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FILE:

Office: MEXICO CITY, MEXICO
CDJ 2004 740 481 (CIUDAD JUAREZ, MEXICO)

Date: **AUG 28 2008**

IN RE:



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

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 District Director, Mexico City, Mexico and the applicant appealed the decision to the Administrative Appeals Office (AAO). On January 25, 2008 the AAO rejected the appeal as having been untimely filed and returned the waiver application to the Mexico City District Office to review as a motion to reconsider. Subsequent to the decision, the AAO received documentation proving that the appeal was timely filed. As such, the AAO will sua sponte reopen the case. The appeal will be dismissed.

The applicant 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 and seeking readmission within ten years of her last departure from the United States. The applicant is married to a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their three U.S. citizen children.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated July 19, 2007.

On appeal, the applicant asserts that she has demonstrated that her qualifying relative would suffer extreme hardship if she were removed from the United States. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; a police clearance letter for the applicant; letters from family members and friends; an employment letter for the applicant's spouse; earnings statements for the applicant's spouse; tax statements for the applicant and her spouse; mortgage statements; property tax statements; electricity, water and cable television bills; bank statements; student enrollment letters for the applicant's children; and a student attendance report for the applicant's children. The entire record was reviewed and considered in rendering 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.

In the present application, the record indicates that the applicant entered the United States without inspection in August 1998. *Consular Memorandum*, dated December 14, 2005. On October 30, 1992 a Form I-130, Immigrant Petition for Relative, Fiance(e), or Orphan, filed by the applicant's father, was approved on her behalf. On January 19, 1999 the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status based on this approved Form I-130. On April 19, 2003 the legacy Immigration and Naturalization Service terminated the Form I-485 based on the applicant's withdrawal of the application. *Interim District Director for Services' decision*, dated April 19, 2003. On August 11, 2004, a second Form I-130 benefiting the applicant was approved, based on her marriage to a United States citizen. In December 2005, the applicant voluntarily departed the United States. *Consular Memorandum*, dated December 14, 2005.

The applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status on January 19, 1999. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a 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 Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002. Therefore, the applicant accrued unlawful presence from August 1998, the date she entered the United States without inspection, until January 19, 1999, the date she filed the Form I-485 and from April 19, 2003, the date the Form I-485 was terminated until December 2005, the date she departed the United States. In applying for an immigrant visa outside the United States, the applicant is seeking admission within ten years of her December 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or her children experience upon removal is not directly relevant to the determination of whether the applicant is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. Hardship to the applicant's children will be considered to the extent that it affects the applicant's spouse. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or

United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Mexico or the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. Both of his parents were born in Mexico. *Id.* The applicant's spouse states that, with the exception of his grandmother who lives in Mexico, all of his family lives in Houston, Texas. *Statement from the applicant's spouse*, dated June 26, 2007. Counsel asserts that the applicant's spouse cannot follow the applicant to Mexico, as he would not be able to find a job paying enough to support his family in Mexico or to provide the care needed by his mother. *Attorney's briefs*, dated June 20 and July 27, 2007. The AAO notes that there is nothing in the record to demonstrate the language abilities of the applicant's spouse or how they would affect his job possibilities, nor does the record include any type of publication documenting the economy and employment situation in Mexico. Neither does it offer evidence that the mother of the applicant's spouse requires his care. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). The AAO further notes that there is nothing in the record to show that the applicant is unable to obtain employment and contribute to her own or her family's financial well-being from a place other than the United States. Counsel states that the oldest child of the applicant has a history of repeated urinary tract infections and urinary reflux. *Attorney's brief*, dated July 27, 2007. Due to the child's chronic condition, he has to be closely supervised so that his kidneys are not damaged by the repeated infections. *Id.* According to counsel, the child will not be covered by health insurance in Mexico. *Id.* The AAO notes that a United States citizen child is not a qualifying relative for purposes of this case and any hardship experienced by the child will be analyzed only to the extent that it impacts the qualifying relative. While the AAO acknowledges the assertions made by counsel, it notes that the record fails to include any documentary evidence such as medical reports from the child's doctor(s) or statements from the child's health insurance company to support such assertions. *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). As such, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse states that he currently pays for the applicant's expenses in Mexico, all of the expenses in Houston, Texas, plus the costs of child care for his children. *Statement from the applicant's spouse*, dated June 26, 2007. While numerous expenses in the United States are documented (*see mortgage statements; bank statements; and numerous bills*), the record does not offer proof that the applicant's spouse is sending the applicant money, nor does the record show how much the applicant's spouse

is spending on child care. The AAO notes that the applicant's spouse also indicates that his sister watches his two older children and that letters from the sister of the applicant's spouse also state that she cares for his children. *Statement from the applicant's spouse*, dated April 2, 2007; Letters from [REDACTED] dated March 26, 2007 and June 20, 2007. The applicant's spouse states that he has been suffering from depression but does not have the money to seek treatment from a physician. *Statement from the applicant's spouse*, dated April 2, 2007. While the AAO notes that only a licensed health care professional can make a clinical diagnosis of "depression," it acknowledges the statements of the applicant's spouse that he cannot afford treatment. The AAO also takes into account the statement from the employer of the applicant's spouse, observing that the applicant's spouse's career has suffered since his separation from the applicant and he may possibly lose everything he has built in his career. *Statement from [REDACTED] Operations Manager, Allied Fire Protection*, dated March 28, 2007. The applicant's spouse states that he misses the applicant and that he is having a very hard time raising his two older children without her. He further states that the children are growing up without either of their parents because he works such long hours and that this adds to his depression. *Statement from the applicant's spouse*, dated April 2, 2007.

While the AAO acknowledges the emotions expressed by the applicant's spouse, 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, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *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 hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of his continued separation from the applicant. However, the record does not distinguish his situation, if he remains in the United States, from that of other individuals separated as a result of deportation or exclusion. Accordingly, it does not establish that the hardship experienced by the applicant's spouse rises to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to remain in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States. 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) of the Act, the burden of proving eligibility remains entirely 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.