



U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

FILE: [REDACTED] Office: MEXICO CITY, MEXICO
(CDJ 2005 513 008) (CIUDAD JUAREZ)

Date: DEC 03 2009

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. section 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.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. He was 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 one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen. 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).

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 16, 2007.

On appeal, counsel for the applicant asserts that the District Director erred in failing to consider hardship to the applicant's children and that the applicant was misadvised with regard to the waiver application process. She further states on appeal that the evidence submitted on appeal will establish that the applicant's spouse will experience extreme hardship if the applicant is excluded from the United States.

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-

....

(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 [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 [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 indicates that the applicant entered the United States without inspection in February 1999 and remained until he departed voluntarily in January 2006. As the applicant resided unlawfully in

the United States for over a year and is now seeking admission within ten years of his last departure from the United States, 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 children is not directly relevant in section 212(a)(9)(B)(v) proceedings and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez*, 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).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or 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 includes, but is not limited to, counsel’s brief; statements from the applicant and his spouse; photographs of the applicant, his wife and their children; an employment verification statement from the applicant’s spouse’s employer; a statement from the Reverend [REDACTED] regarding the applicant’s spouse and children; statements from a friend and family members of the applicant’s spouse; a copy of “The Impact of Our Laws on American Families,” by the Catholic Legal Immigration Network; Country Reports on Human Rights Practices - 2006, section on Mexico, published by the U.S. Department of State; copies of a settlement statement and bills/loans in the applicant’s spouse’s name; and copies of the birth certificates for the applicant’s children.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel acknowledges that section 212(a)(9)(B)(v) of the Act requires the applicant in this proceeding to demonstrate extreme hardship to his spouse, but asserts that the District Director erred in not also considering hardship to the applicant's children. The AAO finds the District Director to have committed no error. Hardship to a non-qualifying relative will be considered to the extent that it creates hardship for the qualifying relative. In the present matter, the AAO does not find the record before it to establish, through documentary evidence, what hardships would be experienced by the applicant's children as a result of their separation from their father or how such hardships would affect their mother, the only qualifying relative in this proceeding. Accordingly, the record provides no basis for considering hardship to the applicant's children.

The record includes a report by the Catholic Legal Immigration Network and the section on Mexico from Country Reports on Human Rights Practices by the U.S. State Department, but neither counsel nor the applicant has made clear how these documents are relevant to the applicant's appeal, or how they are probative of any hardship experienced by the applicant's spouse. United States Citizenship and Immigration Services (USCIS) cannot construct assertions or presume facts on behalf of an applicant. The applicant has the burden to establish eligibility in these proceedings, including clearly articulating a basis of eligibility and supporting any assertions with associated, relevant evidence.

With regard to hardship, counsel asserts that the applicant and his spouse have two children born in the United States, have developed ties to the community, and have purchased a property. She also contends that the applicant's spouse will experience emotional hardship in the applicant's absence. She notes that the applicant's spouse's emotional state has declined as a result of the denial of the applicant's waiver application and that the applicant's spouse has sought counsel from her church. A letter from [REDACTED] indicates that he has had one brief counseling session with the applicant's spouse and that she expressed a great need to have the applicant with her. He also reports that the applicant's children are sad that their father is not with them and that the family's home life will not be normal until the applicant returns to the United States. Counsel also asserts that the applicant's spouse is under financial stress due to the applicant's exclusion. The applicant's spouse states that she is experiencing physical and emotional stress, as well as guilt over the applicant's exclusion, and that her children are experiencing emotional hardship as a result of the absence of their father.

The AAO accepts that the applicant's spouse and children miss the applicant, and are experiencing emotional strain due to separation. While the record contains statements from the applicant's spouse's pastor, her uncle and a family friend that indicate the applicant's spouse and her children are experiencing emotional hardship, these statements, unsupported by any documentary evidence, are insufficient to establish the emotional impact of separation on the applicant's spouse. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)).

Assertions of financial impact are likewise insufficiently documented in the record. The record contains a copy of a settlement statement and several bills/loans, but fails to clearly articulate and

support the financial situation of the applicant's spouse by providing evidence of her total financial obligations. There is nothing to indicate that the applicant's spouse has accrued any debt, is experiencing any impending financial crisis or is unable to meet her financial obligations. Without any such evidence the AAO cannot clearly determine that the applicant's spouse is experiencing financial hardship, or hardship that qualifies as extreme.

An examination of the record as a whole does not indicate that any combined impacts will result in any hardship that rises above that normally experienced by the relatives of excluded aliens. The relative level of hardship a person might suffer cannot be considered entirely in a vacuum, it must necessarily be assessed, at least in part, by comparing it to the hardship others might face. Almost every case will present some hardship. Here the record fails to establish that the hardships faced by the applicant's spouse are different from those that would normally be expected as a result of removal or exclusion. *In Re Martha Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002).

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. Although counsel notes the ties the applicant's family has to the United States, neither counsel nor the applicant has asserted any impacts on the applicant's spouse if she were to join the applicant in Mexico. As such, the record does not indicate that the applicant's spouse would suffer extreme hardship if she were to relocate to Mexico with the applicant.

When considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the hardships described in the record do not support a finding that the applicant's spouse would face extreme hardship if the applicant is refused admission. 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. 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.