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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: DEC 0 4 2009
CDJ 2004 738 674

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)

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
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, 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 a naturalized 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 her 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 December 17, 2006. The applicant filed a timely appeal.

On appeal, counsel states that the applicant should not have been required to file the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, because she never was deported or removed from the United States. Counsel indicates that the director inferred entered the United States intending to adjust status, and that the director's analysis is flawed because it applies to a person who enters the United States with a non-immigrant visa and marries a United States citizen, whereas husband is a lawful permanent resident, not a U.S. citizen. Counsel states that the hardship suffered by the lawful permanent spouse would outweigh any unfavorable factors in this case and the waiver should be reconsidered and approved.

The AAO will first address the finding of inadmissibility.

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

(iii) Exceptions

(I) Minors

> No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States in February 2000. Although the applicant claims she presented her Mexican passport to the inspecting officer at the port of entry and was waved through, the applicant offers no proof in support of her claim. On January 17, 2001, the applicant was in a northbound vehicle at the Sarita Checkpoint when she was arrested by U.S. Border Patrol Agents. The applicant was not admitted or paroled after inspection; she was issued a notice to appear. On May 23, 2003, the immigration judge ordered that the applicant be removed from the United States in absentia for failure to appear at a removal hearing. On October 27, 2004, a motion to reopen was filed. The motion was granted on November 15, 2004. On February 3, 2005, the applicant was granted voluntary departure with an alternate order of removal should she not depart on or before June 3, 2005. On September 15, 2005, a warrant of removal was issued. The record is unclear as to when and how the applicant departed the United States, and the applicant has provided no evidence that she departed prior to June 3, 2005. The AAO finds that the applicant has not met her burden of proof that she is not subject to an order of removal and therefore in need of permission to reapply for admission.

Based on the record, the applicant accrued unlawful presence from the date of her entry in the United States in February 2000 to at least February 3, 2005, when she was granted voluntary departure, as it is unclear as to when the applicant left the United States.[1] When the applicant left the country she triggered the ten-year-bar, rendering her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

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:

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[1] Accrual of unlawful presence stops on the date an alien is granted voluntary departure. 1997. *See,* Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, 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.

(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 U.S. citizen child will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized 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).

"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.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's spouse must be established in the event that he remains in the United States without the applicant, and alternatively, if he 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.

Counsel states that because the director erroneously inferred entered the United States with the intention of adjusting status, the hardship suffered by the lawful permanent resident spouse would outweigh any unfavorable factors. Counsel made no further claims of hardship to the applicant's spouse.

Whether or not the director made the inference suggested by counsel, the AAO finds that the director correctly found no extreme hardship based upon his consideration of the letter dated February 6, 2006 by the applicant's husband, which letter was submitted in support of the waiver application.

The director had considered the factors of the applicant's entry, marriage, and filing of the Immediate Relative Petition on the applicant's behalf as relevant in determining whether the Attorney General should exercise a favorable grant of discretion.

The hardship described in the February 6 letter, is that of the applicant's husband's separation from the applicant, and the applicant's five-year-old son visiting the doctor regularly for a thyroid gland problem.

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). *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).

The applicant is concerned about separation from his wife. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of family separation. The record before the AAO, however, fails to establish that the situation of the applicant's husband, if he remains in the United States without his spouse, rises to the level of extreme hardship. The record is insufficient to show that the emotional hardship to be endured by the applicant's spouse is unusual or beyond that which is normally to be expected from an applicant's bar to admission. *See Hassan* and *Perez, supra.*

There is no claim made that the applicant's spouse will experience extreme hardship if he were to join his wife to live in Mexico.

When all of the factors raised in this case are considered collectively, the AAO finds they do not constitute extreme hardship to a qualifying family member for purposes of relief under sections 212(a)(9)(B)(v) or 212(i) 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.[2]

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.

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[2] The director denied the Form I-212 in his December 18, 2006 decision because he found that the applicant had complied with the voluntary departure order. Regardless of whether or not the Form I-212 was necessary, no purpose would be served in granting permission to re-enter since the applicant is inadmissible under section 212(a)(9)(B) of the Act.