

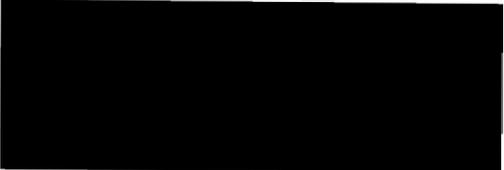
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 2008**

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 Director, California Service Center, 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 Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States. The applicant is married to a lawful permanent resident, [REDACTED]. He has a U.S. citizen daughter. 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 Director denied the waiver application finding that the applicant failed to establish hardship to a qualifying relative. *Notice of Decision, dated July 17, 2006.*

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

Section 212(a)(9)(B)(i)(I) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States, and again seeks admission within 3 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).

Certain periods of presence in the United States are not considered unlawful. *See* section 212(a)(9)(B)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii). There are certain periods of time spent in the United States that are tolled and do not count towards the periods of unlawful presence. *See* section 212(a)(9)(B)(iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iv). With regard to pending adjustment of status applications, aliens with properly filed applications for adjustment of status under both sections 245(a) and 245(i) of the Act will be considered as present in the United States under a period of stay authorized. Such period will also cover renewal of a

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.

denied application in proceedings. An alien who first files an application for adjustment of status after being served with a notice to appear for removal proceedings (Form I-862), however, is not deemed to have a period of stay authorized by the Attorney General.³

The record reflects that on April 10, 1998, the applicant entered the United States in accordance with section 101(a)(15)(K) of the Act, 8 U.S.C. § 1101(a)(15)(K). On May 4, 1998, he filed an Application to Register Permanent Residence or Adjust Status (Form I-485), which was denied on March 16, 2000. The applicant remained in the United States following the denial; and began to accrue unlawful presence until December 28, 2000, at which time he filed a new Form I-485. Thus, from March 16, 2000 to December 28, 2000 the applicant accrued nine months and twelve days of unlawful presence. The applicant departed from the United States and re-entered on advance parole on October 30, 2003, triggering the three-year bar. *Notice of Decision, Form I-485, dated July 17, 2006*. Consequently, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(I).

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 and his child 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 wife. 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).

The record contains letters from the applicant’s wife, a psychological evaluation, prescriptions for the applicant’s wife, a birth certificate, an application to marry, a final judgment of dissolution of marriage, and other documents.

In the letter notarized on August 8, 2006, the applicant’s wife states the following. She has a condition, known as migraine, which causes anxiety; depression; severe, pulsating pain that worsens with physical activity; nausea; sensitivity to light; and occasional auras. Migraine attacks last 4 to 72 hours, with varying frequency. She cannot function when she has a migraine attack, and relies on her husband to care for her and her daughter, and the house. She takes medication for the migraines. If her husband were deported to Cuba,

³ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043).

she would remain in the United States; her whole life is here. She would not have freedom in Cuba and would not have access to medicine and doctors. Because anything triggers a migraine, depression, and anxiety attacks, her health and safety would be in danger there. She takes Prozac for depression, which her husband monitors. Without her husband, she would suffer extreme hardship that is beyond mere separation and financial hardship. Her life depends on her husband's presence.

The content of the letter that is not notarized is similar to the aforementioned letter and includes these statements. Her daughter would suffer extreme hardship if her husband were unable to adjust status because she would not get the chance to know him and to have a father figure; and her husband would miss his daughter's childhood. The education offered in the United States is more advanced than in Cuba; as a U.S. citizen it would be unfair to deny her daughter an excellent education.

"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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's wife must be established in the event that she joins the applicant; and in the alternative, that she 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.

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, the fact that the applicant has a U.S. citizen child 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 wife would endure extreme hardship if she remained in the United States without her husband.

There is no evidence in the record such as the earnings and monthly household expenses of [REDACTED] to suggest that she would be unable to financially support herself and her daughter if they remained in the United States without 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).

Ms. Pellicer asserts that she requires the emotional support and care provided by her husband. She indicates that she has migraine attacks and suffers from depression and anxiety, and in support of these assertions the applicant furnishes a psychological evaluation (dated July 20, 2005) and prescriptions.

With regard to the psychological evaluation, although the input of any mental health professional is respected and valuable, the AAO notes that the submitted psychological evaluation is based on a single interview between [REDACTED] and [REDACTED] who is a licensed clinical social worker (L.C.S.W.). The record fails to reflect an ongoing relationship between a mental health professional and [REDACTED] or any history of treatment for the depression and anxiety suffered by [REDACTED]. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering [REDACTED] findings speculative and diminishing the evaluation's value to a determination of extreme hardship. It is noted that although [REDACTED] recommended that [REDACTED] have individual psychotherapy with a licensed mental health professional and an evaluation by a certified psychiatrist, no evidence in the record establishes that she followed these recommendations.

Besides the prescriptions for medication and the psychological evaluation, the record contains no medical records pertaining to [REDACTED]. Although the submitted evidence is relevant, the AAO finds that it is insufficient to establish that [REDACTED] has a serious health problem that requires her husband's care. 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 record reflects that [REDACTED] is very concerned about separation from her husband and the separation of her daughter from her father. 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 all of the evidence in the record. However, the AAO finds that [REDACTED]'s situation, if she 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 as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship to be endured by [REDACTED] while separated from her husband of two 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 [REDACTED] would endure extreme hardship if she joined her husband in Cuba.

The conditions in Cuba, the country where [REDACTED] and her child would live if she joins her husband, 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).

[REDACTED] makes no claim of economic hardship stemming from an inability to find work in Cuba. However, she does assert that she would not have access to medicine and doctors in Cuba. The AAO finds her assertion unpersuasive. It is not supported by any documentary evidence that establishes that she has a significant condition of health and that suitable medical care is not available in Cuba. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*. Furthermore, "second class" medical facilities in foreign countries are not per se extreme hardship. *Matter of Correa, supra*.

Although hardship to the applicant's child is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by [REDACTED], as a result of her concern about the welfare of her six-year old child, is a relevant consideration. [REDACTED] has expressed concern about education in Cuba, which she indicates is inferior to an education in the United States. 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, [REDACTED] 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." Applying the reasoning in *Ramirez-Durazo* and *Banks*, the

AAO finds that reduced educational opportunities in Cuba would be 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 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.

The AAO notes that the director denied the adjustment of status application (Form I-485) prior to the adjudication of the waiver application's appeal. As the AAO is affirming the director's decision on the waiver application, the adjustment of status application was properly denied.

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.