identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

[redacted]

DATE: AUG 0 2 2012 OFFICE: MEXICO CITY, MEXICO File: [redacted]

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) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601 waiver application and the Form I-212 application for permission to reapply for admission were concurrently denied by the Acting District Director, Mexico City, Mexico, and are 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 who entered the United States without inspection in about 1987. On September 9, 1997 the applicant filed an application for asylum which was denied on October 10, 2002 by an Immigration Judge who granted voluntary departure until December 9, 2002. The applicant appealed the decision to the Board of Immigration Appeals (BIA) on November 12, 2002. The BIA dismissed the appeal, and the applicant filed a petition for review with the Ninth Circuit Court of Appeals which was dismissed for lack of jurisdiction on June 21, 2004. When the applicant failed to comply with the grant of voluntary departure it was converted to a removal order. The applicant remained in the United States unlawfully and under a final order of removal until he departed to Mexico in September 2007. The applicant accrued unlawful presence for a period in excess of one year and was thus found to be inadmissible to the United States 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 and seeking readmission within 10 years of his last departure. The applicant was found to be additionally inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien ordered removed who departed the United States while an order of removal was outstanding and who seeks admission within 10 years of his date of departure. The record supports these inadmissibility findings, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(A)(ii) of the Act. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse and child. Additionally, the applicant seeks permission to reapply for admission into the United States within 10 years of his departure under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The Acting District Director incorrectly found that the applicant is also inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C) because he accrued unlawful presence of more than one year after a previous immigration violation. The Acting District Director concluded that the applicant is thus "inadmissible and ineligible to apply for an immigrant visa until he has remained outside the United States for 10 years." This is an incorrect application of section 212(a)(9)(C) of the Act which only applies to aliens who are in the United States after accruing unlawful presence in excess of one year, or who have been ordered removed and who enter or attempt to reenter the United States without being admitted. The AAO finds that the applicant is not inadmissible under section 212(a)(9)(C) of the Act. The AAO further finds that the Acting District Director erred in finding that the applicant is "inadmissible under a provision of the law for which there is no waiver," presumably referring to § 212(a)(9)(C). The AAO finds that at this time, the applicant is not inadmissible under any provision of law for which there is no waiver available.

Counsel asserts that extreme hardship to the applicant's qualifying relative spouse has been unequivocally established and that the applicant warrants a favorable exercise of discretion. *See Form I-290B, Notice of Appeal or Motion*, received December 19, 2008.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief; numerous immigration applications and petitions; hardship letters; supporting letters; employment letters; financial documents; records pertaining to the applicant's arrest and restraining order; inadmissibility record, record of deportation/removal proceedings, and appeals. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) of the Act provides:

> (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 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

A waiver of inadmissibility under section 212(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or the applicant's child can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record reflects that the applicant's spouse is a 23-year-old native and citizen of the United States who gave birth to their child when she was 15-years-old, married the applicant when she was 16, and has been separated from him since she was 18-years-old as a result of his inadmissibility. The applicant's spouse indicates that she has lived with the applicant's parents since 2005 and her own parents live or lived in the same apartment building. She asserts financial hardship claiming that the applicant was the sole provider for her and their daughter and thus she cannot afford car payments on a vehicle that is in her mother-in-law's name and will likely have to stop contributing to the household rent. Documentary evidence in the record shows that the applicant was not the family's sole provider and that the applicant's spouse has been employed by [redacted] since July 2006. The applicant's spouse maintains that her income therefrom only covers her daughter's needs, food and gas and she speculates that she will have to cancel her cell phone and find a low cost daycare center for her daughter instead of the "certified" center to which she has grown accustomed. The applicant's spouse states that in addition to working, she has been attending college for two years, applied for a competitive state university nursing program, has a lifelong dream of being a doctor or nurse, and wants to become a prosperous person. She asserts that her husband cannot support her financially because "in Mexico the average person makes no more than one hundred dollars a week" which will be barely enough for him to survive on. No supporting documentary evidence has been submitted concerning wages in Mexico in general or the applicant's income specifically. The AAO recognizes that the applicant's spouse has experienced some reduction in household income as a result of her husband residing in Mexico since September 2007. The evidence is insufficient, however, to establish economic difficulties beyond those ordinarily associated with the removal or inadmissibility of a spouse.

