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[REDACTED]

FILE:

Office: PHOENIX, AZ

Date: DEC 01 2006

IN RE:

[REDACTED]

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

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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, AZ denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of Mexico who entered the United States in 1994 with a border crossing card and applied for adjustment of status, on January 31, 2002. The applicant departed the United States with advance parole and re-entered on December 15, 2003. The applicant was found to be inadmissible under section 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, departing, and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States and reside with her U.S. citizen (USC) husband and two USC children.

As a result of her unlawful presence and subsequent departure, the district director found the applicant to be inadmissible to the United States. *District Director's Decision*, dated April 22, 2005. The district director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Id.*

On appeal, counsel asserts that the applicant's husband and children will suffer extreme hardship if the applicant is prohibited from remaining in the United States, and that the district director failed to fully consider the consequences for the applicant's family members. *Brief, dated June 8, 2005*

On appeal, in addition to the above-mentioned brief, counsel submits additional documentation. The record includes the following: a hardship statement from the applicant's husband; the birth certificates of the [REDACTED] two USC children [REDACTED] age, and [REDACTED] age ; [REDACTED] school records; an employment verification letter for the applicant's husband; husband's training record and achievement award; a letter from [REDACTED] income tax records from 2000 to 2003; clippings from La Tribuna newspaper about unemployment in Mexico; the 2003 U.S Department of State Report on Human Rights Practices in Mexico; the Library of Congress Country Study for Mexico; copies of household bills; family photographs; a list of USC and LPR family members of [REDACTED] with the naturalization certificates of some of these family members; and various letters from friends and family. The AAO reviewed the entire record in arriving at 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.

The record reflects that [REDACTED] initially entered the United States in 1994 with a border crossing card that allowed her to remain for three days. [REDACTED] then resided in the United States from 1994 to 2001. She departed the United States and returned on January 27, 2002. It is unclear from the record when she actually departed the United States but the Form G-325A she submitted indicates that she continuously resided in the United States from at least July 1994 until January 2002. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant filed her adjustment application on January 30, 2002. The applicant accrued unlawful presence from April 1, 1997, the effective date of this section of the Act, until her departure in about December 2001. She accrued more than one year of unlawful presence and then departed the United States. In applying to adjust status, the applicant is seeking admission within 10 years of her December 2001 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B).

A section 212(a)(9)(B)(v) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on the USC or lawful permanent resident (LPR) spouse or parent of the applicant. Hardship to the applicant herself and to her USC children is not considered under the statute except insofar as it may affect her qualifying relative, in this case, the applicant's USC husband.

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 in 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 age of the qualifying relative may be an additional relevant factor. See *Matter of Pilch*, 21 I&N 627, 630 (BIA 1996). In examining whether extreme hardship has been established, the BIA has held:

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).

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).

Counsel asserts that the district director did not take into consideration the unique nature of [REDACTED] job. Counsel asserts that moving from the United States to Mexico would mean moving from a lucrative specialized position to work as a mechanic and would be devastating to [REDACTED] professional development. Counsel did not explain how [REDACTED] job differs from that of a mechanic. In addition, counsel did not submit documentation to show that automotive technician jobs do not exist in Mexico or that [REDACTED] would be unable to find a job in that profession if he relocated to Mexico. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). In addition, as noted by the director, [REDACTED] works in Yuma, Arizona which is very close to the Mexican border. No evidence was provided to show that the family could not live together in Mexico while [REDACTED] commuted to his job in the United States.

Counsel asserts that the district director failed to address or rebut the findings of the psychologist. See letter by [REDACTED] licensed psychologist, dated September 27, 2004. The AAO reviewed this letter but can give little weight to it. Although the input of any mental health professional is respected and valuable, Ms. [REDACTED] letter is of limited use, as it is unclear whether [REDACTED] ever met with any member of the [REDACTED] family. The letter does not represent treatment for a mental health disorder, nor does it indicate the need for [REDACTED] to take medication or attend therapy. The letter provides no examination of the background and challenges of the applicant's spouse and it does not show that, should the applicant's Form I-601 be denied, her spouse will suffer emotional consequences beyond those ordinarily experienced by families of those who are inadmissible. For these reasons, little weight is given to the letter insofar as it relates to the hardship Mr. [REDACTED] would suffer if his wife's waiver application is denied.

Counsel asserts that the director failed to take into consideration the contributing effect that the [REDACTED] USC children would have on [REDACTED]. Counsel asserts that [REDACTED] works in a highly technical specialty profession and is unaccustomed to dealing with the day-to-day activities of children. Direct hardship to an applicant's child is not considered in waiver proceedings under section 212(i)(1) of the Act. However, all instances of hardship to qualifying relatives must be considered in the aggregate. As counsel correctly suggests, hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. When a qualifying relative is left alone in the United States to care for children, it is reasonable to expect that the children's emotional state due to separation from the other parent will have an impact on the qualifying relative. Yet counsel has not established that the applicant's

husband will experience consequences that are sufficiently different or more severe than those commonly experienced by families who are separated as a result of inadmissibility.

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, *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. Thus, the applicant has not shown that her husband's emotional hardship will rise to the level of extreme hardship.

Counsel asserts that the district director placed too much emphasis on the extreme hardship standard and failed to address positive factors that weigh in favor of the applicant. However, a balancing of positive and negative factors is only performed when assessing whether the applicant warrants a favorable exercise of discretion. If an applicant fails to first establish that a qualifying relative will experience extreme hardship, the district director lacks discretion to approve a waiver application. *See* section 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would have been served in discussing whether he merits a waiver as a matter of discretion. Thus, the director's lack of discussion of factors that weigh in the applicant's favor was proper.

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 faces extreme hardship if the applicant is refused admission. 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 and Perez v. INS*.

In this case, though the applicant's qualifying relative will endure emotional hardship if he remains in the United States separated from the applicant, their situation, based on the documentation in the record, does not rise to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(i) of the Act, 8 U.S.C. § 1182(i). 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(i) of the Act, 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.

ORDER: The appeal is dismissed.