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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: LOS ANGELES (SANTA ANA) CA Date: JUN 05 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 District Director, Los Angeles, CA, 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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States. The applicant is married to [REDACTED] a lawful permanent resident spouse. 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). The District Director denied the waiver application, and counsel submits an appeal.

The AAO will first address the finding that the applicant is inadmissible pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States.

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

- (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 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.

...

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). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).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-

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. 98-State-060539 (April 4, 1998).

² See DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

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).

On appeal, counsel asserts that the applicant is eligible for adjustment of status under the provisions of section 245(i) of the Act and therefore not subject to inadmissibility for unlawful presence. The AAO disagrees. Adjustment of status under 245(i)(1) of the Act allows an alien who entered the United States without inspection to pay a fee and to apply for adjustment of status to that of lawful permanent resident. Section 245(i) of the Act, 8 U.S.C. § 1255(i)(1). To be eligible, the alien must be the beneficiary of a petition under 8 U.S.C. § 1154 that was filed before April 30, 2001, and if the petition was filed after January 14, 1998, he must have been physically present in the country on December 21, 2000. 8 U.S.C. § 1255(i)(1)(B)-(C). If an alien satisfies these criteria, the Attorney General must determine, among other factors, whether the alien is admissible to the United States for permanent residence. 8 U.S.C. § 1255(i)(2). While 245(i) excuses entry without inspection, the applicant must still be admissible. Unlawful presence in the United States under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), is not excused by the provisions of 245(i).

The record reflects that the applicant entered the United States without inspection in December 1989. She departed from the United States in December 1999. She was arrested by an immigration officer in Calexico, California, on December 29, 1999 for entering the United States illegally. She left the United States on a voluntary departure the same day (December 29, 1999), and re-entered the United States illegally the following day. *Record of Sworn Statement in Affidavit Form, sworn and subscribed by the applicant on May 25, 2005.* Based on the record, for purposes of section 212(a)(9)(B) of the Act, the applicant's time in unlawful presence began to accrue on April 1, 1997, and her departure in December 1999 triggered the ten-year bar.

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

The District Director found that the submitted letters failed to support a finding of extreme hardship to the applicant's spouse and children if the waiver application were denied. The District Director cited to court cases in which the courts have found that the mere loss of employment, the inability to maintain one's present standard of living or pursue a chosen profession, the separation from a family member, or cultural adjustment do not constitute extreme hardship.

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 and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative, which 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).

“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*, 22 I&N Dec. 560, 564 (BIA 1999). The Board of Immigration Appeals (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 564. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

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).

In applying the *Cervantes-Gonzalez* 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 W-2 Forms in the record indicate that the applicant’s husband has been employed by [REDACTED] since 2001. The record contains income tax records; birth certificates; letters from the applicant, her children, and her husband; a marriage certificate; and other documentation.

The letters from the applicant’s children state that their mother traveled to Mexico to care for their grandfather who was very ill. They state that the applicant takes care of them and their father. The children indicate they love their mother and enjoy being with her. One child indicates that the applicant helps with homework and cooks meals. The children state that their mother deserves forgiveness for her mistake. The applicant’s son, [REDACTED] states that his mother will miss his graduation and other special events if she is deported. He states that his mother takes care of her grandson who is very attached to her.

The applicant’s husband states the following in his letter. For 24 years he has been married to the applicant who holds the family and house together. She means everything to him, to his children, and to his grandson. His wife regrets leaving to Mexico; she went there to care for her father. Her children will go through pain and loneliness if their mother’s waiver application is not granted. His grandson regards the applicant like a mother.

The applicant makes the following statements in her letter. She had to go to Mexico to see her father who was very ill. She states that her children need her. Her 12-year-old daughter does not know how to cook or wash clothes. Her 14-year-old daughter cannot be alone because there are men who can harm her. She takes her children to school. Her 15-year-old son needs her guidance because there are lots of drugs. Her husband works all day and cannot watch the children. Is it fair for her to not see her children for five years? She has never been away from her children. It would be very painful for them and her husband because he is always working; he cannot take the children to school or to the doctor's office when they are sick. Her grandson depends on her.

