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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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FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: SEP 01 2009

CDJ 2004 642 450

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 Officer, 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 citizen 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), so as to immigrate to the United States and live with his wife. 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 June 26, 2006.

On appeal, counsel states that the applicant's spouse, [redacted] would experience extreme hardship if she lived in Mexico because [redacted] and her husband are not familiar with life in Mexico and do not know the Spanish language. Counsel further states that if [redacted] joined her husband in Mexico that [redacted] would be forced to give up her job in management, would leave behind a grandmother who raised her, and her parents burial ground. Counsel states that the applicant and his wife have delayed having children until they can jointly raise them. Counsel claims that the district director failed to apply statutory and case law to the instant case and provides only a cursory explanation for denying the waiver application.

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] An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act. *See* Scialabba Memo dated May 6, 2009.

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 1988 and remained until June 12, 2005. The applicant therefore accrued four years of unlawful presence, from January 7, 2001, when he turned 18 years old, to June 12, 2005, 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.

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 is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative here. 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).

"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). The Board of Immigration Appeals (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.

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).

The AAO will now apply the *Cervantes-Gonzalez* factors here in its consideration of hardship to the applicant's wife. Extreme hardship to the applicant's wife 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.

The applicant's spouse indicates that she would find it impossible to live in the United States without her husband. She states that they have delayed having a child until they can jointly raise the child in the United States.

Family separation must be considered in determining hardship. Courts in the United States state 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) (deporting the applicant and separating him 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); and *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996) (the common results of deportation are insufficient to prove extreme hardship; extreme hardship is hardship that is unusual or beyond that which would normally be expected upon deportation).

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. 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], upon separation from her husband if she remains in the United States, 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] indicates that she has experienced financial hardship since her husband's departure to Mexico. She states that "its been hard for [her husband] to find a job, so he has to do mechanic work for very little pay" and that he uses their savings. She states that she has moved in with her grandmother so as to support herself and her husband, and she will have to sell the cars she owns.

The AAO notes that although [redacted] claims financial hardship, there is no documentation in the record of [redacted] monthly income and household expenses. In the absence of such documentation the AAO cannot determine whether [redacted] will experience extreme financial hardship if she remained in the United States without her husband. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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).

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to the applicant's wife if she were to remain in the United States without him.

[redacted] indicates that living in Mexico would be difficult because "there would be a language barrier," and she indicates that her husband has a job doing mechanic work in Mexico. [redacted] states that her U.S. education would be of little value, finding employment would be hard, and because she would leave behind her grandmother and the burial place of her parents.

In considering each of the hardship factors raised, both individually and in the aggregate, and in view of the fact that [redacted] and her husband are familiar with the Spanish language and her husband has employment in Mexico, the AAO finds that [redacted] would not experience extreme hardship if she were to join her husband to live in Mexico.

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 establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained. The application will be approved.

ORDER: The appeal is dismissed.