U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: JAN - 2 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, and the applicant appealed the decision to the Administrative Appeals Office (AAO), asking for its consideration as a motion to reopen prior to submission of the appeal. The Officer in Charge, Ciudad Juarez, considered the appeal as a motion to reopen and issued a denial. He then forwarded the matter to the AAO on appeal. The appeal will be dismissed.

The AAO notes that the regulations at 8 C.F.R. §§ 103.3(a)(2)(iii) and (iv) do not allow a reviewing official, in this case, the officer in charge, to consider a timely-filed appeal as a motion unless favorable action is to be taken. If the reviewing official does not intend to take favorable action, the matter must be referred to the AAO for decision. Accordingly, the officer in charge erred in treating the applicant's appeal as a motion for the purposes of denying it and his decision is withdrawn.

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 (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 and seeking readmission within ten years of her last departure from the United States. The applicant is the wife of a U.S. citizen and the mother of two U.S. citizen children and one child who is a U.S. lawful permanent resident. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The district director found that the record failed to establish that the applicant's spouse would suffer hardship beyond that normally experienced as a result of the removal of a family member. He denied the application accordingly. *Decision of the District Director*, dated June 27, 2006.

On appeal, counsel contends that the applicant's absence is so adversely affecting the health of her husband, the qualifying relative, as to constitute extreme hardship. Counsel asserts that the applicant's absence causes her husband great stress that aggravates the thyroid condition for which he is receiving medical treatment. Counsel also asserts that the applicant's absence limits her husband's "capacity to timely retrieve his medication due to his work schedule," and also limits her husband's ability to care for his three children. *Form I-290B*, dated July 20, 2006, and counsel's *Brief in Support of Appeal and Motion to Reopen*, undated.

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

> The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

The record indicates that the applicant unlawfully resided in the United States from her entry without inspection in May 2001 to her voluntary departure to Mexico in May 2005. As she is seeking admission within ten years of her departure from the United States, she is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

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

> (B) Aliens Unlawfully Present.-
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> (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 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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to a qualifying relative, that is, to a U.S. citizen or lawful permanent resident spouse and/or parent of the applicant. Hardship that the applicant or other family members experience as a result of separation is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it causes hardship to the applicant's spouse and/or parent. In the present case, the applicant's only qualifying relative is Mr. Zapata.

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 alien 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. The BIA has held:

> 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)].

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 aliens being removed.

The AAO notes that, to establish extreme hardship, the applicant must demonstrate that her husband would suffer extreme hardship whether he relocates to Mexico to reside with her or remains in the United States without her. This is because [redacted] is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record contains two letters from [redacted] of the Centro de Salud Familiar La Fe, Inc., a medical clinic in El Paso, Texas. In the first letter, dated July 13, 2006, [redacted] states that [redacted] is undergoing medical treatment at the clinic for thyroid disease and for high cholesterol, and that [redacted] has informed him that the applicant is "the main person to pick up his medications." The body of [redacted] second letter reads as follows:

> [redacted] has a thyroid condition as well as elevated cholesterol. If untreated, Mr. [redacted] could suffer a heart attack, a stroke, and possibly even go into a coma. Obviously, these medical conditions are quite serious with potentially severe complications unless he takes his medications daily. He informs me that his wife is the main person who gets his medication refills and makes sure he takes them. Any assistance you can provide to our patient will be greatly appreciated.

[redacted] affidavit of July 20, 2006 includes the following comments related to the adverse impact that the denial of his wife's waiver application has had on his health. His stress levels have "increased dramatically" since the denial of his wife's waiver application, causing him to "lose concentration at work, feel very tired, and [his] hands and feet to swell." Because he works "very long hours at BMC Building Materials," in his wife's absence he has "had difficulty actually picking up the medication because [he is] always at work." He "will sometimes go days without [his] thyroid medication until [he] actually [has] time to go pick it up," and this "causes [his] thyroid complications to worsen." Mr. [redacted] does not have any family members or friends who can pick up the medication for him. His brother and sister "are both older in age and have their own families to attend [to]." In his affidavit Mr. [redacted] also attests that he does not have anyone to help him care for his three children, and that he cannot take care of the children on his own given his medical condition.

A July 7, 2006 letter from the Administrative Manager of BMC West Building Materials of El Paso, Texas indicates that [redacted] has been employed by that firm since April 5, 2004. According to the letter, [redacted] is a permanent employee, working as a Forklift/Material Manager. The letter indicates that [redacted] does work long hours, as it states that as of July 2006 he had been averaging "54.93 hrs per week this year alone" and that '[t]hese long hours are expected to last past our normal seasonal rush." The Administrative Manager's comments are corroborated by a copy of [redacted] timecards for the period January 1, 2006 to July 7, 2006.

Counsel's brief summarizes the evidence submitted in support of the application and contends that:

> Should [the applicant's] waiver application be denied, [redacted] would suffer extreme hardship due to his medical condition; he would continue to suffer from great levels of stress, causing an aggravation of his thyroid problems; he would also be limited in his capacity to timely retrieve his medication due to his work schedule; and he would be limited in his capacity to care for their three children. [redacted] is not claiming extreme hardship because his employment or standard of living opportunities would be limited. [redacted] is claiming extreme hardship because unlike others he has a medical condition which limits his ability to function normally on his own.

The AAO's finds that the evidence of the record does not substantiate counsel's statement that [redacted] has a medical condition "which limits his ability to function normally on his own." Neither [redacted] letters nor any other documentary evidence in the record characterizes [redacted] thyroid and cholesterol conditions as limiting his abilities to function normally at home, at work, or in any other environment. Without supporting documentary evidence, the assertions of counsel will not meet the applicant's burden of proof in this proceeding. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted earlier, to meet the requirements for a section 212(a)(9)(B)(v) waiver, the applicant must establish that the denial of the waiver application would create extreme hardship for [redacted] whether he were to take up residence with the applicant in Mexico or to remain in the United States without the applicant.

The first part of the extreme hardship analysis requires the applicant to establish extreme hardship to [redacted] in the event that he relocates to Mexico. The AAO notes, however, that the record on appeal does not address the impact of relocation on [redacted] Accordingly, it is unable to find that the applicant's spouse would experience extreme hardship if he joined the applicant in Mexico.

The AAO does conclude that the application and supporting documentation establish that [redacted] would suffer extreme hardship if he were to remain in the United States while the applicant lived abroad. While it does not find the record to demonstrate that [redacted]s health prevents him from picking up his medicine or caring for his young children, it acknowledges the significant hardship created by the combination of having three young children to care for by himself, his working long hours, and his health problems.

Considered in the aggregate, the range of factors presented by the evidence of record demonstrates that [redacted] would experience extreme hardship if he remains in the United States, but not if he relocates to Mexico to reside with the applicant. Therefore, the applicant has failed to satisfy the section 212(a)(9)(B)(v) waiver requirement to demonstrate extreme hardship to [redacted] whether he chooses to relocate outside or to remain within the United States.

As the evidence has not established that the qualifying relative would face extreme hardship if the waiver request were denied, the applicant has failed to establish statutory eligibility for a waiver 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 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.