U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: OCT 15 2009
(CDJ 2003 726 019 RELATES)

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:

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 or reopen, 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 record reflects that the applicant, a native and citizen of Mexico, initially entered the United States without authorization in 1996 and remained until February 2003. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until February 2003.[1] The applicant was thus 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.[2] The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child, born in 1998.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated August 17, 2006.

In support of the appeal, the applicant's spouse submits a letter, dated September 2, 2006, and referenced documentation. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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.

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[1] Notes from the consular officer indicate that the applicant obtained an Employment Authorization Document (EAD), valid from February 2003 until December 2004. The record does not contain any evidence to corroborate that the applicant was issued an EAD by the USCIS and/or how he would have been eligible for such a document. A search of USCIS electronic records did not reveal any record of an EAD issued to the applicant. Irrespective of this issue, the applicant clearly accrued unlawful presence, as noted above, and a waiver of inadmissibility under section 212(a)(9)(B)(v) is necessary.

[2] The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

> (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....

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

> 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).

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their child cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse contends that she will suffer emotional and financial hardship if the applicant's waiver request is not granted. In a declaration she states that her child is experiencing hardship based on long-term separation from his father, which in turn is causing the applicant's spouse emotional hardship. *Letter from* [redacted] dated October 11, 2005. In addition, on appeal, the applicant's spouse contends that she is suffering financial hardship because due to her spouse's inadmissibility, she has been forced to "sacrifice a large part of the gross income [of her business] to inefficiently hire lower-skilled laborers to replace my husband's [the applicant's] expertise and experience.... I do not want to be homeless and lose my business. I do not want to

raise my child homeless...." *Letter from* dated September 2, 2006. Documentation to corroborate the financial hardship referenced by the applicant's spouse has been provided.

Due to the applicant's inadmissibility, the applicant's spouse has had to assume the role of primary caregiver and breadwinner, without the complete support of the applicant. The applicant's spouse needs her husband on a day to day basis, to help with the care of their child and to ensure the continued viability of the landscaping business, which provides critical financial support to the applicant's spouse and child. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. This criteria has not been addressed. As such, it has not been established that the applicant's spouse would suffer extreme hardship were she to relocate to Mexico to reside with the applicant due to his inadmissibility.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse will face extreme hardship if the applicant is unable to reside in the United States. Although the AAO is not insensitive to the applicant's spouse's situation, the record does not establish that the hardships they would face rise to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant 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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.