U. S. courts 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).

However, the fact that the applicant has U.S. citizen children 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.

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

The record reflects that [REDACTED] is the primary provider of the family's financial resources. He earned \$21,886 in 2004; \$47,882 in 2003; \$42,507 in 2002; and \$42,047 in 2001. *W-2 Forms*. The applicant babysits for \$10/hour. *Undated letter from Alesha Antczak*. The Affidavit of Support Under Section 213A of the Act, Form I-864, reflects that [REDACTED]'s earnings do not meet the requirements of the federal poverty guideline for a family of six. There is no evidence in the record establishing that the earnings of the applicant. Furthermore, U.S. courts have universally held that economic detriment alone is insufficient to establish extreme hardship. See, e.g., *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship) and *Mejia-Carrillo v. United States INS*, 656 F.2d

520, 522 (9th Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

The AAO notes that the applicant cares for the children and her grandson while her husband is employed full-time. The record reflects that [REDACTED] has five children, and two are U.S. citizens (ages 13, 14). His children who are citizens of Mexico are ages 17, 24, and 25. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. It has taken into consideration the letters of the [REDACTED] family and notes that the applicant and her husband married in 1981 and that she was 15 years old at the time. However, the AAO finds that [REDACTED]'s situation, if he remains 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. The record before the AAO is insufficient to show that the emotional hardship that will be endured by [REDACTED] while separated from his wife of 26 years, is unusual or beyond that which is normally to be expected upon deportation. *See Hassan and Perez, supra.*

The record is insufficient to establish that the applicant's husband would endure extreme hardship if he joined his wife in Mexico.

The conditions of Mexico, the country where [REDACTED] will live if he joins his wife, are a relevant hardship consideration. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted). Even a significant reduction in the standard of living is not by itself a ground for relief. *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986).

Economic hardship claims of not finding employment in Mexico do not reach the level of extreme hardship. *Marquez-Medina v. INS*, 765 F.2d 673, 677 (7th Cir. 1985). In *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), the Ninth Circuit upheld the BIA's finding that hardship in finding employment in Mexico and in the loss of group medical insurance did not reach "extreme hardship."

However, in *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8th Cir. 1984), the court stated that the BIA improperly characterized as mere "economic hardship" [REDACTED] claim, which was supported by evidentiary material, that he would be completely unable to find work in Mexico. The court stated that "[a]lthough economic hardship by itself cannot be the basis for suspending deportation, *Immigration and Naturalization Service v. Wang*, 450 U.S. at 144, 101 S.Ct. at 1031, we agree with the Ninth Circuit that there is a distinction between economic hardship and complete inability to find work. *Santana-Figueroa*, 644 F.2d at 1356-57."

[REDACTED] makes no claim of economic hardship stemming from an inability to find work in Mexico. The record reflects that he is 46 years old and his wife is 41 years of age. *Form I-485*. No evidence in the record conveys that any member of the [REDACTED] family has a severe illness that would make deportation extremely hard on the applicant's husband.

[REDACTED] does not state that his children will endure hardship if they joined him in Mexico. Although hardship to the applicant's children is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by [REDACTED] as a result of his concern about the well-being of his children, is a relevant consideration. With regard to a child's education in a foreign country, in *Ramirez-Durazo v. INS*, 794 F.2d

491, 498 (9th Cir.1986), the Ninth Circuit stated that “[t]he disadvantage of reduced educational opportunities for the children was also considered by the BIA and found insufficient to establish “extreme hardship.” It also stated that “[a]lthough the citizen child may share the inconvenience of readjustment and reduced educational opportunities in Mexico, this does not constitute “extreme hardship.” In *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979), the Ninth Circuit states that “[w]hile changing schools and the language of instruction will admittedly be difficult, Banks herself admitted that [REDACTED] would be able to learn the German language. The possibility of inconvenience to the citizen child is not itself sufficient to constitute extreme hardship under the statute.” Here, the AAO finds that the fact that [REDACTED] has two children who are United States citizens is insufficient to establish extreme hardship under the Act.

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 deportation.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation 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)(6)(C) 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.