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U.S. Immigration and Citizenship Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FEB 17 2010

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

CDJ 2004 780 564

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), 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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Officer-in-Charge (OIC), Phoenix, Arizona, 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)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii), for having a physical or mental disorder and behavior associated with that disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others; and 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 [redacted], a citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(g) of the Act so as to immigrate to the United States. 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 Officer-in-Charge*, dated January 31, 2007.

On appeal, counsel states that [redacted] does not have a physical or mental disorder in violation of section 212(a)(1)(A)(iii) of the Act; and if he has such a disorder, the section 212(g) waiver should be granted. Counsel states that the civil surgeon's medical examination is over a year old and a new medical examination is required. According to counsel, the applicant's "driving under the influence" convictions are not a Class A medical condition, as shown by the U.S. Citizenship and Immigration Services (USCIS) memorandum, dated January 16, 2004, which provides policy guidance for determining inadmissibility under the health-related grounds of section 212(a)(1) of the Act.

Counsel states that the submitted evidence demonstrates that [redacted] would suffer extreme hardship if her husband were denied admission to the United States. Counsel states that in view of the economic conditions in Mexico, [redacted] would not be able to obtain employment there and, therefore, would not be able to provide any meaningful financial support to his spouse in the United States. He states that [redacted] provides the primary financial support for his wife and children. Counsel states that if the waiver is not granted, [redacted] would not be able to maintain two separate households, provide for their retirement, or have college opportunities for their children. Counsel states that [redacted] has lived in the United States for 13 years and his significant ties are to the United States, not to Mexico; and that hardship to [redacted] would translate into hardship to [redacted] Counsel states that [redacted] has no family ties to Mexico. He contends that [redacted] three U.S. citizen children are unable to speak, read, or write in the Spanish language and would not adequately transition to daily life in Mexico. He also asserts that relocation there would disrupt their education and diminish their educational and economic opportunities. Counsel cites *Matter of Kao-Lin*, 23 I & N Dec. 45 (BIA 2001), to show that hardship to [redacted] children must be considered in the hardship determination. Counsel states that human rights are a concern in Mexico.

The AAO will first address the finding of inadmissibility. The applicant was found to be inadmissibility under section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii).

Section 212(a), 8 U.S.C. § 1182(a), states, in pertinent part:

> (a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> (1) Health-related grounds.—
>
> (A) In general.-Any alien-
>
> . . .
>
> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now 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 . . . is inadmissible.
>
> (B) Waiver authorized.—For provision authorizing waiver of certain clauses of subparagraph (A), *see subsection (g).*

The criminal record shows that [redacted] pled guilty to and was convicted of driving under the influence w/ 0.08% or higher blood alcohol in September 1998, January 2001, and August 2005. He pled guilty to and was convicted of hit and run/property damage on August 18, 1998. On January 6, 2006, the applicant was given a Class "A" medical certification by [redacted] notes indicate that the applicant was in partial remission with evidence of harmful behavior due to his arrest for driving under the influence on February 2005.

Counsel turns to a USCIS memorandum to establish that the applicant's "driving under the influence" convictions are not a Class A medical condition. The USCIS memorandum relied upon by counsel 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.*

The memorandum goes on to describe circumstances when alcohol related driving arrests are not reported or underreported at the time of the initial medical examination, warranting a re-examination, which is limited to a mental status evaluation specifically considering the record of alcohol-related driving incidents.

Counsel states that the applicant's "driving under the influence" convictions are not a Class A medical condition, as shown by the USCIS memorandum. U.S. Citizenship and Immigration Services has no authority to review or overrule a determination of a Civil Surgeon. The applicant may request a redetermination from the Civil Surgeon or may appeal to the U.S. Public Health Service.

According to counsel, a new medical examination is required because the civil surgeon's medical examination is over a year old. With regard to re-examination, the memorandum conveys that it is when alcohol related driving arrests are not reported or underreported at the time of the initial medical examination that a re-examination is warranted, which is limited to a mental status evaluation specifically considering the record of alcohol-related driving incidents. Based on the record, re-examination is not warranted here because the applicant's alcohol related driving arrests were not unreported or underreported.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) 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.
>
> . . .

