



U.S. Citizenship  
and Immigration  
Services

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**DEC 02 2009**

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date:  
CDJ 2004 807 742

IN RE: Applicant: [REDACTED]

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

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

*Perry Rhew*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City, Mexico, 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 under 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. The applicant is the spouse of [REDACTED], a citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated November 14, 2006. The applicant filed a timely appeal.

On appeal, counsel states that the director cited *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), as a reference for pertinent factors to be used in determining whether to grant a waiver. Counsel states that the factors in *Matter of Tin* refer to applicants seeking entry after arrest and deportation. Counsel states that because the applicant was not arrested or deported the factors in *Matter of Tin* should be considered in a more favorable light. Counsel indicates that [REDACTED] needs her husband as she is a single mother raising two young children and cannot rely upon family members for support. Counsel asserts that the director appears to be applying the exceptional and extreme unusual hardship standard rather than that of extreme hardship and that the director needs to consider the quality of the hardship to [REDACTED] wife, not whether the hardship is common or unusual. Counsel states that the submitted evidence established extreme hardship to a qualifying relative, as required by the Act.

The AAO will first address the finding of inadmissibility

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

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

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

USCIS records reflect that the applicant entered the United States without inspection in July 2002 and remained in the country until December 2008. He triggered the ten-year-bar when he left the United States, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).<sup>1</sup>

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which provides that:

(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 waiver under section 212(a)(9)(B)(v) of the Act 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 an applicant is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act. Thus, hardship to the applicant and her children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

It is noted that *Matter of Tin*, as discussed by counsel in his brief, lists the general factors to be considered in determining whether an application should be granted as a matter of discretion. As

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<sup>1</sup> The AAO notes counsel’s assertion that the applicant stopped accruing unlawful presence with the filing of his I-130 visa petition. The AAO does not find this persuasive. The accrual of unlawful presence stops with the proper filing of an application for lawful permanent residence. *See Memorandum by [REDACTED] Refugee, Asylum and International Operations Directorate and [REDACTED] Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.* The filing of an I-130 visa petition is not an application for permanent residence. It is an application for an immigrant visa, therefore, does not stop the accrual of unlawful presence.

noted above, in this case, that determination is made only once the applicant has established extreme hardship to a qualifying relative. The AAO does note, however, that counsel is correct in stating that the director erred when he stated that section 212(a)(9)(B)(i)(II) of the Act imposes a permanent bar of admission to the United States.

“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, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant’s qualifying relative and 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 565-566.

The factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and the “[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). The trier of fact considers the entire range of hardship factors in their totality and then determines “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).

In rendering this decision, the AAO has carefully considered all of the evidence in the record including the affidavit, birth certificates, photographs, invoices, wage statements, and other documentation.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s spouse must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

With regard to remaining in the United States without her husband, in her sworn statement [REDACTED] conveys that she is a single parent to her two children who are 10 months old and two years old, and that she and her children live with her parents and their three children in a small two-bedroom house. She indicates that she depends on her parents for most of her and her children’s support and that her father is working part time due to a recent work injury which has financially impacted her and his family, and they may have to file bankruptcy. [REDACTED] conveys that she works forty hours per week earning little more than minimum wage and is forced to leave her children with family members, friends, and babysitters. She states that she was a full-time mother while the applicant was in the country. She indicates that she is concerned that her children are too much for her parents to handle. [REDACTED] conveys that she needs her husband’s help to obtain her General Educational Development (GED) so that she will no longer be forced to work minimum

wage jobs. She indicates that her children miss their father and she is limited in telephoning him due to cost. She conveys that she is worried that her parents may lose their house.

has lived in the United States without her husband for two years. The wage statements show she earns \$8.67 per hour. She has health insurance, which has paid most of her medical expenses; however, there is a collection notice for an unpaid medical bill of \$201.62. The submitted invoices, which are primarily medical bills, are not sufficient to show that [REDACTED] salary is insufficient to meet her monthly household expenses. There is no documentation showing that she is financially dependent upon her parents and that her parents are unable to pay their household expenses. 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)).

Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“the most important single hardship factor may be the separation of the alien from family living in the United States”).

However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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). In *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)).

is very concerned about separation from her husband and having to raise her children alone. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. The record before the AAO, however, fails to establish that the situation of [REDACTED] if she remains in the United States without her husband, rises to the level of extreme hardship. The record is insufficient to show that the emotional hardship to be endured by [REDACTED] is “unusual or beyond that which is normally to be expected” from an applicant’s bar to admission. *See Hassan and Perez, supra*.

When considered in its totality, the AAO finds that the hardship factors raised here are insufficient to demonstrate that [REDACTED] would experience extreme hardship if she were to remain in the United States without her husband.

The applicant makes no claim of extreme hardship to his spouse if she were to join him to live in Mexico.

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 establishing that the application merits approval 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. The waiver application is denied.