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U.S. Department of Homeland Security
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: CIUDAD JUAREZ

Date:

FEB 25 2010

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) and under Section 212(g) of the INA, 8 U.S.C. § 1182(g)

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 Officer in Charge (OIC), Ciudad Juarez, denied the instant waiver application. The matter 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. In a decision dated April 15, 2007 the OIC found that the applicant accrued unlawful presence in the United States from January 1, 1998 until March 29, 2006. The OIC therefore found the applicant 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 longer than one year and seeking admission within ten years of his last departure.

In addition, the OIC found the applicant inadmissible pursuant to section 212(a)(1)(A)(iii)(I) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii)(I), as an alien with a mental disorder and behavior associated with the disorder that poses a threat to the property, safety, or welfare of the alien or others.

In order to reside in the United States with his wife and children, the applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and waiver of inadmissibility under section 212(a)(1)(A)(iii)(I) of the Act pursuant to section 212(g)(3) of the Act, 8 U.S.C. § 1182(g)(3). The OIC also concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on the applicant's spouse and denied the waiver application. On appeal, counsel submitted a brief and additional evidence.

The record contains, among other documents, a note from a medical doctor, a letter from the applicant's wife, a deed to real property transferring title to the applicant and his wife, and a Statement in Support of Application for Waiver of Inadmissibility under Section 212(a)(1)(A)(iii)(I) of the Act.

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

(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 . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, 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.

(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.

Section 212(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182 makes ineligible for admission to the United States any alien:

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the [Secretary of Homeland Security])—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior.

Section 212(g) of the Act provides, in pertinent part:

The Attorney General may waive the application of

* * * *

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation provide.

The salient regulation is 8 C.F.R. §212.7(b)(4).

The record contains evidence that the applicant was arrested on October 28, 2000, and again on January 17, 2004, for driving while intoxicated. In the October 28, 2000 incident, the applicant was also charged with using a vehicle to elude arrest. The Statement in Support of Application for Waiver of Inadmissibility noted above contains a finding by a physician that the applicant has a physical/mental disorder with associated behavior that may pose, or has posed a threat to the

property, safety, or welfare of the applicant or others. The AAO therefore affirms the OIC's finding that the applicant is inadmissible pursuant to section 212(a)(1)(A)(iii)(I) of the Act.

The record further shows that the applicant entered the United States without inspection during January 1, 1998 and remained in the United States until he departed voluntarily on March 29, 2006. The applicant's presence during that time was unlawful and he is now seeking admission. The AAO therefore affirms the OIC's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

As was noted above, 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 his 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 wife 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 (BIA) 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 also held that:

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).

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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts 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). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also 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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she joins the applicant to live in Mexico and in the event that he or she 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.

The applicant’s wife stated in her letter, which is dated May 21, 2006, that she has been obliged to work a full-time job and two part-time jobs in order to support herself and her daughter, who is also the applicant’s child. She appears to indicate that after their daughter was born, the applicant took care of the child, but did not work. She indicated that she is now paying for daycare, which is expensive. She noted that the applicant, who is in Mexico and unable to return to the United States, lives 45 minutes from her and their daughter, and that she is therefore unable to see him as often as their child would like. She stated that her daughter also wants the applicant to return to the United States. She further stated that she was then pregnant and due to give birth to another child on July 30, 2006 and might therefore be out of work for two months. The applicant’s wife listed some of her recurring monthly expenses. A birth certificate in the record shows that a second child, a son, was born to the applicant and his wife on July 1, 2006.

A note from a medical doctor states that the applicant’s wife has asthma and allergic rhinitis, both of moderate severity. In the brief on appeal, counsel asserted that the applicant’s financial difficulties, her illnesses, and the difficulty of raising children without the applicant’s assistance, considered together, constitute extreme hardship in the applicant’s absence.

The AAO appreciates that any family separation is typically a source of hardship. 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 plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exists.

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 standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

The applicant's wife's mailing address is the same address shown on the real property deed mentioned above. She resides there, presumably with her two children. Her living arrangements are not otherwise indicated in the record. Whether anyone else lives with her, or is otherwise available to care for her children, is unknown. Neither the applicant's wife nor counsel addressed whether any modification to her living arrangements would accommodate her need for daycare while working. As the record does not indicate that the applicant ever worked in the United States, it contains no indication of any other financial hardship the applicant's absence has caused or will cause in the future.

The evidence submitted pertinent to the applicant's wife's illnesses is insufficient to show that, if the applicant is not admitted to the United States, those illnesses will cause the applicant's wife hardship which, when considered together with the other hardship factors in this matter, will rise to the level of extreme hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that, if the applicant remains in Mexico, and the applicant's wife remains in the United States, the applicant's wife will experience extreme hardship as a consequence of her separation from the applicant.

Further, even if the applicant's wife had demonstrated that she would suffer extreme hardship by remaining separated from the applicant, she would still be obliged, in order for the applicant to qualify for waiver, to demonstrate that she would face extreme hardship if she relocated to Mexico to live with the applicant. Neither the applicant, nor the applicant's wife, nor counsel, has addressed this requirement. The AAO cannot, therefore, find that the applicant's wife would suffer extreme hardship if she moved to Mexico to be with the applicant.

A review of the documentation in the record fails to establish that denial of the waiver application will result in extreme hardship to the applicant's spouse. Because the AAO has found the applicant statutorily ineligible for waiver pursuant to section 212(a)(9)(B)(v), no purpose would be served in discussing whether he merits a waiver as a matter of discretion pursuant to that section or pursuant to section 212(g)(3) of the Act.

In proceedings on an application for waiver of grounds of inadmissibility, the burden of proving eligibility rests 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.

The AAO is aware of the emotional stress the applicant's family has suffered as a result of the applicant's absence from the United States. Nevertheless, the evidence does not demonstrate that the hardship that the applicant's wife has suffered and will suffer if the waiver application is not approved rises to the threshold required by the sections of the law under which the applicant has applied.

ORDER: The appeal is dismissed.