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[REDACTED]

HB

FILE:

[REDACTED]

Office: SAN FRANCISCO

Date: SEP 15 2005

IN RE:

[REDACTED]

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:

[REDACTED]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco. 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 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 for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to adjust his status to permanent resident and remain in the United States with his U.S. citizen father and permanent resident mother.

The district director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen father or permanent resident mother. The application was denied accordingly. *Decision of the District Director*, dated December 5, 2003.

On appeal, counsel asserts that the applicant's father and mother will suffer extreme hardship if the applicant is prohibited from remaining in the United States. *Brief in Support of Appeal*, dated February 3, 2004. Counsel further contends that the district director failed to consider all relevant factors in aggregate in assessing the hardship to the applicant's parents, and the district director made erroneous assumptions of facts. *Id.*

The record contains a brief from counsel; statements from the applicant's mother and father in support of the appeal; a letter from the applicant's employer; documentation of the applicant's siblings' enrollment in college programs; letters from a health center discussing care provided to the applicant's parents; statements from the applicant's parents in support of the Form I-601, Application for Waiver of Ground of Excludability; a copy of the permanent resident card of the applicant's mother; a copy of the naturalization certificate of the applicant's father; a letter from a church with which the applicant's father is active; copies of documentation of expenses of the applicant's parents; copies of federal tax filings of the applicant's brother and father; evidence of the income of the applicant's father, and; a copy of the applicant's birth certificate. The entire record was reviewed and considered in rendering a decision on the appeal.

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 application, the record indicates that the applicant entered the United States without inspection in January 1990. On February 27, 2001, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. Subsequently, the applicant was approved for advance parole on two occasions, valid from March 13, 2003 to May 31, 2003 and from July 17, 2003 to August 31, 2003. The applicant departed the United States during those periods, and was readmitted on August 22, 2003. Thus, the applicant was present in the United States without any legal status for approximately thirteen years, from 1990 to 2001. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until February 27, 2001, the date that he filed his Form I-485 application. Thus, the applicant accrued over three years of unlawful presence. Accordingly, the applicant was found inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant does not contest his inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon being found inadmissible is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Once 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 Bureau of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors 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.

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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and that, “[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.” (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant’s parents would possibly remain in the United States if the applicant departs. Separation of family will therefore be considered in the assessment of hardship factors in the present case.

On appeal, the applicant’s father explains that he and the applicant reside in the same household, together with the applicant’s mother, two brothers, and sister. *Statement from the Applicant’s Father in Support of the Appeal*, dated January 24, 2004. The applicant’s father states that he and the applicant’s mother depend on the applicant for financial support, including payment of their mortgage and other monthly expenses. *Id.* at 1. The applicant’s father noted that when he is unemployed his income is limited to social security payments of \$205 per month. *Statement from the Applicant’s Father in Support of the Form I-601*, dated October 11, 2003. The applicant’s father indicated that he cannot rely on support from his other children, as two are college students and the other earns little income. *Statement from the Applicant’s Father in Support of the Appeal*.

The applicant’s father further provides that he will suffer emotional hardship if the applicant departs the United States, as the applicant is a close companion. *Id.* He indicates that the applicant provides transportation for him to doctor appointments, church functions, and routine errands. *Id.* The applicant’s father states that he fears that his children who attend college would be forced to compromise their studies should the applicant be unavailable to provide assistance. *Id.* The applicant’s mother states that she has experienced emotional hardship due to the applicant’s immigration difficulties, her high blood pressure has been exacerbated, and that she is under the care of an herbalist to relieve her stress. *Statement from the Applicant’s Mother in Support of the Appeal*, dated January 24, 2004. The applicant submits letters from a health center discussing care provided to the applicant’s parents, including treatment for hypertension, high cholesterol, and early diabetes. *Letters from Dr. Charles White*, dated January 13, 2004 and January 20, 2004.

The applicant’s father stated that he does not understand English well enough to communicate to doctors, and the applicant assists in this regard including reading instructions on medications. *Statement from the Applicant’s Father in Support of the Form I-601*. The applicant’s mother indicated that she does not speak English. *Statement from the Applicant’s Mother in Support of the Form I-601*, dated October 10, 2003.

The record contains a copy of the 2002 IRS Form 1040A, U.S. Individual Income Tax Return, for the applicant’s mother and father that reflects that they received \$4,941 as income for the year. The form lists the applicant’s father’s occupation as “janitor.” The record further contains copies of IRS Forms 1040A of the applicant’s brother’s household, showing that he received \$48,364 as income in 1999 and \$33,773 in 2000. The record contains a letter from the employer of the applicant’s brother, dated January 9, 2001, that provides that he works 40 hours per week at a rate of \$20.10 per hour. It is noted that, in connection with the applicant’s Form I-485 application, on February 16, 2001 his father and brother executed a Form I-864,

Affidavit of Support, reflecting that they have a combined income of \$57,710 and they are capable of supporting the applicant in the United States.

