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U.S. Citizenship  
and Immigration  
Services

H2

FILE:

CDJ 2004 635068

Office: MEXICO CITY (CIUDAD JUAREZ) Date: SEP 02 2009

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.

John F. Grissom,  
Acting Chief Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Officer, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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], who is a U.S. citizen. 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 and live with her husband. The district officer 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 July 20, 2006. The applicant submitted a timely appeal.

On appeal, [REDACTED] states that his five-year-old U.S. citizen daughter lives with her mother in Mexico and can now attend kindergarten. He states that since his daughter is not a Mexican citizen she will not receive credit for studying in Mexico. He states that she needs to study in the United States to obtain official proof of her schooling. [REDACTED] indicates that he cannot take care of his daughter if she were to live with him in the United States; he states that his wife must come to the United States to take care of their daughter.

The brief submitted on appeal makes the following assertions. Most of [REDACTED] family members reside in the United States as either U.S. citizens or lawful permanent residents and that [REDACTED] has no significant family ties to Mexico. [REDACTED]'s wife is pregnant with their fourth child. [REDACTED] will not have the same employment opportunities in Mexico that he has in the United States. [REDACTED] is enduring financial hardship and his wife cannot make ends meet due to Mexico's unstable economy. In Mexico, violence is perpetuated against foreigners. Mexico has inadequate healthcare. It would be difficult for [REDACTED] to adapt to life in Mexico. Family separation has affected [REDACTED] physical and emotional health.

The AAO will first address the finding of inadmissibility.

Inadmissibility for unlawful presence is found under section 212(a)(9) 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.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>1</sup>

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* Memo, note 1.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in September 2000 and remained in the country until April 2005. The applicant therefore accrued four years of unlawful presence, 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.

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<sup>1</sup> 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.

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 and to his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B)(v) of the Act. Thus, hardship to the applicant and his U.S. citizen children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S 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).

The AAO notes that the record contains letters and medical records written entirely in Spanish. 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to the Service [now U.S. Citizenship and Immigration Services, "USCIS"] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Those letters and medical records that have no English translation will carry no weight in these proceedings. *See* 8 C.F.R. § 103.2(b)(3).

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.

In regard to the financial hardship that [REDACTED] will experience if he were to remain in the United States without his wife, the record shows that [REDACTED] has been unable to repay a loan. [REDACTED] conveys that he loaned money to [REDACTED] and that he is still waiting for Mr. [REDACTED] to pay him back [REDACTED] dated June 30, 2009. The wage statement in the record shows that [REDACTED] earns \$17 per hour with L.C. Fewell Corporation. However, there is not sufficient evidence in the record to show that [REDACTED] monthly income is not enough to meet his monthly financial obligations. Without independent evidence of all of Mr. [REDACTED] monthly financial expenses the AAO cannot determine whether [REDACTED] income falls short of paying for all of his monthly financial obligations. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

With respect to the emotional hardship that [REDACTED] will experience if he remains in the United States without his wife, [REDACTED] who is [REDACTED] employer, states in her letter dated August 8, 2006, that [REDACTED] family is the motivation of [REDACTED] hard work and that "[t]he stress and strain of the absence of his family continues to take its toll." She conveys that the health, welfare, and job performance of [REDACTED] has been negatively affected by his family's absence and that he "appears fatigued and less mentally focused on the details of his job." [REDACTED] states that [REDACTED] "mental attitude and work ethic, which have always been exemplary, are now nothing special." She conveys that [REDACTED] is "emotionally upset" and that she is worried about his "health, welfare, and future with our company."

In a letter dated June 19, 2009, [REDACTED] states that [REDACTED] continues to be her company's most valuable employee.

