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[REDACTED]

FILE:

Office: PHOENIX, ARIZONA

Date: **AUG 29 2007**

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality 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 waiver application was denied by the Acting District Director, Phoenix, Arizona, and 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 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. The applicant is married to [REDACTED] who is a lawful permanent resident of the United States. She sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Acting District Director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision Acting District Director, dated October 31, 2005.* The applicant submitted a timely appeal.

The submitted appeal notice indicates that a brief and/or evidence will be sent to the AAO within 30 days. On July 16, 2007, the AAO faxed a notice to counsel requesting the brief and/or evidence. The AAO received no response from counsel. Therefore, the record as constituted is complete.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See DOS Cable, note 1. See also Matter of Rodarte, 23 I&N Dec. 905 (BIA 2006)*(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. [REDACTED]

² See DOS Cable, note 1; and [REDACTED]

The record reflects that the applicant entered the United States without inspection in March 1994. *Application for Employment Authorization (Form I-764)*, dated January 22, 2001. On December 31, 1998, the applicant filed the Application to Register Permanent Residence or Adjust Status (Form I-485). For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant accrued more than one year of time in unlawful presence from April 1, 1997 until December 31, 1998, at which time she filed the Form I-485. When the applicant voluntarily departed from the United States on advance parole she triggered the ten-year-bar. Consequently, the Acting District Director was correct in finding her inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. Thus, hardship to the applicant and his children will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant’s husband. If extreme hardship to the 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).

In addition to income tax documents, the record contains W-2 forms, earnings statements, birth certificates, a marriage certificate, school records, letters from employers and friends, a letter from Habitat for Humanity, and other documents.

Since case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, decisions from that court will be given appropriate weight in this proceeding.

On appeal, counsel states that the evidence was not properly considered and the incorrect law was applied because *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) is not the only controlling law to assess hardship, as the factors in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), should have been considered. Counsel claims that “extreme hardship” is to be analyzed in the context of applicants who have recently arrived to the United States and are applying for immigrant visas. Counsel asserts that the separation of family was not considered in assessing hardship, and the affidavit of support should not adversely impact the applicant. Counsel states that all factors must be considered in the aggregate or cumulatively. According to counsel, applying and weighing the 212(i) standards is not a requirement for an unlawful presence waiver, as the applicant did not commit a crime, but committed a “technical violation of a regulatory offense.”

On appeal counsel asserts that *Matter of Cervantes-Gonzalez* should not be used in the applicant's case because *Matter of Cervantes-Gonzalez* involved a 212(i) waiver for a crime, not unlawful presence. The AAO notes that *Matter of Cervantes* is used in cases involving waivers of inadmissibility as guidance for what constitutes extreme hardship and this cross application of standards is supported by the BIA. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA), in assessing a section 212(i) waiver of inadmissibility for visa fraud, wrote:

Although it is, for the most part, prudent to avoid cross application between different types of relief of particular principles or standards, we find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibility to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion [S]ee . . . *Hassan v. INS*, 927 F.2d 465, 467 (9th Cir. 1991) (noting that suspension cases interpreting extreme hardship are useful for interpreting extreme hardship in section 212(h) cases). These factors related to the level of extreme hardship which an alien's "qualifying relative," . . . would experience upon deportation of the respondent.

In a cancellation of removal case, *In Re Monreal-Aguinaga*, 23 I&N Dec. 56, 63(BIA 2001), the BIA states:

We do find it appropriate and useful to look to the factors that we have considered in the past in assessing "extreme hardship" for purposes of adjudicating suspension of deportation applications, as set forth in our decision in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978). That is, many of the factors that should be considered in assessing "exceptional and extremely unusual hardship" are essentially the same as those that have been considered for many years in assessing "extreme hardship," but they must be weighted according to the higher standard required for cancellation of removal. However, insofar as some of the factors set forth in *Matter of Anderson* may relate only to the applicant for relief, they cannot be considered under the cancellation statute, where only hardship to qualifying relatives, and not to the applicant, may be considered. Factors relating to the applicant himself or herself can only be considered insofar as they may affect the hardship to a qualifying relative.

In a suspension of deportation case, *In Re Kao & Lin*, 23 I&N Dec. 45, 54 (BIA 2001), the BIA referred to the factors listed in *Matter of Anderson*, *supra*, in making a determination of extreme hardship, stating in footnote 3 that:

The standard for "extreme hardship" that we apply in the present case is the same as that applied in cases dealing with petitions for immigrant status under section 204(a)(1) of the Act, 8 U.S.C. § 1154(a)(1) . . . as well as in cases involving waivers of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i) (Supp. V 1999).

Thus, in rendering this decision, the AAO will apply to the present case those factors set forth in *Matter of Anderson*, *Matter of Cervantes-Gonzalez*, and other cases to the extent they are relevant in determining hardship to the applicant's spouse.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez* at 560, 565. The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an

applicant has established extreme hardship pursuant to section 212(i) of the Act. The 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of Anderson*, in assessing hardship the BIA examined:

[T]he age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health; conditions in the country to which the alien is returnable-economic and political; financial status-business and occupation; the possibility of other means of adjustment of status; whether of special assistance to the United States or community; immigration history; position in the community.

Id. at 597

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* and *Matter of Anderson* factors here, extreme hardship to the applicant's husband must be established in the event that he joins the applicant; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record fails to establish that the applicant's husband would endure extreme hardship if he remained in the United States without his wife.

The applicant does not claim that her income is necessary to meet the family's household expenses.

In an October 9, 2002 letter, counsel states that the applicant is active in her community, in her children's school, and in her religious community. In support of this statement, the record contains a letter from Arizona Charter Academy and a letter from the applicant's church. Counsel does not explain how this evidence establishes "extreme hardship" to the applicant's husband. In any case, *Matter of Piltch*, 21 I&N Dec. 627 (BIA 1996), indicates that "emotional hardship caused by severing family and community ties is a common result of deportation." (citations omitted).

Counsel states that separation of family must be considered in assessing hardship. Courts in the United States have stated that "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).

Although [REDACTED] has children who have approved immigrant petitions (Form I-130), the record does not contain evidence establishing that they are legally in the United States. Assuming that the children hold lawful permanent resident status, this is not sufficient, in itself, to establish extreme hardship. The general proposition is that the mere birth of a deportee’s child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985), the Seventh Circuit has stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977). In a per curiam decision, *Banks v. INS*, 594 F.2d 760 (9th Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

Moreover, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA’s finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent’s bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *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.

The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of [REDACTED] if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship, which most certainly will be endured by the applicant’s husband, is unusual or beyond that which is normally to be expected upon removal. See *Hassan and Perez, supra*. While the AAO is sympathetic to the plight of [REDACTED] the factors needed to categorize hardship as extreme are not present.

[REDACTED] makes no claim of hardship if he joined his wife in Mexico.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the

aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.