Counsel asserts that the district director erroneously indicated that the applicant does not live with his parents. *Brief in Support of Appeal* at 1-2. Counsel states that the applicant's siblings do not share the same active role of care giver for the applicant's parents. *Id.* at 2. Counsel reiterates that the applicant's parents depend on him for emotional and economic support, as well as daily assistance. *Id.* at 3-4. Counsel contends that if the applicant's parents relocate to Mexico with the applicant they will lose their home and medical benefits in the United States. *Id.* at 4. Counsel notes that the district director referred to the applicant's inadmissibility due to fraud and misrepresentation, while the only ground for inadmissibility is unlawful presence. *Id.* at 5. Finally, counsel asserts that Citizenship and Immigration Services (CIS) disregarded its own policy in granting the applicant advance parole, as permission to leave should not have been afforded unless it appeared that the applicant would likely receive a waiver of inadmissibility when his Form I-485 application was adjudicated. *Id.*

Upon review, the applicant has not established that his parents would suffer extreme hardship should he be prohibited from remaining in the United States. The applicant's parents explain that they will suffer economic hardship if the applicant departs the United States, as they depend on the applicant to provide substantial economic assistance. However, the applicant has not shown that his parents will be unable to meet their financial needs in his absence. The applicant's household contains his parents and three siblings. While two of the applicant's siblings are full-time college students, the evidence of record shows that one of his brothers has earned significant income, working full-time for \$20.10 per hour as of January 9, 2001, and there is no documentation to show that he does not continue to earn an equivalent amount. The applicant's father states that he receives social security payments when he is not working. The applicant has not shown that his father is unable to continue his work as a janitor, or that his father does not currently earn income in addition to his social security payments. In fact, in connection with the applicant's Form I-485, the applicant's father and brother previously represented that they were capable of supporting the applicant with a combined income of \$57,710. Thus, the evidence of record does not show that the applicant's parents would be unable to sustain their financial position without the assistance of the applicant. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The applicant's parents express that they would suffer emotional hardship due to separation from the applicant. The applicant's parents indicate that they would lose the close companionship of the applicant. The applicant's father provides that he would lose the applicant's assistance in his daily life, such as the provision of transportation and translation assistance. The AAO acknowledges that the applicant has a close relationship with his parents and separation would be difficult. However, U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does

not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The situation of the applicant's parents, if they remain in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship. It is further noted that the applicants parents reside with their three other children, all of whom are permanent residents. Accordingly, the applicant's parents will not go without emotional support and daily assistance.

The applicant's parents reference their health problems, including hypertension, high cholesterol, and early diabetes. However, the applicant has not submitted sufficient documentation to show that his parents have suffered unusual health consequences as a result of his inadmissibility. Nor has the applicant shown that his parents would be unable to obtain sufficient medical care should they chose to relocate to Mexico with the applicant.

The AAO notes that, as a U.S. citizen and permanent, the applicant's parents are not required to reside outside of the United States as a result of denial of the applicant's waiver request. However, should they choose to relocate to Mexico with the applicant, as Mexico natives it is evident that they would experience limited difficulty associated with adjusting to a new culture. Both of the applicant's parents are native Spanish-speakers. The applicant's mother indicates that she does not speak English, thus it is assumed she is accustomed to communicating primarily with Spanish-speaking individuals.

As noted by counsel, the district director indicated that the applicant does not live with his parents. Yet, the AAO finds sufficient evidence to show that the applicant currently resides with his parents. As the applicant's household also contains his three siblings, it has not been shown that the absence of the applicant would cause extreme hardship to his parents, as discussed above. Counsel asserts that the district director referred to the applicant's inadmissibility due to fraud and misrepresentation, while the only ground for inadmissibility is unlawful presence. However, a review of the district director's decision reveals that he referenced fraud in the context of discussing precedent decisions, and he did not clam that the applicant committed fraud or misrepresentation. The applicant was not prejudiced by the district director's reference to fraud.

Counsel asserts that CIS disregarded its own policy in granting the applicant advance parole, as permission to leave should not have been afforded unless it appeared that the applicant would likely receive a waiver of inadmissibility when his Form I-485 application was adjudicated. Counsel is correct that, as a matter of CIS standard practice, advance parole should not be granted in such case unless it appears that the applicant would be likely to receive a waiver of inadmissibility. In the present matter, as the applicant has two qualifying relatives, at the time he filed his Form I-131, Application for Travel Document, it was evident that he was eligible to apply for a waiver. Thus, the issuance of a Form I-512, Authorization for Parole of an Alien into the United States, was proper. It is noted that the applicant's Forms I-512 were accompanied by Forms I-831, which explicitly warned the applicant of the possible consequences of departing the United States after accruing unlawful presence, despite the fact that he had received advance parole. The applicant was responsible for understanding this warning and he assumed the risk of failing to obtain a waiver when he departed the United States. It is further noted that the issuance of a Form I-512 does not serve as prima facie evidence that an applicant is eligible for a waiver, and it does not reflect that an applicant's eligibility for a waiver has been previously fully considered and approved. The applicant must submit sufficient

documentation with his Form I-601 application to establish eligibility for a waiver. As discussed above, in the present matter the applicant has failed to show eligibility.

Based on the foregoing, the instances of hardship that will be experienced by the applicant's parents should the applicant be prohibited from remaining in the United States, considered in aggregate, do not rise to the level of extreme hardship. Thus, the applicant has not shown that the refusal of her admission would result in extreme hardship to a qualifying relative, and he is statutorily ineligible for relief. *See* section 212(a)(9)(B)(v) of the Act. Accordingly, CIS lacks the discretion to approve the application for a waiver, and no purpose would be served in discussing the balance of positive and negative factors that would determine whether he merits a waiver as a matter of discretion. *Id.*

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.