



U.S. Citizenship
and Immigration
Services

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FILE:

(CDJ 2004 828 745)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: DEC 03 2009

IN RE:

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:

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).

A handwritten signature in cursive script, appearing to read "Perry Rhew".

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 March 5, 2007.

On appeal, counsel for the applicant states that the District Director erred in his reliance on cited precedents, and that the applicant's spouse is experiencing extreme hardship.

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 with a B-1 visa in April 2000 and remained until he departed voluntarily in December 2005. The applicant's authorized stay expired in October 2000 and he remained in the United States until December 2005. On December 29, 2001, the date of his 18th birthday, the applicant began accruing unlawful presence. 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 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; a statement from the applicant’s spouse; a letter from [REDACTED] statements from the applicant’s spouse’s family; and copies of bills in the applicant’s spouse’s name.

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

Counsel has submitted a 19-page brief primarily asserting that the District Director’s reliance on various precedent cases was in error, detailing factual distinctions in each case. The AAO notes that *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Comm.

1978) address the exercise of discretion in cases involving applications for permission to reapply for admission rather than the determination of extreme hardship. However, the remaining cases referenced by the District Director were not cited based on their individual holdings or fact patterns, but for the guidance they provide on what constitutes extreme hardship, the standard necessary to obtain a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. It is appropriate to reference suspension of deportation cases for their informative guidance on what constitutes extreme hardship. *In Re Cervantes-Gonzalez*, 22 I & N Dec. 560, 565 (BIA 1999); See also *Hassan v. INS*, 927 F.2d 465, 467 (9th Cir. 1991) (noting that suspension of deportation cases interpreting extreme hardship are useful for interpreting extreme hardship in section 212 cases). Counsel's assertions are, therefore, unpersuasive.¹

With regard to any hardship experienced by the applicant's qualifying relative, counsel asserts that the applicant earned three-quarters of the family's income and that his spouse has had to work two jobs to cover the mortgage and household expenses, and may have to sell their home, forego further education, forego starting a family, and is suffering extreme emotional hardship due to the separation from the applicant. Counsel also asserts that the applicant has been unable to assist his spouse financially since being in Mexico and is experiencing significant hardship in Mexico related to his health, which results in hardship to the applicant's spouse.

The applicant's spouse asserts that the applicant was the primary source of income for their family, and that she has had to assume all of the financial responsibilities in his absence. She states that she is extremely emotionally distressed. She states that she does not understand why the applicant is being excluded as he has never broken any laws and is a good person.

An examination of the record reveals that it fails to document many of the hardships just noted. There is no documentation that the applicant's spouse is employed, or that she is currently working two jobs, that she has had to forego any education or the starting of a family, or even that she is unable to meet her financial obligations. It also fails to document that the applicant is experiencing problems with his health in Mexico. While the record contains copies of various bills in the applicant's spouse's name, there is no evidence of her income, no evidence of any accrued debt, or any impending cessation of utilities or services. Thus, it cannot be determined that her income is not sufficient to meet her financial obligations. Even in a light most favorable to the applicant, if there was evidence to support counsel's assertions of financial hardship, the loss on the sale of a home or financial difficulties does not constitute extreme hardship. *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985); see also *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984) (holding that common results of the bar, such as separation, financial difficulties, etc., in themselves are insufficient to warrant approval of an application absent other greater impacts.)

¹ Counsel also asserts that the equal protection clause of the U.S. Constitution has been violated because the applicant is required to wait outside the United States longer than other aliens who have committed worse immigration violations. The AAO observes that, like the Board of Immigration Appeals, it cannot rule on the constitutionality of laws enacted by Congress. See, e.g., *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

The record also contains a brief letter from [REDACTED] asserting that she met with the applicant's spouse in November 2007 and that the applicant's spouse completed the QIDS-SR depression assessment and scored as moderately depressed. The AAO notes the information provided by [REDACTED] but does not find it sufficient to establish how the applicant's spouse's separation from the applicant is affecting her mental health. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter fails to indicate any evaluation of the applicant's spouse's mental health beyond her completion of a depression assessment. It also observes that [REDACTED] failed to provide the applicant's spouse's score on the depression assessment or the scale against which it was measured. Moreover, [REDACTED] findings are based on a single interview with the applicant's spouse. Accordingly, the AAO does not find the conclusions reached by [REDACTED] to reflect the insight and elaboration commensurate with an established relationship with a mental health practitioner, thereby rendering them speculative and of diminished value to a determination of extreme hardship. While the AAO accepts that the applicant's spouse misses the applicant and desires to have him reside in the United States, the record fails to document that the hardship she is experiencing as a result of separation rises above that normally experienced by the relatives of aliens who have been excluded. *See Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984) (holding that common results of the bar, such as separation, financial difficulties, etc., in themselves are insufficient to warrant approval of an application absent other greater impacts.)

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. Counsel asserts that it would constitute an extreme hardship for the applicant's spouse to relocate to Mexico because she would have to abandon her life in the United States and all that is familiar to her, and she has close family ties to the United States. Counsel also notes that the applicant's spouse would have to give up fulfilling her dreams of starting a family with the applicant in the United States, continuing to live and work in the country where she was born and raised, and providing a quality U.S. education and a good standard of living for her future children. Counsel also states that economic opportunities for the applicant's spouse are lacking in Mexico. The applicant's spouse states that she has considered relocating to Mexico, but that it would mean giving up everything she has worked to accomplish, including her career as an administrative technician.

Neither the assertions of counsel nor those of the applicant's spouse establish a basis for a finding of extreme hardship in the event she were to relocate with the applicant to Mexico. The extreme hardship requirement was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue their lives which they currently enjoy. *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994). The fact that economic, educational, and medical facilities and opportunities may be better in the United States does not in itself establish extreme hardship. *Matter of Ige*, 20 I&N 880 (BIA 1994). In addition, extreme hardship must be based on an actual or prospective hardship, not a speculative hardship such as the inability to start a family in the United States or maintain preferred employment. *Matter of Ngai*, 19 I&N Dec. 245 (BIA 1984); see also *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996)(noting that the inability to follow a chosen profession does not constitute an extreme hardship.)

When considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the hardship factors discussed in the record do not support a finding that the applicant's spouse would face extreme hardship if he is refused admission. The AAO recognizes that the applicant's spouse will experience hardship as a result of his inadmissibility. The record, however, does not distinguish her hardship from that commonly associated with removal or exclusion, and it does not, therefore, rise to the level of "extreme" as informed by relevant precedent. 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.