In his letter dated June 30, 2009, [REDACTED] states that he is depressed due to separation from his wife and children and that he sees them once a year and that his relationship with his wife is affected due to four years of separation. He states that his wife is pregnant and her pregnancy is risky and he is worried. He conveys that it is difficult to maintain a house in the United States and a house in Mexico. He states that the schools in Mexico are poor and there are no jobs in Mexico to support his family. In his letter dated June 19, 2008, [REDACTED] states that he would not be able to find an adequate job or house in Mexico and that he does not have a permit to work there.

[REDACTED] states that [REDACTED] is his patient and that [REDACTED] is receiving counseling in his office for insomnia, anxiety, and depression, which problems stem from separation from his family living in Mexico. *Letter by [REDACTED]*, dated June 17, 2009.

The psychosocial assessment of [REDACTED] by [REDACTED] dated June 17, 2009, conveys that [REDACTED] was born in California and raised in Mexico, completing his education to the tenth grade there. [REDACTED] states that the applicant has lived in Mexico for over four years and has been unable to find employment. [REDACTED] diagnosed [REDACTED] with Major

Depression, single episode, moderate in nature.

The record shows the applicant and her husband have three U.S. citizen children who were born on November 26, 2004, March 29, 2003, and June 29, 2001. 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). In *Shooshtary v. INS*, 39 F.3d 1049 (9<sup>th</sup> Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. *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). In *Sullivan v. INS*, 772 F.2d 609, 611 (9<sup>th</sup> Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

In view of the submitted evidence of the counseling that the applicant is receiving for depression as a result of separation from his wife and four children and his concern about their safety in Mexico, the AAO finds that the evidence, when considered cumulatively along with his claim of financial hardship, establishes extreme hardship to [REDACTED] if he were to remain in the United States without his wife. The extreme hardship caused by family separation, in this case, is not the common result of removal. The extreme hardship to [REDACTED] is unusual or beyond that which would normally be expected from the applicant's bar to admission.

In regard to [REDACTED] joining his wife to live in Mexico, [REDACTED] indicates that he will not have the same employment opportunities in Mexico that he has in the United States. Country conditions in the submitted documentation establish the poor job market in Mexico. The brief submitted on appeal states that in Mexico [REDACTED] would not have the same level of medical and psychiatric care that he receives in the United States. Adequate medical care is available in major cities in Mexico. *See, Consular Information Sheet, page 9.* In *Marquez-Medina*, the Seventh Circuit states that it considers the availability of medical care nationwide. (citing *Bueno v. INS*, 578 F.Supp. 22, 25 (N.D.Ill.1983)). [REDACTED] expresses concern about his family's safety in Mexico. The submitted U.S. Department of State Travel Alert conveys that there has been an increase in violence near the U.S. border and that U.S. citizens have been kidnapped across Mexico. The brief indicates that [REDACTED] will have difficulties adapting to life in Mexico and will be separated from family members in the United States. With regard to the education of his children in Mexico, which [REDACTED] states will not be of the same level of quality as in the United States, although hardship to [REDACTED] children is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by [REDACTED], as a result of his concern about the welfare of his children, is

a relevant consideration. With the case here, [REDACTED] has not explained how the hardship experienced by his children would result in extreme hardship to [REDACTED]

The AAO finds that the submitted evidence of country conditions in Mexico confirm [REDACTED] poor job prospects there, the travel alert substantiates [REDACTED] concern about lack of personal safety in Mexico, and collectively the country conditions documentation and travel alert demonstrate that [REDACTED] would have difficulty adapting to life in Mexico. When considered in the aggregate, the AAO finds that the submitted evidence demonstrates extreme hardship to Mr. [REDACTED] if he were to join his wife to live in Mexico.

In the final analysis, the AAO finds that extreme hardship to [REDACTED] has been established if he were to remain in the United States without his spouse, and alternately, if he were to join her to live in Mexico. Consequently, the factors presented do 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).

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's family members, and the passage of approximately four years since the applicant's immigration violations. The unfavorable factors in this matter are the applicant's entry into the United States without inspection and her unauthorized presence,. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The waiver application is approved.