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

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[redacted]

FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: AUG 04 2009

CDJ 2004 596 016

IN RE: Applicant: [redacted]

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

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom,
Acting 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 is a native and citizen of Mexico who was found to be inadmissible to the United States under 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; and section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii), as an alien classified as having a 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.

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), so as to immigrate to the United States and live with his U.S. citizen wife. The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated July 7, 2006. The applicant submitted a timely appeal.

On appeal, counsel states that the OIC failed to apply the proper legal standard in determining whether to grant the hardship waiver. Counsel states that the applicant's wife, [redacted] will suffer extreme hardship well beyond the normal financial and emotional hardship of family separation. Counsel asserts that the applicant is not inadmissible under section 212(a)(1)(A)(iii)(I) of the Act because he did not exhibit "associated harmful behavior," as defined in either the Technical Instructions for Medical Examination of Aliens in the United States or the Act. Counsel states that the applicant's arrest for public intoxication in Texas in May 2004 is not enough to render him inadmissible under 212(a)(1)(A)(iii)(I) of the Act.

The AAO will first address whether the applicant is inadmissible for unlawful presence and whether the grant of a waiver is warranted.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (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.
>
> . . . .

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired 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). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[1]

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, 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* Memo, note 1.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in February 1999 and remained until October 2005. The applicant therefore accrued six years of unlawful presence and triggered the ten-year-bar when he left the United States, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). That section 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.

The waiver under section 212(a)(9)(B)(v) of the Act 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 an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered here only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is

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[1] Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (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). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant's qualifying relative and 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 factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines "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 spouse must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins him 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.

In her affidavit dated September 1, 2006, [redacted] states that her husband had taken care of their daughter while she worked, and since he left the country she moved to Oregon to be closer to her parents because the hours of her full-time job with Costco Wholesale vary each shift, often requiring her to work late into the night and making it difficult for her to get daycare. She conveys that her mother took care of her daughter three to four days each week when she first moved to Portland, and that her daughter is now in Mexico for a few months to be with her husband, and in the meanwhile her parents moved to Seattle so she does not know how she will take care of her daughter and work full time. She states that traveling to Mexico is expensive, costing $700 per person, and requires her to use her vacation time.

Although [redacted] states that her work schedule makes it very difficult to obtain childcare, there is no documentation in the record that demonstrates that she has an irregular work schedule. In addition, although [redacted] states in her letter dated October 18, 2005 that she needs financial assistance from her husband, her wage statements reveal that she earns $19.87 per hour with Costco Wholesale and nets approximately $1,138 bi-weekly. No documentation has been provided to prove that the applicant's spouse's income is not sufficient to pay her monthly expenses and childcare.

[redacted] states that she has depression and anxiety due to separation from her daughter. *Affidavit of the Applicant's Wife*, dated September 1, 2006. She states that her emotional state has

impacted her job and that her manager recommended that she seek counseling, which she obtained in late July 2006. The letter by [redacted]s manager states that [redacted] approached him six months ago to explain her family situation and that he advised her to seek counseling from their assistance program. This statement by [redacted]s manager does not convey that [redacted] work performance has been negatively affected by her emotional state.

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, courts have found that family separation does not conclusively establish extreme hardship. *See, e.g., Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991) (separation of the applicant 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); *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (finding separation of respondent from his lawful permanent resident wife and two U.S. citizen children is not extreme hardship); and *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985) (deportation is not without personal distress and emotional hurt).

Furthermore, the AAO notes that the general proposition is that the birth of an illegal alien's child who is a U.S. citizen is not sufficient in itself to prove extreme hardship. *See, Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985) (an illegal alien cannot gain a favored status merely by the birth of a citizen child); *Lee v. INS,* 550 F.2d 554 (9th Cir. 1977) ("an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child"); *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984) (birth of a U.S. citizen child is not per se extreme hardship).

is very concerned about separation from the applicant and the impact of his separation on their young daughter. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. It has taken into consideration and carefully reviewed the evidence in the record. After careful consideration, it finds that the situation of Ms. [redacted] if she remains in the United States without her husband, 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 to be endured by Ms. [redacted] is unusual or beyond that which is normally to be expected upon removal. *See Hassan* and *Perez, supra.*

In considering all of the hardship factors presented, both individually and in the aggregate, the AAO finds they fail to demonstrate that [redacted] will experience extreme hardship if she were to remain in the United States without her husband.

The applicant makes no claim of extreme hardship to his wife if she were to join him to live in

Mexico.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(a)(9)(B)(v).

The applicant was also found inadmissible under section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii), as an alien classified as having a 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.

Section 212(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182 makes ineligible for admission to the United States any alien:

> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the [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 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....

A policy memorandum by U.S. Citizenship and Immigration Services (CIS) provides guidance for determining inadmissibility under INA § 212(a)(1). That memorandum states:

> DHS officers determine that a health-related ground of inadmissibility exists based on the findings of a civil surgeon's medical examination....Alcohol abuse and alcohol dependence are medically classifiable mental disorders. Operating a motor vehicle under the influence of alcohol is clearly an associated harmful behavior that poses a threat to the property, safety or welfare of the alien or others. Where a civil surgeon's mental status evaluation diagnoses the presence of alcohol abuse or alcohol dependence, and there is evidence of harmful behavior associated with the disorder, a Class A medical condition is certified on Form I-693, Report of Medical Examination of Alien Seeking Adjustment of Status. DHS officers then determine that the alien is inadmissible, based on the Class A condition certified on the medical report. *Memorandum by William R. Yates, Associate Director for Operations, Page 2, January 16, 2004.*

In the present case, the applicant was examined by a civil surgeon who certified that the applicant had a Class A condition, alcohol abuse. The district director based the finding of inadmissibility on the civil surgeon's finding that "at this time there is evidence of harmful behavior due to applicant's

arrest for pubic intoxication on [sic] May 2004." The applicant was referred to have a psychological evaluation. The psychological evaluation of the applicant states that the applicant's prognosis is good and the evaluation recommends the applicant attend Alcoholics Anonymous or an Alcohol Rehabilitation Program in order to obtain sobriety and prevent future relapse, and attend individual counseling focusing on adaptive behavior.

Counsel contests the finding of inadmissibility under section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii). A civil surgeon found the applicant to have a Class A medical condition and neither the AAO nor the OIC is in a position to overcome the civil surgeon's findings. The applicant is inadmissible under section 212(a)(1)(A)(iii) of the Act; but, as noted in the denial, the applicant's wife complied with the CDC requirement so the waiver under section 212(g) has been granted.

The AAO did not find the applicant eligible for a waiver of his unlawful presence. 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.

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.