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U.S. Citizenship and Immigration Services

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MAY 02 2007

FILE: [redacted] Office: ATLANTA, GA Date:

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:

[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, Atlanta, Georgia, 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 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. [redacted] a naturalized citizen of the United States, is the wife of the applicant. [redacted] 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). The district director found the applicant failed to establish that he merits the grant of a waiver of inadmissibility and denied the application.

The applicant submitted a timely Form I-290B on September 23, 2005 and indicated that a brief and/or additional evidence would be submitted to the AAO within 35 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record as constituted is complete.

The AAO will first address the district director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
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> (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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> . . .
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> (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.
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> . . .

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General 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). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately

for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).[1] For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[2] 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, then 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. DOS Cable, *supra. See also Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that the applicant was unlawfully present in the United States for more than one year. He entered the United States without inspection in March 1993, and began accruing unlawful presence as of April 1, 1997. At his adjustment of status interview on July 18, 2005, he stated that he had departed from the United States in March 1998 and reentered without inspection in June 1998. (He thus accrued about 11 months of unlawful presence). The applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status, on November 6, 2003. He had been unlawfully present in the United States from June 1998 to November 6, 2003. (He therefore accrued more than five years of unlawful presence – June 1998 to November 6, 2003). In a sworn statement, the applicant indicated that he departed from the United States in October 2004. *Affidavit-Witness, dated July 18, 2005.* The applicant's departure and return to the United States on advance parole triggered the ten-year bar.

The district director found that the applicant did not merit a waiver of inadmissibility. In her decision, she described the extreme hardship factors that must be present in order to waive inadmissibility for unlawful presence. The district director found the statements of the applicant's wife about their daughter's limited knowledge of Spanish; how it would be "extremely hard" to maintain a decent living in the United States and she and her daughter would become dependent upon public assistance; her inability to get a job in Mexico because she would need to care for her daughter at home; and how her family would have to live in a small apartment in Mexico were unpersuasive in establishing extreme hardship.

The AAO will now address the district director's finding that a waiver of inadmissibility is not warranted in the present case.

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 and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative, which in this case is the applicant's husband. If extreme hardship to the qualifying relative is

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[1] Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

[2] DOS Cable, supra.; and IIRIRA Wire #26, HQIRT 50/5.12.

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-Gonzalez,* 22 I&N Dec. 560, 564 (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 564. The BIA indicated that these factors relate to the applicant's "qualifying relative." *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 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 joins the applicant; and in the alternative, that she remains in the United States. 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 wife has been employed from December 20, 2000 until the present, earning $7.55 per hour, with U.S. Security Associates, Inc. as an assistant supervisor. She is up for promotion to post supervisor, which provides an annual income of $28,000. *Letter from* [redacted] *dated August 8, 2005.*

Bank statements from SunTrust Bank and WalMart Money Center are in the record for [redacted] the applicant's business, but the AAO cannot determine from those statements the applicant's annual income.

In an August 9, 2005 letter, the applicant's wife makes the following statements. She speaks to her daughter at home in the English and Spanish languages and she replies in English. Her daughter takes 90 minute Spanish language courses on Sundays and knows less than 75 words. Her language skill level is that of a kindergartener and is not sufficient for an adequate transition to daily life in Mexico. She would not be able to follow the Mexican school system. There are no English schools that are affordable. She cannot maintain a decent living standard if she remains in the United States without her husband and may become a public charge. They have been saving to buy a house. She was a housewife before the birth of her daughter and has never been on welfare. She has been involved in her local church since she arrived in 1998, and has participated in the children's ministry and in other church events. She has about 20 good friends. It would be hard for her to participate in fellowship groups in Mexico because people are converting to Islam. She has been studying to be a paralegal for two years and has two months to complete before she graduates. Her

mother lives in North Carolina and she and her daughter often drive their on weekends. She has one sister and two brothers living in North Carolina and has no family ties to Mexico. She spends a lot of time with an uncle and his family who live in Gainsville. She could not get a job in Mexico because she would need to care for her child at home. She would not live with her husband's relatives in Mexico as they have small accommodations; she and her family would probably live in a one-bedroom apartment in Mexico.

The applicant states the following. He works six days a week and attends church on Sundays. He earns $30,000 annually and pays $550 per month in rent. He recently started a subcontracting business. He has started writing letters to businesses in Mexico inquiring about employment and has received no replies. His family said that he will not be able to get a job in Mexico and if he did he would be paid $100 per month. The cost of living is cheaper in Mexico, but he is at a disadvantage because companies prefer younger workers. He has family ties in the United States.

The record reflects that the applicant's daughter, who was born on January 26, 1999, is eight years old. *State of Georgia Certificate of Live Birth.*

The applicant and his wife married on December 20, 1999. *Marriage License, State of Georgia.*

The record contains a recommendation letter pertaining to the applicant from the Words of the Covenant Ministry Church, dated October 23, 2003.