USCIS records reflect that the applicant entered the United States without inspection in June 1994. He therefore began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until January 2006, when he left the country and triggered the ten-year bar, 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 is not a consideration under the statute, 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. Thus, hardship to the applicant and his 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 U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

[redacted] states in her undated declaration that she will experience extreme financial hardship if she remains in the United States without the financial support of her husband. The wage statements in the record show that in December 2005 [redacted] worked full time, earning $9.00 per hour, and that [redacted] worked full time, earning $10.50 per hour. There is no documentation in the record of the monthly financial obligations of the [redacted] family for the years 2005 or 2006.[1] In the absence of such documentation, [redacted] fails to prove that his wife's income is not sufficient to meet monthly household 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).

[1] The AAO notes that the record contains an apartment lease agreement for 2001.

Counsel states that [redacted] is concerned about separation from her husband and the effect of his separation on their children, who are now 8, 6, 15, and 17 years old.[2] 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. In *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that 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). *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991).

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of family separation. The record before the AAO, however, fails to establish that the situation of [redacted], if she remains in the United States without his spouse, rises to the level of extreme hardship. The record is insufficient to show that the emotional hardship to be endured by [redacted], in remaining in the United States without her husband, is unusual or beyond that which is normally to be expected from an applicant's bar to admission. *See Hassan* and *Perez, supra.*

When all of the hardship factors raised are considered collectively, the AAO finds the factors do not establish extreme hardship to [redacted] if she were to remain in the United States without her husband.

Counsel contends that [redacted] children are unable to speak, read, or write in the Spanish language and would not adequately transition to daily life in Mexico, which would disrupt their education and diminish their educational and economic opportunities. [redacted] states in her undated declaration that she is fluent in Spanish, but her children are not. While *Matter of Kao-Lin* holds that having to adjust to a foreign academic and social environment would most likely result in extreme hardship to [redacted] children, [redacted] has not specified how the extreme hardship to his children would result in extreme hardship to his spouse.

Counsel, citing the U.S. Department of State Country Reports on Human Rights Practices – 2004 for Mexico, states that human rights are a concern in Mexico. The U.S. Department of State conveys in its report on Mexico that corruption within police ranks was widespread and military and police officers committed human rights abuses and that there is a poor climate of human rights in some states. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports*

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[2] The children who are 15 and 17 years old are the applicant's stepchildren.

*on Human Rights Practices – 2004: Mexico*, 1 (February 28, 2005). State law enforcement officials were accused of committing unlawful killings. There were vigilante killings, disappearances, and an unofficial estimate of 3,000 kidnappings, some with police involvement; and alleged police involvement in narcotics-related crime and trafficking of persons, including children. *Id.* at 1-2. There was an increase in narcotics related killings and violence, particularly in the Northern States. The bodies of 16 dead women were found in Ciudad Juarez in 2004. *Id.* at 3. The Amnesty International Report 2005 for Mexico describes human rights violations and violence perpetuated against women.

Counsel states that in view of the economic conditions in Mexico, [redacted] would not be able to obtain employment. However, the AAO finds that the submitted documentation in the record fails to provide sufficient information to show that [redacted] would not be able to obtain employment in Mexico.

In her declaration, [redacted] states that Mexico does not offer the same standard of living or opportunities as the United States. In *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), the U.S. Supreme Court held that economic detriment alone is insufficient to establish extreme hardship.

Considered individually, the hardship factors raised in this case fail to demonstrate extreme hardship to the applicant's spouse if she were to join the applicant to live in Mexico. However, when those factors are considered collectively, particularly hardship to the applicant's spouse as a result of ongoing violence in Mexico, the AAO finds that the applicant demonstrated extreme hardship to his spouse.

While the applicant established extreme hardship to his spouse as a result of joining him to live in Mexico, he has not demonstrated extreme hardship to his spouse if she were to remain in the United States without him. Thus, the hardship factors do not constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act.

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 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 not met that burden. Accordingly, the appeal will be dismissed.

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