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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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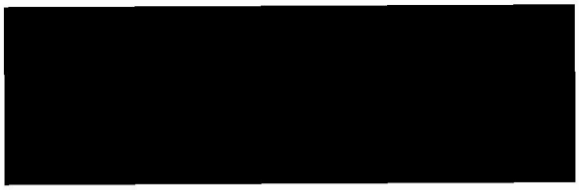


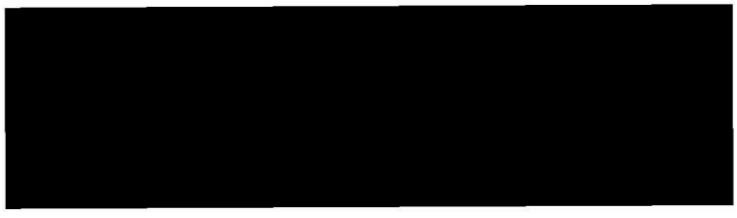
H2

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: NOV 2 5 2009
CDJ 2004 779 233 (relates)

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:



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 record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 and seeking readmission within 10 years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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), in order to reside in the United States with his United States citizen wife and son.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated August 11, 2006.

On appeal, the applicant, through counsel, asserts that the District Director erred in denying the applicant's waiver application, in that the applicant's wife is suffering extreme hardship. *Form I-290B*, filed September 11, 2006.

The AAO notes that counsel raises the argument that sections 212(a)(9)(B)(ii) and 212(a)(9)(B)(i)(II) of the Act "deny legally married spouses the right to be married here in the United States of America. Thus, these two laws are in direct conflict with the U.S. Constitution." *Appeal Brief*, page 5, filed October 11, 2006. Like the Board of Immigration Appeals (Board), the AAO 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 includes, but is not limited to, counsel's appeal brief, declarations from the applicant's wife and her parents, and the applicant's marriage certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (B) Aliens Unlawfully Present.-
>
> (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 AAO notes that the record contains several references to the hardship that the applicant's son would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(i) of the Act provides that a waiver, under section 212(a)(9)(B)(v) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's wife is the only qualifying relative, and hardship to the applicant's son will not be considered, except as it may cause hardship to the applicant's wife.

In the present application, the record indicates that the applicant initially entered the United States on May 15, 2000 without inspection. On July 28, 2004, the applicant's United States citizen wife filed a Form I-130 on behalf of the applicant. On August 28, 2004, the applicant's Form I-130 was approved. In October 2005, the applicant departed the United States. On October 18, 2005, the applicant filed a Form I-601. On August 11, 2006, the District Director denied the Form I-601, finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from May 15, 2000, the date the applicant entered the United States without inspection, until October 2005, the date the applicant departed the United States. The applicant is attempting to seek admission into the United States within 10 years of his October 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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 *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors 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.

Counsel claims that the applicant's wife is suffering extreme hardship through her separation from the applicant. The applicant's wife states she is "in constant anxiety and depression due to the fact that [the applicant] and [her] have been forcefully separated." *Declaration of* **page 2, dated** October 5, 2006. In declarations dated October 4, 2006, the applicant's parents-in-law state they have seen a decline in their daughter's emotional wellbeing, in that she is always depressed. The AAO notes that other than statements from the applicant's wife and her parents, there are no professional psychological evaluations for the AAO to review to determine if the applicant's wife is suffering from any depression or whether any depression is beyond that experienced by others in the same situation. Counsel states that the applicant's wife was working in a bank as a vault teller, but she had to take a leave of absence in order to deal with the applicant's immigration issues. The AAO notes that the applicant has not established that his wife has no transferable skills that would aid her in obtaining a job in Mexico or that there are no employment opportunities for her there. Counsel states the applicant's wife's immediate family resides in the United States, and she has no living immediate relatives in Mexico. *See appeal brief, supra* at 3. The AAO notes that it has not been established that the applicant's wife has no family ties in Mexico. Additionally, the AAO notes that the applicant's wife's parents are natives of Mexico. The AAO finds that the applicant failed to establish that his wife would suffer extreme hardship if she joined him in Mexico.

In addition, counsel does not establish extreme hardship to the applicant's wife if she remains in the United States, in close proximity to her family. As a United States citizen, the applicant's wife is not required to reside outside of the United States as a result of denial of the applicant's waiver request. The applicant's wife states she soon may have to "apply for some type of government assistances for [her son] and [her] since [she] [is] not working, and [the applicant], who is in Mexico, does not have a job." ***Declaration of*** *supra* at 2. The AAO notes that beyond generalized assertions regarding country conditions in Mexico, the record fails to demonstrate that the applicant will be unable to contribute to his family's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang,* 450 U.S. 139 (1981).

United States court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the Board held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. In *Hassan*, *supra,* the Ninth Circuit Court of Appeals held further that the uprooting of family and separation from friends

does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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) of the Act, the burden of proving eligibility remains entirely 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.