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U.S. Citizenship
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[REDACTED]

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FILE:

[REDACTED]

(CDJ2004 751 528)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: FEB 05 2009

IN RE:

[REDACTED]

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter 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 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 naturalized United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their United States citizen child.

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 June 5, 2006.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of fact and law in finding that the applicant failed to meet the burden of establishing extreme hardship to her qualifying relative as necessary for a waiver under 212(i) of the Act. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to a statement from [REDACTED], dated September 13, 2006; a statement from [REDACTED] Municipal Psychologist, Jocotepec, Jalisco, Mexico, dated September 21, 2005; Medical records, [REDACTED] Pediatric Emergency Medical Visit, ISSSTE, dated September 12, 2005; a statement from the applicant; tax statements for the applicant and her spouse; a W-2 Form for the applicant's spouse; employment letters for the applicant's spouse; and a statement from the applicant's spouse. 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 January 2003 and departed the United States, returning to Mexico in September 2005. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated September 9, 2005. The applicant, therefore, accrued unlawful presence from January 2003 until she departed the United States in September 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of her September 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(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 child experience upon removal is not directly relevant to the determination as to whether she 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. 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 whether he resides in Mexico or the United States, as he is not required to reside outside 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 travels with the applicant to Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Mexico. *Form G-325A, Biographic Information sheet, for the applicant.* Although the record does not specify how long the applicant's spouse has resided in the United States, the AAO notes that the applicant's spouse naturalized on July 7, 2003. *Naturalization certificate.* The parents and siblings of the applicant's spouse are United States citizens and lawful permanent residents. *Naturalization certificates and lawful permanent residency cards.* The record does not address what family members the applicant's spouse may have in Mexico. Counsel asserts that the applicant's spouse has established his own construction business and has built up a considerable commercial reputation. *Attorney's brief; See also employment letters for the applicant's spouse, dated July 14, 2006 and August 15, 2006.* Counsel notes that the applicant's spouse would have to give up his business and reputation if he moved to Mexico. *Id.* While the AAO acknowledges counsel's assertions, it notes that the record fails to include published country conditions reports documenting the economic situation and employment opportunities available in Mexico. The record does not document that the applicant's spouse would be unable to secure employment in the construction industry or in any other field in Mexico. The applicant's spouse states that he cannot live in Mexico because the wages paid are not sufficient to discharge his debt that he has accumulated in travel, legal fees and in being a co-signer on his parent's home. *Statement from [REDACTED] dated September 13, 2006.* While the record contains an airplane ticket confirmation receipt for the applicant's trip to Mexico showing a total charge of \$577.36, the AAO observes that the record does not include documentation regarding the additional debts acquired by the applicant's spouse. Moreover, as previously noted, the record does not include country conditions materials to establish wage levels in Mexico. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)).* 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 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 parents and siblings of the applicant's spouse reside in the United States. *Attorney's brief; Naturalization certificates and lawful permanent residency cards.* According to [REDACTED] the applicant's spouse is clinically depressed. *Statement from [REDACTED] dated September 13, 2006.* He has lost interest in things he used to enjoy and as of the applicant's departure, his ability to concentrate has been deeply compromised which has subsequently affected his business. *Id.* While the AAO acknowledges these statements, it finds the evaluation of diminished value to a finding of extreme hardship as the evaluator has failed to indicate the basis on which he reached his diagnosis; e.g. whether he administered any diagnostic tests to the applicant's spouse, or the period of time over which he conducted his analysis of the applicant's spouse. Although the input of any mental health professional is respected and valuable, the record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the applicant's spouse.

The applicant's spouse states that he spends up to \$1,000.00 per month on long-distance telephone calls to the applicant every night and he worries about the welfare of his child and his wife because

the town in which they are living is not secure from crime. *Id.* The AAO notes, however, that the record does not include documentation regarding the telephone bills, nor does it include published country conditions reports showing the crime levels in Mexico. As previously stated, going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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 does document that the applicant's United States citizen child who is currently residing in Mexico with the applicant has developed behavior problems as well as physical problems as a result of her separation from her father. *Statement from* [REDACTED]; *Municipal Psychologist, Jocotepec, Jalisco, Mexico*, dated September 21, 2005; *Medical records, [REDACTED] Pediatric Emergency Medical Visit, ISSSTE*, dated September 12, 2005; *Statement from* [REDACTED] *LCSW*, dated September 13, 2006. While the AAO notes that the applicant's child is a United States citizen and is not required to live in Mexico, it also acknowledges the fact that if she were to live in the United States with her father, she would subsequently be separated from the applicant. Thus, regardless of where she lives, the applicant's child will be separated from one of her parents and due to her young age, she would not be able to independently visit the other parent. *See United States birth certificate for the applicant's child.* While the applicant's child is not a qualifying relative for purposes of this case, the AAO acknowledges the impact that the child's condition has had upon the applicant's spouse, the only qualifying relative in this case. As documented by the licensed clinical social worker, the applicant's spouse feels as though his child is dying as a result of his poor judgment. *Statement from* [REDACTED], dated September 13, 2006. In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. When looking at the aforementioned factors, specifically the applicant's numerous family ties to the United States and the health conditions of the applicant's child as they affect the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to continue to reside in the United States.

However, as the record has failed to establish the existence of extreme hardship to the applicant's spouse if he joins the applicant in Mexico, the applicant is not eligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. 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.