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U.S. Department of Homeland Security
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: MEXICO CITY (CIUDAD JUAREZ) Date: SEP 01 2009

CDJ 2004 718 530

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 District Director, Mexico City, 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 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.

The applicant is the spouse of a naturalized citizen of the United States. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to join his spouse in the United States. The district officer 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 District Director*, dated July 19, 2006. The applicant submitted a timely appeal.

On appeal, counsel states that [redacted] wife and U.S. citizen children were financially dependent upon [redacted] when he lived in the United States. Counsel submits a letter by [redacted] on appeal.

The AAO will first address the finding of inadmissibility.

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-
> >
> > > (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 September 1999 and remained in the country until October 2005. He therefore accrued six years of unlawful presence and triggered the ten-year-bar when he left the United States, rendering her 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. 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. Hardship to children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen spouse. Once extreme hardship is 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-*

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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.

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).

Counsel states that a section 212(h) waiver is distinguishable from a section 212(a)(9)(B)(v) waiver in that the hardship standard applied in waiving inadmissibility for a crime under section 212(h) of the Act is more demanding than the hardship standard for waiving the lesser ground of inadmissibility for unlawful presence under section 212(a)(9)(B)(v) of the Act. The AAO notes that *Matter of Cervantes* is used in cases involving waivers of inadmissibility as guidance for what constitutes extreme hardship and this cross application of standards is supported by the BIA. In *Matter of Cervantes-Gonzalez,* the BIA, assessing a section 212(i) waiver of inadmissibility case, wrote:

> Although it is, for the most part, prudent to avoid cross application between different types of relief of particular principles or standards, we find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibility to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion . . . . [*S]ee . . . Hassan v. INS,* 927 F.2d 465, 467 (9th Cir. 1991) (noting that suspension cases interpreting extreme hardship are useful for interpreting extreme hardship in section 212(h) cases). These factors related to the level of extreme hardship which an alien's "qualifying relative," . . . would experience upon deportation of the respondent.

Id. at 565.

In *In Re Monreal-Aguinaga,* 23 I&N Dec. 56, 63(BIA 2001), a section 240A(b) of the Act, 8 C.F.R. § 240.20, cancellation of removal case, the BIA states:

> We do find it appropriate and useful to look to the factors that we have considered in the past in assessing "extreme hardship" for purposes of adjudicating suspension of deportation applications, as set forth in our decision in *Matter of Anderson,* 16 I&N Dec. 596 (BIA 1978). That is, many of the factors that should be considered in

> assessing "exceptional and extremely unusual hardship" are essentially the same as those that have been considered for many years in assessing "extreme hardship," but they must be weighted according to the highter standard required for cancellation of removal. However, insofar as some of the factors set forth in *Matter of Anderson* may relate only to the applicant for relief, they cannot be considered under the cancellation statute, where only hardship to qualifying relatives, and not to the applicant, may be considered. Factors relating to the applicant himself or herself can only be considered insofar as they may affect the hardship to a qualifying relative.

In *In Re Kao-Lin,* 23 I & N Dec. 45, 54 (BIA 2001), a suspension of deportation case, the BIA referred to the factors listed in *Matter of Anderson, supra,* in making a determination of extreme hardship, stating in footnote 3 that:

> The standard for "extreme hardship" that we apply in the present case is the same as that applied in cases dealing with petitions for immigrant status under section 204(a)(1) of the Act, 8 U.S.C. § 1154(a)(1) . . . as well as in cases involving waivers of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i).

The AAO does not find counsel's assertions persuasive. There is no distinction in the various statutes dealing with extreme hardship regarding the level of hardship that must be met.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to [redacted], the applicant's spouse, must be established in the event that she joins the applicant to live in Mexico, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The hardship in this case is based upon family separation and is primarily emotional in nature. Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States").

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 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"); and *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984) (birth of a U.S. citizen child is not per se extreme hardship).

The letter by [redacted] dated May 2, 2008, conveys that [redacted] was diagnosed with colelithiasis and has abdominal pain from it, and is seven weeks pregnant. [redacted] states that [redacted] will require surgery in the next several months, depending upon her symptoms. [redacted] states that if her symptoms continue or increase her gallbladder will have to be removed after the first three months of her pregnancy; if the symptoms are controlled, she will need to have surgery after the delivery of her baby. He states that [redacted] situation would be relieved with help from her spouse.

In her statement dated August 29, 2006, [redacted] describes a close relationship with her husband and worries that her U.S. citizen children will forget their father, and she states that he had been the sole financial provider for them. She states that she may need to seek public assistance from the government to help support her and her children. [redacted] indicates that she is employed. Ms. [redacted] states that Mexico has much poverty and is not a safe country. She indicates that her children should attend school in the United States because the quality of education in the United States is higher than in Mexico. She and her husband would have to start all over in Mexico, Ms. [redacted] states, and finding jobs there that pay well is difficult especially because her husband is from a small town. The record shows the applicant's daughters were born on May 28, 2002 and July 15, 2003.

Although [redacted] claims financial hardship, there is no documentation in the record such as Ms. [redacted] wage statements and monthly financial obligations that would demonstrate that Ms. [redacted] income is not sufficient to cover her monthly expenses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

[redacted] is very concerned about separation from her husband. 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 [redacted] situation, 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 conveys that the emotional hardship to be endured by [redacted] is a heavy burden, but it is not unusual or beyond that which is normally to be expected upon removal. *See Hassan* and *Perez, supra.*

[redacted] will undergo gallbladder removal. In his letter [redacted] states that [redacted] "current situation would be much relieved with help from her spouse." However, [redacted] does not describe the surgical procedure that [redacted] will undergo or its complications, or its recovery period. In the absence of such information, the AAO cannot determine the level of hardship that [redacted] will experience following her operation.

The AAO notes that the letter by does not describe the recovery process for [redacted] will undergo and the states that [redacted] will require surgery in the next several months, depending upon her symptoms. [redacted] states that if her symptoms continue or increase her gallbladder will have to be removed after the first three months of her pregnancy; if the symptoms are controlled, she will need to have surgery after the delivery of her baby. He states that situation would be relieved with help from her spouse.

In considering all of the hardship factors presented, both individually and in the aggregate, the AAO finds they fail to demonstrate that the applicant's spouse would experience extreme hardship if she were to remain in the United States without her husband.

states it is difficult obtaining employment in Mexico that pays well and she states that Mexico is not a safe country in which to live. The conditions in Mexico, the country where Ms. [redacted] would live if she joins her husband, are a relevant hardship consideration. However, political and economic conditions in Mexico alone will not establish extreme hardship to Ms. [redacted] if she were to join her husband to live in Mexico. Other factors such as advanced age or severe illness need to combine with economic detriment to justify a grant of relief. See, e.g. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994).

In considering the hardship factors raised here both individually and cumulatively, they fail to demonstrate extreme hardship to the applicant's spouse if she were to join her husband to live in Mexico.

It is thereby concluded that a waiver of inadmissibility for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), is not warranted.

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. *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.