the children. He states that without the presence of their mother his children's grades are suffering and the teachers have noticed a change in them. He states that his wife always helped the children with their school work. [redacted] conveys that he is struggling economically because he works fewer hours in order to pick up the children either from school at 2:00 P.M. or daycare, and that he cannot work overtime or travel with his crew to out-of-town jobs. He states that he is worried about losing his job. [redacted] indicates that he sends approximately $350 each month to support his wife and daughter in Mexico, and that he worries about them and feels sad and depressed. He conveys that he cannot afford to travel to Mexico with his children and states that his parents and siblings are U.S. residents and citizens.

A letter dated April 18, 2005 from [redacted] is not translated into the English language; as such, the AAO cannot determine its contents.

The letters from [redacted] and [redacted] indicate that the applicant's children miss her and are sad and depressed without her. [redacted] indicates that she cares for the applicant's three children starting at 6:00 A.M.; [redacted] are at school at 8:00 A.M.; and she cares for [redacted] until 3:30 P.M.

The letters from the vice-president of Interstate Roofing indicate that [redacted] has been an employee for over seven years. They state that [redacted] has cut back his hours and travel in order to care for his children. One letter conveys that as a foreman [redacted] is required to be present at a job site during normal working hours and, if necessary, to travel to out-of-town jobs. The letter indicates that his position is jeopardized if he can no longer work normal hours and travel. *Interstate Roofing Letters, dated September 1, 2005 and December 13, 2005.*

The submitted monthly income and expenses reflect monthly bills totaling $5,161, and the earnings statements reflect monthly net pay of $5,000.

The AAO has carefully considered all of the submitted evidence in rendering this decision.

"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 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 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.

The record establishes that the applicant's husband would endure extreme hardship if he remains in the United States without her.

[redacted] is very concerned about separation from his wife and her separation from their children. 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).

In *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995), the Ninth Circuit considered the psychological hardship of [redacted] It found that [redacted] sole reason for living and her overriding mission in her live was to work and provide for her parents and sibilings. *Id.* at 464. In considering her hardship, the court recognized that, "'deportation may result in the loss of all that makes life worth living.' (citation omitted). *Tukhowinich* at 464-463.

The record conveys that [redacted] has four young children and his [redacted] lives with his wife in Mexico. It shows that he is caring for his two sons, who are six and eight years old, and his nine-year-old daughter. It reflects that [redacted] and his employer indicate that [redacted] job performance has been impacted by the absence of his wife. [redacted] and his employer state that he has reduced his hours of work and travel, and consequently, is not able to supervise his crew. The record reflects that [redacted] provides the sole income for his family and is concerned about their well-being. It also reflects that his earnings are nearly equal to the family's household expenses. Based on the evidence in the record and the *Tukhowinich* decision, the AAO finds that the record establishes that [redacted] would experience extreme hardship if he remains in the United States without the support of his wife.

The applicant must also prove extreme hardship in the event the qualifying relative joined the applicant to live abroad. In the instant case, the applicant presented no claim of hardship to her husband if he were to join her in Mexico other than to state that his parents and siblings are U.S residents and citizens. Given that [redacted] ties to Mexico are his spouse and in-laws, which will help in easing his transition to life there, the AAO finds that the record fails to establish that [redacted] would experience extreme hardship if he were to join his wife to live in Mexico.

On appeal counsel indicates that the applicant is eligible for adjustment of status under the provisions of section 245(i)(1) of the Act and that her inadmissibility is due to improper advice from the USCIS. While the AAO acknowledges that the applicant may meet the basic requirements for adjustment of status under section 245(i) of the Act, there are no provisions, other than the present waiver application, to excuse inadmissibility under section 212(a)(9)(B), regardless of the circumstances which brought it about. While 245(i) excuses entry without inspection, the applicant must still be admissible. Admissibility is defined by section 212 of the Act, 8 U.S.C. § 1182. Unlawful presence in the United States under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), is not excused by the provisions of 245(i).

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.

The record supports a finding of extreme hardship to the applicant's husband if he were to remain in the United States without her. However, it does not 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 in

the event that the applicant's husband were to join her in Mexico. 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.