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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: PHOENIX DISTRICT OFFICE Date: JUL 05 2006

IN RE: [redacted]

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix. The matter 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 pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, 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 seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), in order to remain in the United States with her husband, who is a Lawful Permanent Resident, and her U.S. citizen children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on her qualifying relative, the applicant's husband, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated October 26, 2004.

On appeal, counsel for the applicant stated "DHS was in error in requesting a waiver of inadmissibility due to the fact that [the applicant] had been issued advance parole . . . [making] the issue of inadmissibility moot." Counsel also noted that pursuant to the provisions of the Legal Immigration Family Equity Act Amendments of 2000 (LIFE Act Amendments), a new sunset date of April 30, 2001 was established for the filing of applications for adjustment of status under section 245(i) of the Act; therefore, by being physically present in the United States on December 21, 2000, the date the LIFE Act was signed into law, and having previously filed a section 245(i) application, the applicant had not accrued any period of "unlawful presence." Counsel's conclusion was based on an analogous interpretation of "lawful presence" for individuals who had entered the United States before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and had properly filed adjustment applications pursuant to the section 245(i) provisions of IIRIRA, noting that the same interpretation should be applied to the section 245(i) provisions of the LIFE Act Amendments. *Form I-290B*, dated November 24, 2004. Counsel added that, even if a waiver were required, the applicant had submitted sufficient evidence to meet the extreme hardship standard. *Id.* In support of this assertion, counsel had attached to the Application for Waiver of Grounds of Inadmissibility (Form I-601, dated June 18, 2003) a letter from the applicant's husband explaining why he needs his wife and their children need their mother. Other attachments included documents related to elementary school attendance by the applicant's children and special education services given to the applicant's younger daughter for "speech language impairment."

Counsel requested 30 days in which to submit a brief. *Form I-290B*. On May 15, 2006 the AAO requested a copy of that brief. There has been no response to that request. The record is, therefore, considered complete. The entire record was reviewed and considered in rendering this decision.

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

(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.

Regarding the District Director's finding that the applicant is inadmissible, the record reflects that the applicant entered the United States in April 1993 with a Border Crossing Card and remained in the United States beyond the authorized 24-hour period of stay. On June 1, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) along with Biographic Information (Form G-325), indicating that she had resided in the United States since her 1993 entry. The applicant was therefore unlawfully present from April 1, 1997 (the effective date of IIRIRA, *supra,* which created the "unlawful presence" ground of inadmissibility) until June 1, 1999, the filing date of Form I-485, a period of more than one year. The record also shows that the applicant applied for and was issued a travel document, Advance Parole Authorization (Form I-512), and left and re-entered the United States with that document on December 14, 1999, thus triggering the 10-year bar to admission pursuant to section 212(a)(9)(B) of the Act. Applicants for adjustment of status under section 245(i) of the Act must be admissible to the United States or, if inadmissible, all grounds of inadmissibility must have been waived. *See Memorandum by Michael D. Cronin, Acting Executive Associate Commissioner, Office of Programs*, dated January 26, 2001.

Contrary to counsel's assertions that a grant of advance parole authorization and subsequent parole into the United States makes the issue of inadmissibility moot, the law does not support this reasoning. In fact, in 1997 the legacy Immigration and Naturalization Service (legacy INS) specifically addressed this issue with a memorandum that clarified that an applicant for adjustment of status can be granted advance parole to depart and return to the United States to resume processing of an application for adjustment of status, but that because a departure triggers the 3- or 10-year bar under section 212(a)(9)(B)(i) of the Act, departure from and return to the United States will pose serious adverse consequences. *See Memorandum by Paul W. Virtue, **Acting Executive Associate Commissioner, Office of Programs***, **dated November 26, 1997. The same** memorandum explained that in light of the adverse consequences noted above, advance parole should generally not be granted to individuals who had accrued more than 180 days of unlawful presence prior to

filing an adjustment of status application unless it appeared likely that a waiver of inadmissibility would be granted. *Id.* In cases where, despite potentially adverse consequences, advance parole is authorized, the Advance Parole Authorization (Form I-512) should include a written notice to applicants that upon return to the United States they may be found inadmissible if they were unlawfully present in the United States for more than 180 days before applying for adjustment of status and they will need to qualify for a waiver of inadmissibility in order for their adjustment of status application to be approved. *Id.* The AAO notes that in the present case, the applicant did receive a Form I-512 with the appropriate advisory language.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002. In this case, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until June 1, 1999, the date of her proper filing of Form I-485, a period of more than one year. In applying to adjust status to that of Lawful Permanent Resident, the applicant is seeking admission within 10 years of her December 1999 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission under section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant herself or her U.S. citizen children experience upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should grant a waiver in the exercise of discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals deems relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or U.S. 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.

Counsel asserts that the applicant had submitted sufficient evidence to meet the extreme hardship standard, but adds that it is the applicant herself who would experience extreme hardship if required to remain outside the United States for a period of ten years before seeking admission. *See Form I-290B.* Other than noting that the applicant's husband would be separated from the children should the applicant elect to take the children with her to Mexico (*Id.)*, the only other relevant information on record was a statement by the applicant's husband about how much he and their children needed and loved the applicant. *See attachments to Form I-601.* The record includes school records showing that one of the applicant's children suffers from a

speech impairment and is receiving treatment at her elementary school, but there is no indication that the applicant would take the child to Mexico or that treatment is not available in Mexico. There is also no indication that the applicant is a source of economic support for her qualifying relative, her Lawful Permanent Resident spouse; income tax records show that her spouse provides the sole financial support for the family. *Form 1040, U.S. Individual Income Tax Return, 1998 and 1999.*

Counsel does not establish extreme hardship to the applicant's spouse if he remains in the United States, maintaining his employment and access to adequate speech therapy for their child. The AAO notes that, as a Lawful Permanent Resident of the United States, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request. The record fails to make reference to any hardship that the applicant's spouse would suffer were he to relocate to Mexico with the applicant.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most individuals who are deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.