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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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FILE:

Office: PORTLAND, OR

Date:

SEP 15 2009

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i).

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Portland, Oregon, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who entered the United States with a counterfeit border crossing card. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C). He is the husband of a lawful permanent resident (LPR). The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The Acting Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his LPR spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), dated May 30, 2007.

On appeal, counsel for the applicant asserts the director applied the wrong legal standard and that the applicant has established his U.S. citizen spouse will suffer extreme hardship if the applicant is excluded.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien

The record indicates that the applicant used a counterfeit border crossing card to enter the United States in 1974, and thus entered the United States by fraud or the willful material misrepresentation of a material fact. Therefore the applicant is inadmissible pursuant to section 212(a)(6)(C) of the Act. The applicant does not contest this finding. In December 2004, the applicant applied for adjustment.

A waiver of inadmissibility under section 212(i) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, in this case the lawfully resident spouse of the applicant. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez*, 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 list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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.

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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

U. S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). In that this case arises within the jurisdiction of the 9th Circuit Court of Appeals, separation of family will be given appropriate weight in the assessment of hardship factors in the present case.

The record of proceeding contains, but is not limited to, the following relevant evidence: statements from the applicant, the applicant’s spouse and their four children; a statement from [REDACTED] a licensed clinical social care worker; letters from [REDACTED] and [REDACTED] a copy of a property tax statement for the applicant; a social security benefits statement indicating the applicant is receiving payments for a disability; a 2007 emergency room visitation report indicating the applicant’s spouse was seen for an upper respiratory infection and treated with Vicodin; copies of medical records from 2006 and 2007 indicating that the applicant was seen for chest and back pain, and diabetes; lab reports from Quest Diagnostics; country conditions materials on health problems and care in Mexico; a copy of an article from the New York Times discussing Mexico’s efforts to address diabetes; and photographs of the applicant and his family.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal counsel asserts the applicant is not inadmissible because his conduct occurred in 1974, and cites to *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). Counsel's assertion that *Cervantes-Gonzalez* stands for the proposition that the applicant is not inadmissible cites to a dissenting opinion in that decision, and is therefore incorrect as a matter of law. As noted by the majority opinion, a request for a waiver of inadmissibility pursuant to section 212(i) of the Act is a request for prospective relief. *Matter of Cervantes-Gonzalez*, supra, at 563. As such, the applicant must establish extreme hardship to a qualifying relative pursuant to §212(i).

Counsel asserts that the Acting Field Office Director cross applied legal standards, and that cross application of standards is inappropriate, and faults the Acting Field Office Director for citing cases that involve section 212(h) waivers by citing to *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). The ruling in *Mendez* does not hold that extreme hardship under 212(i) is different than extreme hardship under 212(h). Both sections 212(i) and 212(h) of the Act waive inadmissibility, and thus constitute the same form of relief. The assertion that cross application among forms of relief – which is not the case here - is improper is typically alleged in the application of holdings from suspension of deportation cases to waiver application cases. However, as noted by the Board of Immigration Appeals, such cross application is appropriate in waiver of inadmissibility proceedings. *See Matter of Cervantes-Gonzalez*, 22 I & N Dec. 560, 565 (BIA 1999)(considering a 212(i) waiver application and utilizing the cross application of the extreme hardship standard from suspension of deportation cases, citing to *Hassan v. INS*, 927 F.2d 465, 467 (9th Cir. 1991), which is a 212(h) case. Counsel's assertion therefore contradicts the reasoning in *Cervantes-Gonzalez* and is not supported or even referenced in *Mendez*.

Counsel also cites to a number of other cases that have been superseded by statute. The holdings of such cases no longer have any legal authority, and have no impact on these proceedings. Finally, contrary to counsel's assertion, United States Citizenship and Immigration Services (USCIS) has the authority to construe extreme hardship narrowly. *INS v. John Ha Wang*, 450 U.S. 139 (1981). The Acting Field Office Director's reliance on case law in this matter was appropriate.