U. S. courts have stated 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, the fact that the applicant has a U.S. citizen child is not sufficient in itself to establish extreme hardship. The general proposition is that the mere birth of a deportee's child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa,* 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS,* 765 F.2d 673 (7th Cir. 1985), the Seventh Circuit has stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS,* 550 F.2d 554 (9th Cir. 1977). In a per curiam decision, *Banks v. INS,* 594 F.2d 760 (9th Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

Furthermore, in *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA's 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). The Ninth Circuit in *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.

The record is insufficient to establish that the applicant's wife would endure extreme hardship if she remained in the United States without her husband. The AAO is not persuaded by [redacted] claim that she might become a pubic charge if she loses financial support from her husband. The letter from her employer indicates that she might be promoted to a position earning $28,000 annually. As reflected in the Form 1040A, she currently earns $15,397 annually. There is no evidence in the record of [redacted]s monthly household expenses and her inability to meet them. Furthermore, U.S. courts have universally held that economic detriment alone is insufficient to establish extreme hardship. *See, e.g., INS v. Jong Ha Wang,* 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship) and *Mejia-Carrillo v. United States INS,* 656 F.2d 520, 522 (9th Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

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 the statements of the [redacted] family. However, the AAO finds that [redacted]'s situation, if she 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. The record before the AAO is insufficient to show that the emotional hardship that will be endured by [redacted] while separated from her husband of seven years is unusual or beyond that which is normally to be expected upon deportation. It is noted that [redacted] has family residing in the United States which will undoubtedly help in easing the separation from her husband.

The conditions of Mexico, the country in which the [redacted] will live if she joins her husband, are a relevant hardship consideration. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted). Even a significant reduction in the standard of living is not by itself a ground for relief. *Ramirez-Durazo v. INS,* 794 F.2d 491 (9th Cir. 1986). Living in a one-bedroom apartment in Mexico would therefore not constitute "extreme hardship" to [redacted]

Economic hardship claims of not finding employment in Mexico do not reach the level of extreme hardship. *Marquez-Medina v. INS*, 765 F.2d 673, 677 (7th Cir. 1985). In *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), the Ninth Circuit upheld the BIA's finding that hardship in finding employment in Mexico and in the loss of group medical insurance did not reach "extreme hardship."

However, in *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8th Cir. 1984), the court stated that the BIA improperly characterized as mere "economic hardship" Carrete-Michel's claim, which was supported by evidentiary material, that he would be completely unable to find work in Mexico. The court stated that "[a]lthough economic hardship by itself cannot be the basis for suspending deportation, *Immigration and Naturalization Service v. Wang,* 450 U.S. at 144, 101 S.Ct. at 1031, we agree with the Ninth Circuit that there is a distinction between economic hardship and complete inability to find work. *Santana-Figueroa,* 644 F.2d at 1356-57."

[redacted] claim of economic hardship stemming from his inability to find work in Mexico is not supported by evidentiary material. There is no evidence that he would be completely unable to find work in Mexico. 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)).

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are a hardship consideration. However, "second class" medical facilities in foreign countries are not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). Economic hardship claims of not having proper medical care benefits do not reach the level of extreme hardship. *Marquez-Medina v. INS*, *supra.* It is noted that the record does not reveal that the applicant or his wife or child has a significant health condition.

Although hardship to the applicant's child is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by the applicant's wife, as a result of her concern about the well-being of her daughter, is a relevant consideration. In *Ramirez-Durazo, supra* at 498, the Ninth Circuit stated that "[t]he disadvantage of reduced educational opportunities for the children was also considered by the BIA and found insufficient to establish "extreme hardship." It also stated that "[a]lthough the citizen child may share the inconvenience of readjustment and reduced educational opportunities in Mexico, this does not constitute "extreme hardship." In *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979), the Ninth Circuit states that "[w]hile changing schools and the language of instruction will admittedly be difficult, Banks herself admitted that [redacted] would be able to learn the German language. The possibility of inconvenience to the citizen child is not itself sufficient to constitute extreme hardship under the statute."

[redacted] is concerned that her daughter will not be able to transition to life in Mexico and will be at a disadvantage in the school system in Mexico because of her difficulty with the Spanish language. The AAO finds that these problems will be alleviated by the fact that most of the immediate family of the applicant, including his parents, are residents and citizens of Mexico. His relatives will be available to assist the family in settling back into the Mexican culture. The fact that the [redacted]amily has been speaking Spanish in the home will ease their daughter's transition into Mexican society and schools.

[redacted] states that her immediate family ties and close friends are in the United States. As previously stated, *Hassan, supra,* indicates that separation from family is 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). The holding in *Perez, supra,* is 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. Thus, [redacted] severance of family ties and friendships does not in itself constitute extreme hardship.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation has not been met so as to warrant a finding of

extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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)(6)(C) 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.