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

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FILE:



Office: BALTIMORE, MD

Date: JUN 07 2007

IN RE:



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:



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, Baltimore, Maryland, denied the waiver application, and it 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 is 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 is the son of a naturalized U.S. citizen father. He 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 reside in the United States with his father.

The district director concluded that the applicant had 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) accordingly. *Decision of the District Director*, dated June 7, 2006.

The record reflects that, on January 3, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Worker (Form I-140) filed on his behalf. On August 8, 2001, the applicant's Form I-485 was denied because of abandonment. On June 20, 2002, the applicant filed a second Form I-485 based on the approved Form I-140. On December 16, 2004, the applicant appeared at Citizenship and Immigration Services' (CIS) Baltimore, Maryland District Office. The applicant testified that he had originally entered the United States without inspection in May 1995 and had remained in the United States until he departed the United States in July 2000 due to a family emergency in Mexico. The applicant testified that he reentered the United States without inspection in February 2002, where he has since resided. On August 8, 2005, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his father.

On appeal, counsel contends that the district director erred in denying the applicant's application for adjustment of status based on section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), because he was eligible for relief pursuant to the Legal Immigrant Family Equity (LIFE) Act. Alternatively, counsel contends that the district director acted arbitrarily and abused his discretion in denying the applicant's waiver application. *See Counsel's Brief*, dated August 4, 2006. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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.

Section 212(a)(9) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admission to being unlawfully present in the United States from April 1, 1997, the date on which unlawful presence provisions under the Act were enacted, until July 2000, the date on which he traveled to Mexico. Counsel does not contest the district director's determination of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Counsel contends that the district director erred in denying the applicant's application for adjustment of status pursuant to section 212(a)(9)(C)(i)(I) of the Act, as an alien who has illegally entered the United States after having been removed, because the applicant is eligible for adjustment of status pursuant to section 245(i) of the Act, 8 U.S.C. 1255(i), under the LIFE Act. Counsel contends that the applicant's case falls under the purview of *Padilla-Caldera v. Gonzalez*, 426 F.3d 1294 (10<sup>th</sup> Cir. 2005), in which the applicant was permitted to apply for permission to reapply for admission prior to the ten year statutory inadmissibility of section 212(a)(9)(C)(i)(I) of the Act because he was eligible for adjustment of status pursuant to section 245(i) of the Act. However, this case does not arise within the jurisdiction of the Tenth Circuit Court of Appeals (Tenth Circuit) and, therefore, *Padilla-Caldera* is not controlling. Moreover, the district director did not deny the applicant's application for adjustment of status or his waiver application pursuant to section 212(a)(9)(C)(i) of the Act. The district director found the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(ii) of the Act and denied the applicant's waiver application because he failed to prove that a qualified relative would suffer extreme hardship.

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 on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon removal is not considered in section 212(a)(9)(B)(v) waiver proceedings.

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 alien 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 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 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).

Since the applicant's father is a U.S. citizen and is not required to reside outside the United States as a result of the denial of the applicant's waiver request, extreme hardship must be established whether he resides in the United States or Mexico.

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).

The applicant's father, [REDACTED] (Mr. [REDACTED]), is a native of Mexico who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 2003. The record reflects that the applicant is in his 40's and Mr. [REDACTED] is in his 70's.

On appeal, counsel asserts that the applicant is eligible for relief as the son of a U.S. citizen father who is in his 70's. The record only contains a copy of Mr. [REDACTED] naturalization certificate. The record does not contain an affidavit from the applicant or Mr. [REDACTED] describing the hardships Mr. [REDACTED] would suffer upon denial of the applicant's waiver request. There is no evidence in the record that Mr. [REDACTED] has any health concerns. There is no evidence in the record that Mr. [REDACTED] is financially dependent upon the applicant. Without supporting documentary evidence, the assertions of counsel are not sufficient to meet the applicant's burden of proof in these proceedings. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 3042 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 2820 (BIA 1980). The AAO is, therefore, unable to find that Mr. [REDACTED] would experience hardship should he choose to reside in the United States or join the applicant in Mexico.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen father as required under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1186(a)(9)(B)(v). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.