

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

H2

NOV 23 2009

FILE:

CDJ 2004 764 646

Office: MEXICO CITY (CIUDAD JUAREZ)

Date:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)
of the Immigration and Nationality Act (INA), 8 U.S.C. § 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, Mexico City, denied the instant waiver application. The matter came before the Administrative Appeals Office (AAO) on appeal and was summarily dismissed. The AAO will reopen the matter *sua sponte*, withdraw its previous decision, and dismiss the appeal.

The record shows that the applicant is a native and citizen of Mexico, the wife of a U.S. citizen, the mother of two children, at least one of whom is a U.S. citizen, and the beneficiary of an approved Form I-130 petition. The applicant was found to be inadmissible pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i).

The district director found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act in order to reside in the United States with her husband and daughter. The district director also found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse, and denied the application.

On appeal, counsel provided additional evidence and reiterated that denial of the waiver application would cause extreme hardship to the applicant's husband. Although counsel did not appear to contest the district director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

In a G-325A Biographic Information form, the applicant, who signed that form on November 14, 2005, stated that she had lived in California since July 1999. In a DS-230, the applicant reiterated that she had lived in California since 1999. The Form I-130, which the applicant's husband signed on July 27, 2004, indicates that the applicant entered the United States without inspection during June 1999.

In a letter dated October 21, 2005 the applicant stated that she entered the United States without inspection on June 18, 1999 and had not left since. However, the applicant submitted the Form I-601 waiver application on November 14, 2005, in Ciudad Juarez, Mexico, which demonstrates that she has since left the United States. **The record does not demonstrate that the applicant ever achieved any legal status when she was in the United States.**

The evidence in the record is sufficient to show that the applicant was unlawfully present in the United States from June or July of 1999 until a departure between October 21, 2005 and November 14, 2005. The applicant was therefore unlawfully present in the United States for more than one year and then departed. The applicant has not disputed that she is inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The remainder of this decision will address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] 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 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.

A waiver of inadmissibility 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 the applicant or her children is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In a declaration dated October 21, 2005 the applicant's husband stated that he loves the applicant and that she and their children are important to him. He stated that the applicant prepares meals and cares for the house. He further stated that his adoptive daughter, the older of the two, is at the head of her class and, if obliged to live in Mexico, will miss out on a U.S. education.

In a declaration dated October 21, 2005, the applicant stated that if she were to return to Mexico she would take her daughters with her and they would, therefore, be separated from their father for long periods of time.

On appeal counsel submitted a report from [REDACTED] a licensed psychologist in El Monte, California. She stated that she interviewed the applicant's husband for two and a half hours and that he took psychological tests for an additional three hours. She stated that the applicant's husband supports his mother, wife, and children in Mexico, but had been unemployed during the previous five months because of his emotional condition, and is consuming his savings. She stated that, at the time of the interview, he resided with a brother in Los Angeles. She stated that since the applicant returned to Mexico with the children, the applicant's husband has seen them all only one time in ten months, being prevented from additional visits by his fiscal circumstances.

She stated that the applicant's husband reported being depressed, unable to concentrate, unable to work, worried, nervous, tense, and insomniac. She further stated that the applicant's husband indicated that he was born in the United States and cannot go to Mexico because he does not know the country. She also indicated that he suffers from heartburn and middle-back pain from lifting heavy objects, and cannot lift heavy objects anymore; that if he moved to Mexico the only work he would be able to find would require heavy lifting, that he stated that he suffered from second degree burns on his right arm because of a job accident, and that his arm now becomes numb and he can't move it well.

[REDACTED] further stated that the applicant's husband stated that he had only seen his children one time during the previous 10 months, and that he lost his job because his depression caused his productivity to drop. The record does not demonstrate what job the applicant's husband held prior to his dismissal, does not include corroborating evidence of that dismissal, and does not address other employment options.

