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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

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JAN 07 2010

FILE:

(CDJ 2004 751 612)

Office: MEXICO CITY, MEXICO  
(CIUDAD JUAREZ)

Date:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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 Khew  
Chief, Administrative Appeals Office

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

The applicant 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 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 ten years of her last departure from the United States. The applicant is married to a naturalized United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their United States citizen child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated September 14, 2006.

On appeal, the applicant's accredited representative asserts that the applicant and her family would suffer extreme and unusual hardship if the waiver application is denied. *Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO); Accredited Representative's brief*.

In support of these assertions, the accredited representative submits a brief. The record also includes, but is not limited to, school records for the applicant's daughter; a property deed; property tax bills; a property tax refund statement; a homeowner's insurance statement; an academic report for the applicant; mortgage statements; employment letters for the applicant and her spouse; earnings statements and W-2 forms for the applicant's spouse; tax statements; and a gas bill. The entire record was reviewed and considered in rendering a decision on the appeal. The AAO notes that the record also includes several documents in the Spanish language unaccompanied by a certified translation. Accordingly, the AAO will not consider these documents. *See* 8 C.F.R. § 103.2(b)(3).

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 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.

In the present case, the record indicates that the applicant entered the United States without inspection in October 1998 and voluntarily departed in October 2005, returning to Mexico. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated October 27, 2005. The applicant, therefore, accrued unlawful presence from October 1998 until she departed the United States in October 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of her October 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(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 a violation of section 212(a)(9)(B)(i)(II) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or her child would experience as a result of her inadmissibility is not directly relevant to the determination as to whether she is eligible for a waiver. The only directly relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. Hardship to a non-qualifying relative will be considered to the extent that it affects the applicant's spouse. If 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).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in Mexico or the United States, as he is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse travels with the applicant to Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in Mexico. *Birth certificate*. The applicant's spouse has lived in the United States since 1978 and has no immediate family in Mexico.<sup>1</sup> *Accredited Representative's brief*. The accredited representative asserts that the applicant's United States citizen daughter has no ties to Mexico and will suffer tremendous hardship if she is separated from her home, family, school, friends and security. *Id.* While the AAO acknowledges these assertions, it notes that the applicant's child is not a qualifying relative for the purposes of this proceeding and the record fails to document how any hardship the applicant's child might encounter would affect her father, the only qualifying relative. The accredited representative notes that the applicant's spouse has other United States citizen children from a previous marriage who reside in the United States. *Id.* The AAO observes that the record includes a death certificate for one of these children. *Death certificate*. However, it fails to document the existence of any additional children born to the applicant's spouse's previous marriage or indicate the nature of his relationship to these children and whether there is a custody agreement that would affect his ability to relocate. The record also fails to demonstrate how his separation from his older children would affect the applicant's spouse.

The accredited representative also notes that the applicant's spouse has been a loyal employee of the city of Palm Springs since 1988. *Id.* She further asserts that he has been contributing towards his retirement and that he would lose everything if he had to quit his employment. *Id.* While the record includes earnings statements and letters of employment for the applicant's spouse, it fails to include a statement regarding his loss of retirement benefits should he move to Mexico. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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 accredited representative also cites the Department of State's Country Reports on Human Rights, 2005, noting that two-thirds of the population in Mexico lives in poverty. *Accredited Representative's brief*. She further notes it would be difficult for the applicant's spouse to find employment in Mexico and that his family in the United States cannot afford to support him. *Id.* The AAO notes that the record does not include a copy of the country conditions report to which the accredited representative cites. Furthermore, there is no documentation in the record to support the assertion that the applicant's spouse would be unable to find employment in Mexico. 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 AAO also observes that the record does not contain documentation provided by a licensed medical practitioner that indicates that the applicant's spouse suffers from any health conditions, physical or mental, and, if so, whether adequate treatment is available in Mexico. When looking at the record

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<sup>1</sup> The AAO finds the record to be unclear as to the residence of the applicant's spouse's parents. It notes that the applicant's spouse's Form G-325A, Biographic Information, dated January 26, 2004, reports his parents as living in Mexico. While the applicant's spouse's 2004 tax return lists his parents as dependents, it does not indicate that they reside with him.

before it, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in Mexico. *Birth certificate*. The applicant's spouse has lived in the United States since 1978 and all of his family resides in the United States. *Accredited Representative's brief*. The accredited representative notes that the applicant's spouse is the primary caregiver for his child. *Id.* While the AAO acknowledges this statement, it notes that the record fails to document what, if any, hardships associated with being a single parent are affecting the applicant's spouse. The accredited representative also asserts that the applicant's child misses her mother and that having to travel back and forth to Mexico has disrupted her school routine, and homework and school assignments. *Id.* As noted previously, the applicant's child is not a qualifying relative for the purposes of this case and the record fails to document how any hardship the applicant's child is encountering affects her father, the only qualifying relative.

The applicant's accredited representative states that if the applicant's waiver application is not approved, her spouse will be faced with constant worry about her safety and welfare in Mexico because of the widespread human rights violations in Mexico. The representative also contends that, as the applicant is unable to obtain employment, her spouse will have to provide for the expenses of two households. However, as previously noted, the record does not contain documentary evidence of how the applicant's spouse would be affected by the political situation in Mexico or that she is unable to obtain employment that would allow her to reduce any financial burden on her spouse. 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 accredited representative states that the applicant's spouse's adult son recently died, and the current situation combined with the emotional duress of his daughter's missing her mother along with the death of his son has caused a great deal of emotional stress for the applicant's spouse. *Accredited Representative's brief*. The record includes a death certificate showing that a son of the applicant's spouse died on April 9, 2006 at 20 years of age. *Death certificate*. The AAO notes that the accredited representative states that the applicant's spouse is experiencing severe depression and is in the care of a mental health professional, but that the professional's evaluation was not available at the time the appeal was filed.<sup>2</sup> *Accredited Representative's brief*. Counsel's assertion that the applicant's spouse is under treatment for depression is not, however, sufficient proof of his mental/emotional status. Without supporting documentation, the assertions of counsel are not

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<sup>2</sup> The AAO notes that the submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Accordingly, the applicant had the opportunity to present additional evidence in support of the waiver application following the submission of the Form I-290B, including documentation regarding the psychological health of the applicant's spouse.

sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). While the AAO does not find the record to establish the mental status of the applicant's spouse, it acknowledges the emotional pain of losing a child and finds that, when this loss is considered in combination with the normal difficulties and disruptions created by separation from a close family member, the applicant's spouse would experience extreme hardship if the applicant's waiver application were to be denied and he remained in the United States.

However, as the record has failed to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States if he relocates to Mexico, the applicant is not eligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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.