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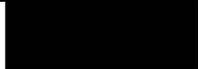
U.S. Citizenship
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FILE:



Office: CIUDAD JUAREZ, MEXICO

Date: **APR 24 2008**

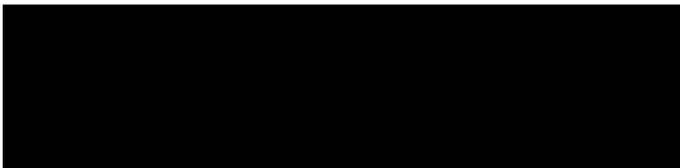
IN RE:

Applicant:



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), and section 212(i) of the Act, 8 U.S.C. § 1182(i).

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 waiver application was denied by the Officer-in-Charge, Ciudad Juarez, Mexico. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 under 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated November 18, 2005.*

The AAO will first address the finding of inadmissibility of unlawful presence.

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).

The record reflects that the applicant entered the United States without inspection in January 2000, living illegally in the country from that time to January 23, 2004, when she voluntarily departed from the country. The record shows that the applicant's Petition for Alien Fiance was approved on November 17, 2004. For

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.

purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence in January 2000. From January 2000 to November 17, 2004, the applicant accrued four years of unlawful presence, and when she voluntarily departed from the country in 2004, she triggered the ten-year-bar. Consequently, the finding of inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will first address the finding of inadmissibility for fraud or willful misrepresentation.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant gained admission into the United States by presenting to an immigration inspector a border crossing card that did not belong to her. The applicant's willful misrepresentation of a material fact, her identity, enabled her to gain admission into the United States. As a result, she is inadmissible under section 212(a)(6)(C) of the Act.

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

A waiver under section 212(a)(9)(B) of the Act for unlawful presence 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 under section 212(i) of the Act for fraud or willful misrepresentation provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) or section 212(i) is the same; it 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 these waivers and 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-Moralez*, 21 I&N Dec. 296 (BIA 1996).

The record contains declarations, letters, a notice of entry of judgment, a marriage certificate, and other documents.

The applicant's husband submitted a declaration on appeal in which he explains why he should have been granted additional time to submit evidence in response to the Officer-in-Charge's request for evidence, which is dated July 29, 2005. The applicant's husband states that with the additional time he would have obtained current letters from two doctors regarding his U.S. citizen children's medical problems, letters from his employer and relatives, and proof of medical insurance and travel costs to Mexico. The applicant states that the U.S. Consulate's error in addressing the request for evidence to the wrong person prejudiced his due process rights.

The declaration by the applicant's sister-in-law is about the request for evidence.

The AAO finds that, with regard to the declarations concerning the request for evidence, although the applicant did not have the full 30 days in which to respond to the request for evidence, the applicant on appeal had an opportunity to furnish additional evidence and/or a brief in support of the I-601 waiver. Other than the declarations from the applicant's husband and sister-in-law, no additional evidence was submitted on appeal. It is noted that a brief was not submitted on appeal. Thus, the AAO considers the record, as constituted, as complete.

The record contains a letter dated August 23, 2005 in which the applicant's husband conveys that he and the applicant have two boys. He indicates that his son, [REDACTED] did not pass a hearing test given at the time of his birth; and that [REDACTED] did not re-test within six months, as suggested by the specialist, because his wife was in Mexico. The applicant's husband states that [REDACTED] who is two years old, has shown signs of hearing loss: he does not respond when his name is called, and hand gestures get his attention. He states that his son has not received proper treatment in his hometown because it does not have an audiologist specialist, and that his wife may find an audiologist specialist in the nearest city. He states that his hometown does not have special education classes, proper medical attention, or special training and that they cannot afford to send their son to a specialized private school. The applicant's husband indicates that his son, [REDACTED], lived in the United States for the first four years of his life, and has had difficulties adjusting to life in Mexico. He states that [REDACTED] has asthma and that his health has deteriorated on account of burning tires, trash, and brush and gasoline fumes. He states that at night [REDACTED] coughs because their house is not warm and that his coughing is usually followed by an asthma attack, which has led to bronchitis. The applicant's husband indicates that [REDACTED] has frequented doctor's offices due to respiratory problems and that the quality of treatment in Mexico is not the same as in the United States. He states that in Mexico [REDACTED] does not have the anti-allergen products that he had access to in the United States, so when he is outside, he wears a mouth mask to prevent inhalation of the air pollutants. He states that [REDACTED] started school in Mexico and is having difficulties adjusting to teaching methods. He states that his sons should receive a better education than what is offered in Mexico, and that English should be their first language. He states that if the waiver were denied, he may be forced to return to Mexico, giving up his job of many years of which he would not find a comparable income in Mexico. He indicates that his sons should not be separated from their mother.

