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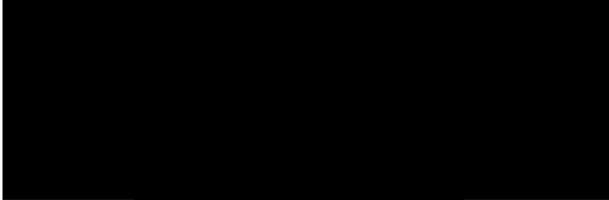
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:

Office: CIUDAD JUAREZ

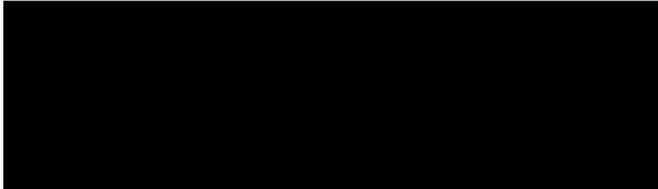
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IN RE:



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, Mexico 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 January 5, 2007, the OIC found that the applicant accrued unlawful presence in the United States for more than one year and is seeking admission within ten years of his last departure. 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).

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 son, 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 wife and denied the waiver application. On appeal, counsel submitted additional evidence.

The record contains, among other documents, a Form W-2 Wage and Tax statement, tax return, and medical documentation pertinent to the applicant's son.

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 of 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 an evaluation by a civil surgeon who found the applicant to have a physical or mental disorder and a history of behavior associated with that 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. The applicant is therefore 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 of 1996 and remained in the United States unlawfully until he departed voluntarily during June of 2005.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's unlawful presence began on April 1, 1997 and continued until June 2005, a period of more than one year. The applicant is inadmissible for ten years after the date he left the United States during June 2005, which period has not yet ended. 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. The remainder of this decision will be concerned with whether waiver of the applicant's inadmissibility is available and whether it should be granted.

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-Moralez*, 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 outside the United States 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 tax return and W-2 form in the record show that during 2005 the applicant’s wife earned \$6,759. The AAO notes that the applicant’s wife filed as single, notwithstanding that the marriage license in the record shows that the applicant and his wife were married on April 17, 2004.

The medical evidence in the record shows that the applicant's son was treated at the Sunrise Children's Hospital Emergency Room on February 1, 2007 and was treated for wheezing, asthma, and sinusitis. The record contains no evidence pertinent to the severity of that condition or whether it has ever recurred.

The AAO appreciates that 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 medical evidence does not show that the applicant's son's condition requires, or will be alleviated by, the applicant's presence in the United States. The record contains no evidence that the applicant ever had any income while in the United States.

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. The record contains no evidence or argument to support that living in Mexico would cause the applicant's wife extreme hardship, and the AAO cannot so find.

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.