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CDJ 2004 758 086

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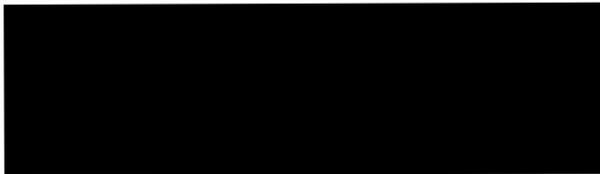
IN RE: Applicant:



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:



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, [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 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 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 October 6, 2006. The applicant filed a timely appeal.

On appeal, counsel states that [REDACTED] submitted substantial evidence of extreme hardship, and that the director relied on case law overruled by recent Board of Immigration Appeals (BIA) decisions. Counsel states that economic hardship must be considering in determining hardship. He states that [REDACTED] is employed as a maintenance man and his income is not sufficient to maintain his household in the United States and his wife's and four-year-old daughter's in Mexico. He states that [REDACTED] has diabetes and requires insulin shots and that [REDACTED] assisted in the care of her husband. Counsel maintains that [REDACTED]'s physical and emotional well-being is impacted by separation from his child. Counsel cites *Matter of Savetamal*, 13 I&N Dec. 249 (BIA 1969), and states that the BIA found exceptional hardship in maintaining two households where the respondent was to return to Thailand. Counsel cites to cases wherein the BIA held that the hardship determination must include the factors of a child's separation from a parent and loss of educational and professional opportunities in the United States. Counsel states that the hardship to [REDACTED] daughter can be added directly to [REDACTED]'s hardship. According to counsel, [REDACTED] would be unable to obtain employment in Mexico, and if he obtained employment there it would not be enough to provide for his family. Counsel states that [REDACTED] is of Filipino descent and does not speak enough Spanish to remain gainfully employed in order to support his family. He states that [REDACTED] would not be able to find a job in Mexico due to her educational level and lack of employment history. Counsel states that Mr. [REDACTED] would need to adapt to a different culture and society in Mexico. Counsel cites *In Re L-O-G*, 21 I&N Dec. 413 (BIA 1996), and states that country conditions in Mexico play an important part in the hardship consideration. He states that the submitted evidence shows the political situation in Mexico and in [REDACTED] home state of Oaxaca is hostile to not only Mexicans, but to U.S. citizens. Counsel states that [REDACTED] precarious health and the family's concern about their daughter contracting a disease in Mexico creates an extreme hardship. Counsel claims that there is a long-standing policy to grant waivers of inadmissibility where an applicant has no criminal record and no other immigration law violations other than unlawful presence.

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

(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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in November 1998 and remained in the country until May 2003. The applicant accrued unlawful presence from November 1998 to May 2003, and triggered the ten-year-bar when she left the United States, 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:

(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 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-Morales*, 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 including the U.S. Department of State Country Reports on Human Rights Practices 2005 for Mexico, the Public Announcement by the U.S. Department of State on Mexico (Oaxaca) dated November 15, 2006, a health insurance card, prescriptions from Kaiser Permanente for [REDACTED] a list of remittances to Mexico, airline tickets, a letter by [REDACTED] dated November 18, 2005, and other documents.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's husband 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.

With regard to remaining in the United States without his wife, in his letter dated November 18, 2005, [REDACTED] conveys that he wants a higher level of education and finds it difficult to achieve without the presence of his wife. He states that he spent money traveling to Mexico that was saved for his daughter's future. He states that he needs his wife and daughter with him, that he has diabetes (type 2), and that physically and emotionally his life is hard and he cannot concentrate on his job or control his blood sugar. The prescriptions confirm that [REDACTED] takes medication for type 2 diabetes. Counsel asserts that [REDACTED] needs his wife to take care of him, especially because of his diabetes. However, the AAO finds that [REDACTED] is gainfully employed and no documentation has been provided to show that [REDACTED] is unable to

function without his wife. 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)).

Counsel claims that [REDACTED] income is not sufficient to support [REDACTED] and his family in Mexico. Although the record reflects that [REDACTED] provides remittances to his spouse, there is no documentation in the record of [REDACTED] monthly income and financial expenses. Without such documentation, [REDACTED] fails to demonstrate that his income is insufficient to support two households. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

Counsel is correct in that 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 (9<sup>th</sup> 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 record conveys that [REDACTED] is concerned about separation from his wife and daughter. 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 Mr. [REDACTED] if he remains in the United States without his spouse and daughter, 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*.

With regard to joining his wife to live in Mexico, the Public Announcement conveys that U.S. citizens should avoid travel to Oaxaca City, Oaxaca, Mexico due to an increase in violence and should be alert to the increased security concerns related to protest violence throughout Mexico.

Counsel asserts that [REDACTED] would be unable to obtain employment in Mexico because he is Filipino and has limited knowledge of Spanish; and that if he obtained employment it would not be enough to provide for his family. He states that [REDACTED] would not be able to find a job due to her educational level and lack of employment history. The record conveys that [REDACTED] completed 10 years of education in Mexico and was employed with Personal Plus while in the

United States. The country report on Mexico reflects that the minimum wage in Mexico did not provide a decent standard of living for a worker and family and only a small fraction of workers in the formal workforce received the minimum wage. The record reflects that [REDACTED] has provided remittances on a regular basis to his wife since she left the United States in 2003.

In view of the hardship factors of the violence in Mexico and in Oaxaca; of [REDACTED] unfamiliarity with Mexico's culture and language and its impact on his employability; of [REDACTED] health condition; and of the fact that only a small fraction of the 15 million workers in the formal sector actually received the minimum wage, even though the minimum wage did not provide a decent standard of living, the AAO finds that the hardship factors, when considered in their totality, demonstrate that [REDACTED] would experience extreme hardship if he were to join his wife to live in Mexico.

Although counsel asserts that there is a long-standing policy of granting waivers of inadmissibility where an applicant has no criminal record and no immigration law violations other than unlawful presence, counsel submits no documentation in support of his assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the Act is clear in that an applicant must establish extreme hardship to a qualifying relative and have a favorable exercise of discretion in order to be granted a waiver under section 212(a)(9)(B)(v) of the Act.

The hardship factors raised here establish extreme hardship to [REDACTED] if he were to join his wife to live in Mexico; however, the record fails to show that he would experience extreme hardship if he were to remain in the United States without his wife. Thus, the hardship factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). 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.

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.