The letter by M.S., CCC-A, Clinical Audiology, states the following:

History: Failed newborn hearing screening, rule out hearing loss.

Audiologic Evaluation: Auditory brainstem evoked response audiometry revealed robust and replicable Wave V responses in both ears down to intensity levels consistent with normal hearing.

Summary: Normal hearing neonate.

It is recommended that [REDACTED] be retested in six months to be certain we are not missing something.

The record contains two untranslated letters, one by [REDACTED] and the other by the applicant's husband. Because the applicant failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The medical records from St. Johns Regional Medical Center show that [REDACTED] was seen for asthma and asthmatic bronchitis in May 2002 and was prescribed medication. On September 18, 2002, [REDACTED] was seen at the same medical center and the medical records indicate that he takes Albuterol (5 mg) and amoxicillion and has acute asthma bronchitis.

"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, 565 (BIA 1999). 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 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* 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's husband indicates that his sons should not be separated from their mother. With regard to family separation, 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).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The record reflects that the applicant's husband is very concerned about separation from his wife and the impact of the separation on their children. 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 the applicant's husband, 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 required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by the applicant's husband, is unusual or beyond that which is normally to be expected upon deportation or exclusion. See *Hassan*, *Shooshtary*, *Perez*, and *Sullivan*, *supra*.

It is noted that the applicant makes no claim of economic hardship to her husband if he were to remain in the United States without her.

The documentation in the record is insufficient to establish that the applicant's husband would experience extreme hardship if he were to join her to live in Mexico.

The conditions in the country where the applicant's husband would live if he joined 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).

The applicant's husband states that medical treatment is better in the United States than in Mexico. The fact that medical facilities in a foreign country are not as good as in the United States is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130, 134 (BIA 1984).

The applicant's husband indicates that it would be difficult for him to find, in Mexico, employment comparable to his present position in the United States. Difficulties in obtaining employment in a foreign country are not sufficient to establish extreme hardship. See, e.g., *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (difficulty in finding employment and inability to find employment in one trade or profession, although a relevant hardship factor, is not extreme hardship); and *Santana-Figueroa v. INS*, 644 F.2d 1354, 1356 (9th Cir. 1981) ("difficulty in finding employment or inability to find employment in one's trade or profession is mere detriment").

The applicant's husband is concerned about raising his sons in Mexico. As previously stated, although hardship to the applicant's children is not a consideration under sections 212(a)(9)(B)(v) and 212(i) of the Act, the hardship endured by the applicant's husband, as a result of his concern about his children, is a relevant consideration.

The applicant's husband claims that [REDACTED] is having difficulty adjusting to life in Mexico and that a child's education in Mexico is inferior to that which is offered in the United States.. In *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986), the court stated that a U.S. citizen child's inconvenience of readjustment does not constitute "extreme hardship." *Id.* at 499. It also 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." *Id.* at 498.

With regard to the health problems of [REDACTED] the applicant's eight-year-old son, the medical records convey that he has had respiratory problems; but no documentation has been submitted to show that his health problems have worsened since living in Mexico. No documentation shows that the country lacks anti-allergen products, as claimed by the applicant's husband. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The applicant's husband claims that his youngest son has hearing problems. Although the letter by Ms. [REDACTED] indicates that [REDACTED] had initially failed the newborn hearing screening, the letter conveys that the auditory brainstem of [REDACTED] was retested and found to be within normal hearing range. Ms. [REDACTED] recommends that retesting occur again in six months to be certain they are not missing something.

Furthermore, although the applicant's husband asserts that [REDACTED] has exhibited signs of hearing loss, the record does not contain a diagnosis from an audiologist to substantiate the claim of the applicant's husband.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and 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 he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) 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.