The applicant's spouse contends that due her employment and educational demands, she is having difficulty managing her time effectively, is always tired and irritated at work, and is stressed at school because of fast-paced classes. She states that her stress causes severe headaches and she thinks she might be developing a chronic migraine condition. Supporting medical evidence has not been submitted. The applicant's spouse notes that she has contemplated visiting a counselor or psychologist but cannot afford to do so nor does her insurance cover such services. She alleges that as a result of being separated from the applicant since before her third birthday, her daughter, [redacted] overall well-being and development is being jeopardized. The applicant's spouse asserts that her daughter's caretaker has noticed behavioral changes in [redacted] since her father's departure including her being "very violent and non-cooperative." The record contains no documentary evidence supporting this contention.

Counsel cites *Matter of* [redacted] 13 I&N Dec. 249 (BIA 1969) as an instance where the Board of Immigration Appeals found existence of the "unusual hardship of maintaining two households," and noted that the U.S. citizen child "would be deprived of the affection, emotional security and direction of its father which is most important during its formative years." Counsel asserts that the applicant's spouse's circumstances are "virtually identical" to those in [redacted] The AAO finds counsel's assertion unpersuasive. [redacted] was in proceedings under section 212(e) of the Act as a J-visa exchange visitor whose lawful permanent resident spouse was a medical physician who, were he to accompany his wife to Thailand for her 2-year foreign residence requirement, would give up his established medical practice in a city where he was the only urologist. In the

present matter, the applicant's spouse works part-time as a receptionist while attending school, and never contends nor has she established, that she is or would be supporting two households. Additionally, counsel cites decisions of the U.S. Court of Appeals for the Ninth Circuit and asserts that they support that the applicant has established extreme hardship to his spouse. The present matter arises in Mexico, outside the United States and jurisdiction of the Ninth Circuit. While the reasoning of the Ninth Circuit is generally instructive, it is not binding on the present case.

The AAO acknowledges that separation from the applicant has and may continue to cause various difficulties for the applicant's spouse. However, it finds the evidence in the record insufficient to demonstrate that the challenges encountered by the qualifying relative, when considered cumulatively, meet the extreme hardship standard.

Addressing relocation, the applicant's spouse asserts that her life would be ruined and dreadful in such a deprived country, it would be extremely difficult to continue her education in Mexico, and she does not want to deprive her children the opportunity to grow up in the United States. She states that she was born in the United States and does not know anything about Mexico where she has no family support. The applicant's spouse explains that she is very close to her mother, father, brother, and extended family members all of whom live lawfully in the United States. [redacted] youth pastor of a Spanish-speaking congregation, writes that the applicant's spouse has a hard time understanding the Spanish language and counsel contends that she is "unable to read or write Spanish." Counsel claims that the applicant's spouse would be unable to obtain employment in Mexico and if she did, her job would not pay enough. Counsel further opines that "the economical and medical conditions do not stand comparison to those in the United States," and adds without explanation or foundation that the applicant and his spouse "are living in constant fear that their child will contract an extremely dangerous decease [*sic*] that could not be cured by the means available in Mexico." Counsel further notes that Mexico is currently experiencing a widespread drug war that has claimed many lives. The record contains no documentary evidence addressing country-conditions of any kind in Mexico. 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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cites *In Re Bing Chih Kao*, 23 I&N Dec. 45 (BIA 2001), for the contention that "extreme hardship to an applicant's children is an important factor that must receive close attention in evaluating a suspension claim." The AAO notes that the *Bing* family had five children, the "oldest daughter was a 15-year-old United States citizen, has spent her entire life in the United States, has been completely integrated into the American lifestyle, and is not sufficiently fluent in the Chinese language to make an adequate transition to daily life in her parents' native country of Taiwan." *Id.* at 50. In the present matter the applicant has one child, a 7-year-old daughter, for whom no documentary evidence has been submitted to suggest or demonstrate she would be unable to learn Spanish or adequately transition to daily life in Mexico, a country contiguous to the United States.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including adjustment to a country in which she has never lived; her lack of fluency in the Spanish language; separation from close family ties and community ties in the United States and lack of family ties in Mexico; and employment, economic, educational and safety concerns. Considered in the aggregate, the AAO finds the evidence insufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Mexico to be with the applicant.

The applicant has, therefore, failed to demonstrate that the challenges his spouse faces are unusual or beyond the common results of removal or inadmissibility to the level of extreme hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate extreme hardship to a qualifying relative. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

The AAO notes that the Field Office Director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, (Form I-212) in the same decision denying the applicant's Form I-601 application. The AAO has dismissed the appeal of the Form I-601 application. *Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act, no purpose would be served in adjudicating the applicant's Form I-212.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.