Counsel has asserted that the applicant is essential to supporting his spouse financially, physically and emotionally. The applicant's spouse asserts she would be devastated without the applicant and that he drives her to her doctor's appointments and helps her with her medication. Counsel relies on a letter from [REDACTED] and quotes [REDACTED] statement that diabetes commonly requires support from others to maintain one's health as evidence of the applicant's essential role. However, the statement by [REDACTED] offers only a general discussion of the impacts of diabetes and fails to provide such information as the type of diabetes the applicant's spouse has, to what extent it affects her ability to function on a daily basis and what amount of assistance she needs. [REDACTED] letter does not conclude that the applicant needs a caretaker, specifically the applicant, or indicate that the applicant is incapable of administering her own medication. [REDACTED] statement also does not address the specifics of the applicant's spouse's esophageal reflux disease or gallstone problems, and as such their severity and the effect on her daily life cannot be determined. In a separate letter, [REDACTED] states that the applicant provides a great deal of support to his spouse, but does not conclude that he is required to be her caregiver. The letters written by [REDACTED] and [REDACTED] are

not sufficiently probative to establish the nature and severity of the applicant's spouse's conditions, nor do they provide any insight as to the level of assistance required by the applicant's spouse.

The AAO also notes that the record reports that the applicant's spouse has four children and that it does not indicate that they are unwilling or unable to assume the role now played by the applicant in caring for their mother. While the AAO does not discount the medical condition of the applicant's spouse, the availability of these resources mitigates the impact from the loss of support due to the exclusion of the applicant. The AAO notes that [REDACTED] indicates that the applicant reminds his spouse to take her medicine and that he brings her to all her appointments and that he states that the removal of the applicant would be detrimental to his spouse's condition. However, the evidence in the record does not establish that the applicant is the only person who is capable of providing support to his spouse, or that her condition is such that she requires a constant physical caretaker.

Counsel asserts the applicant suffers from depression and refers to a letter in the record written by [REDACTED] a licensed clinical social worker. The applicant's spouse states she has been suffering from depression since she suffered an injury while working and was declared disabled. Mr. [REDACTED] letter recounts the factual assertions stated by the applicant's spouse, concludes that she suffers from major depression and finds that, if the applicant were excluded from the United States, her physical and mental condition would worsen to a "possibly dangerous level." Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter is based on a single one-hour interview between the applicant's spouse and [REDACTED]. In the absence of an ongoing relationship between a mental health professional and the applicant's spouse or any history of mental health treatment to support [REDACTED] findings, the AAO finds his conclusions to be insufficient proof of the applicant's spouse's mental state. Based on a single one-hour interview, [REDACTED] evaluation does not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering his findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

The record contains various medical documents, including Quest Diagnostic lab reports, medical notes from medical records for the applicant's spouse and an emergency room report. The emergency room report indicates the applicant was diagnosed with an upper respiratory tract infection and prescribed Vicodin. There is no documentation in the record that indicates that the applicant's spouse continues to require treatment for this infection. The other documentation that has been submitted is either raw medical data or medical notations, which the AAO is not authorized or qualified to interpret. As such, the evidentiary weight of this documentation is minimal.

There is no evidence of the applicant's income, or other financial documentation such as monthly household obligations, tax returns or medical bills. As such, the AAO cannot make an informed determination as to the financial impact that the applicant's removal would have on the applicant's spouse. Accordingly, the record does not contain sufficient documentary evidence to establish that the applicant's spouse will suffer financial hardship upon the applicant's exclusion.

Counsel asserts that medical facilities in Mexico would be unable to provide for the applicant's spouse's medical condition, and that the current economic situation in Mexico would render the applicant and his spouse unable to support themselves financially. While the record contains some documentation on health care conditions in Mexico, including an article from the New York Times

on Mexico's struggle to address diabetes, the AAO again notes that the record does not establish what treatment the applicant's spouse requires to deal with her medical conditions. Moreover, the submitted documentation offers an overview of health care conditions in Mexico and does not demonstrate that the applicant's spouse would be unable to receive a specific medical treatment in Mexico. The record also fails to support counsel's claim that the applicant would be unable to obtain employment in Mexico. The AAO finds no documentation in the record, e.g., country conditions reports on Mexican employment practices or the Mexican economy, to establish that the applicant could not find work in Mexico if he were to be excluded from the United States. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

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 spouse would face extreme hardship if he is refused admission. The AAO sympathizes with the applicant's spouse's medical conditions and recognizes that she will experience hardship as a result of the applicant's inadmissibility. However, U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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 the present case, the record fails to distinguish the hardship that would be experienced by the applicant's spouse from that suffered by other individuals whose spouses have been found to be inadmissible to the United States. The AAO therefore finds that the applicant has failed to establish extreme hardship to his lawful permanent resident spouse, as required under section 212(i) of the Act. Having found the applicant ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here the applicant has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.