██████████ stated that the applicant's husband's test results confirm that he is anxious and depressed, and attributed those conditions to his separation from his wife and children. She stated that the applicant's husband is currently on Prozac and Trazadone, but did not state who had prescribed those drugs, how long ago, for what reason, or what results that therapy was yielding. ██████████ described the applicant's husband's psychological and emotional state as fragile and stated that the applicant's husband would continue to become more depressed and more prone to suicide so long as the separation continues.

In a brief filed to supplement the appeal, counsel reiterated many of ██████████ statements.

██████████ appears, at various points during her report, to be restating the applicant's husband's assertions as fact. If ██████████ had any independent basis for her assertions that the applicant's husband supports his mother, wife, and children in Mexico; that he is unemployed as a result of his depression; that he has various injuries that preclude him from certain work; that the type of work he is unable to do is the only type of work he would be able to find in Mexico; that he has only seen his wife and children once since their departure from the United States, *et cetera*, that additional basis is not reported in the record.

That report contains no evidence that ██████████ conducted therapy with the applicant's husband either before or after their meetings. Other than the report that the applicant's husband is using Prozac and Trazadone, the record contains no evidence to show that the applicant's husband has ever sought treatment for any symptoms related to stress, anxiety, or depression. The record does not show that ██████████ recommended that the applicant's husband undergo psychiatric treatment or psychological therapy to relieve his symptoms. Nothing in the record suggests that the applicant's husband has ever received regular psychiatric care. Rather, the evidence suggests that he consulted with a psychologist only once as necessary to obtain a letter for use as evidence in the instant case.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted report is based on a single interview between the applicant's husband and the psychologist. The record fails to reflect an ongoing relationship with the applicant's husband. The conclusions reached in the submitted report, being based on a single self-reporting interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering ██████████ findings speculative and diminishing the report's value in determining extreme hardship.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to

cases of “*extreme hardship*,” Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one’s spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the “*extreme hardship*” standard, hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The evidence in the record is insufficient to establish that the applicant’s husband is experiencing or will experience emotional hardship that, when combined with other hardship factors, is greater than they typical hardship associated with removal or inadmissibility of a spouse. The record does not establish that, if the applicant is unable to return to the United States and the applicant’s husband remains in the United States, he will suffer psychological or emotional hardship which, when considered together with the other hardship factors in this case, will rise to the level of extreme hardship.

Counsel, the applicant’s husband, and [REDACTED] all asserted that the applicant’s husband is unemployed and supporting his mother, wife, and children in Mexico on his savings, but provided no evidence to support those assertions. Although they implied that denial of the waiver application will necessarily cause the applicant’s husband hardship, they provided no independent documentary evidence to substantiate that assertion.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Although the statements by the applicant’s husband and [REDACTED] are relevant and have been taken into consideration, little weight can be accorded them in the absence of supporting evidence. An unsupported statement is insufficient to sustain 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)).

The record contains no indication of the applicant's husband's earnings and whether they are sufficient to support him in the United States, and his mother, wife, and children in Mexico as necessary.

The evidence in the record is insufficient to show that, if the waiver application is denied and the applicant's husband remains in the United States, he will suffer financial hardship which, when considered with the other hardship factors in this case, will rise to the level of extreme hardship. The remaining consideration is the hardship that will be occasioned to the applicant's husband if the waiver application is denied, the applicant remains in Mexico, and he joins her there to live.

The applicant's husband has asserted that he is unable to live in Mexico because he was not born there, is unfamiliar with it, is unable to lift heavy objects because of back pain and heartburn, and would be unable to find any employment there that would not require heavy lifting. The record demonstrates that the applicant's husband was born in the United States, but contains no support for any one of the other three propositions.

The evidence does not demonstrate that, if the waiver application is denied, and the applicant remains in Mexico, and her husband joins her there to live, the applicant's husband would suffer extreme hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband faces extreme hardship if the applicant's waiver application is not granted. Rather, the record suggests that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

The AAO finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

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. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The previous decision of the AAO, dated September 1, 2009, is withdrawn. The appeal is dismissed.