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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: AUG 28 2008

IN RE: [redacted]

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

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The applicant 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 after April 1, 1997, and section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. 1182(a)(1)(A)(iii), as an alien classified as having a 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. 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), and section 212(g)(3) of the Act, 8 U.S.C. § 1182(g)(3) in order to reside in the United States with his U.S. citizen spouse and child.

The record reflects that the applicant entered the United States without inspection in 1994 and remained in the United States until March 31, 2005. The applicant and his spouse were married in the United States on March 15, 2003. On March 5, 2004, the applicant's spouse filed a Petition for Alien Fiance(e) (Form I-129F) on the applicant's behalf. The petition was approved on November 30, 2004. The applicant subsequently filed an Application for Nonimmigrant Visa (DS-156) and an Application for Waiver of Grounds of Excludability (Form I-601) at the U.S. Consulate in Ciudad Juarez.

The OIC concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative as required by section 212(a)(9)(B)(v) of the Act and denied the waiver application accordingly. *Decision of OIC*, dated March 20, 2006. Although noting the applicant's inadmissibility under section 212(a)(1)(A)(iii) of the Act, the OIC did not make a determination as to the applicant's eligibility for a waiver of inadmissibility under section 212(g) of the Act. *Id.* The record contains documentation from the Centers for Disease Control indicating that the applicant complied with the waiver requirements under section 212(g) of the Act. Consequently, the matter before the AAO is the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) and the OIC's decision to deny the application for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

On appeal, counsel contends that the OIC applied the wrong waiver standard. Counsel asserts that because the applicant is the beneficiary of an approved petition for a non-immigrant visa, rather than an immigrant visa, he is eligible for a waiver of inadmissibility under section 212(d)(3)(A) of the Act. Counsel states that this is supported by section 214.2(k) of the Operating Instructions and Footnote 9.3 to 9 FAM § 41.81. Nevertheless, counsel also asserts that the applicant's departure from the United States has caused extreme hardship to his spouse and children, as they have been forced to abandon their home without his financial support. Counsel contends that discretion should be exercised in favor of the applicant, who entered the United States illegally as a young child but has since married and supported a citizen of the United States.

The record contains, among other documents, letters from the applicant's spouse, bank statements, tax and insurance records, title documents, utility bills, and affidavits from friends and family. The entire record has been reviewed and considered in rendering a decision on the appeal.

If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

> (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

Counsel contends that, because the underlying application is for a nonimmigrant visa, use of the "extreme hardship" standard contained in the statutory waiver provision applicable to immigrants is inappropriate. Counsel contends that the relevant statutory provision is INA § 212(d)(3), which provides:

> (3) Except as provided in the subsection, an alien
>
> > (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . ..

8 U.S.C. § 1182(d)(3). Counsel contends that K visa applicants need only apply for a waiver of inadmissibility as a nonimmigrant under 212(d)(3) and that the immigrant visa standard will not apply until the applicant, having arrived in the United States, makes an application to adjust status to that of a lawful permanent resident.

The AAO does not concur. The appropriate Department of State regulation provides as follows:

> § 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.
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> . . .
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> (b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:
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> > (1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.
> >
> > . . .
> >
> > (4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

. . .

> (d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related CIS provision is 8 C.F.R. 212.7(a)(1), cited *supra,* specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1)(66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the Federal Register along with this amendment to 212.7(a)(1) stated:

> Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the CIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If CIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible, and so would not need the benefit of INA § 212(d)(3).

The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined, in that, since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will be adjudicated in the United States in light of the already-approved waiver of any identified inadmissibility grounds.

K-3 visa applicants intend to remain in the United States permanently. The Form I-601 process ensures that waivers for K-3 applicants will be scrutinized under the appropriate standard in recognition of their intent to immigrate to the United States, and also capitalizes on the existing immigrant waiver process to provide for consistency, transparency, and the opportunity for the applicant to be heard on the merits of the application.

Finally, although 8 C.F.R. § 212.3, the CIS regulation governing waivers under INA § 212(d)(3), does not explicitly preclude a K nonimmigrant visa applicant from seeking relief under INA § 212(d)(3), whether to

grant this relief is a matter entrusted to the discretion of the Secretary of Homeland Security, upon the recommendation of the Secretary of State. The AAO concludes that 8 C.F.R. § 212.7(a)(1), by requiring the K nonimmigrant to seek a waiver on the same terms as an immigrant visa applicant, must be seen as precluding CIS from exercising the discretion under INA § 212(d)(3) in the applicant's favor. The OIC correctly concluded that the standard for granting a waiver of inadmissibility stated in section 212(a)(9)(B)(v) of the Act governs the adjudication of the applicant's Form I-601.

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

> (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.

The record reflects that the applicant entered the United States without inspection in 1994 and remained in the United States until March 31, 2005. The applicant is now seeking admission to the United States. Therefore, the applicant was unlawfully present from April 1, 1997 until March 31, 2005, a period in excess of one year. The applicant has not disputed that he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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 or his child is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act.

These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

In addition, the Ninth Circuit Court of Appeals in reversing the denial of suspension of deportation to the petitioner in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted), *see also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) ("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). Separation of family will be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

In her letter submitted on appeal, the applicant's spouse states the applicant's absence has made her feel "lost and alone" and has forced her to abandon their home because she could not afford to pay the mortgage and other expenses. She indicates that the applicant was the sole means of financial support for her and her child and that his absence forced her to borrow money just to afford basic necessities until she finally had to move in with her parents. She claims that she cannot continue living with her parents because their income is inadequate. She asserts that the painting company started by her husband is now on the verge of bankruptcy and that she is afraid to lose their home because she has made no mortgage or tax payments in a year.

The AAO recognizes that the applicant's spouse suffers emotionally as a result of separation from the applicant, but the applicant has failed to demonstrate that this hardship, when considered with other hardship factors, is extreme. The applicant's spouse has asserted that she is experiencing financial hardship without the applicant's income and has little job experience, but she has not demonstrated that she is incapacitated or

unable to find work to support herself, or that the applicant is unable to secure employment in Mexico to continue providing her financial support. The mere loss of current employment or the inability to maintain one's present standard of living or pursue a chosen profession (or, in this case, no profession at all), does not constitute extreme hardship. *Matter of Pilch*, 21 I. & N. Dec. 627, 631 (BIA 1996). The hardship described by the applicant's spouse is the common result of removal or inadmissibility, and it does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). 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.

Furthermore, the applicant has not demonstrated that his spouse would suffer extreme hardship if she relocated to Mexico. Neither the applicant's spouse nor counsel has addressed this issue on appeal.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required 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 proving eligibility rests 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.