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U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: MEXICO CITY, MEXICO

Date:

FEB 19 2009

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.

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The Administrative Appeals Office (AAO) rejected a subsequent appeal as having been untimely filed but returned the matter to the district director for consideration as a motion to reopen and the issuance of a new decision. The acting district director issued a new decision, again denying the application. The applicant has now appealed that decision to the AAO. **The appeal will be dismissed.**

The applicant is a native and citizen of Colombia 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 the wife of a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The acting district director found that the record failed to provide sufficient evidence to establish that the applicant's spouse would suffer extreme hardship or that she warranted a favorable exercise of discretion. He denied the application accordingly. *Decision of the Acting District Director*, dated July 7, 2008.

On appeal, counsel contends that U.S. Citizenship and Immigration Services (USCIS) has failed to consider all of the relevant factors in this matter. He asserts that the applicant has presented credible affidavits, and other probative and corroborative evidence to establish extreme hardship to her spouse. *Form I-290B*, received July 30, 2008; *Counsel's brief*, undated.

In a letter dated February 4, 2008, the applicant's spouse requests oral argument, contending that oral argument is an essential component of the applicant's case. While the AAO acknowledges this request, it notes that regulation requires the requesting party to explain in writing why an oral argument is necessary. Further, USCIS, which has the sole authority to grant or deny a request for oral argument, will grant such argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the applicant's spouse states that the applicant's case involves unusually complex or novel questions of law or fact that cannot be adequately expressed in writing, but fails to identify these questions or provide any specific reasons why oral argument should be granted. Absent a basis for the assertions made by the applicant's spouse, the AAO finds the written record of proceedings to fully represent the facts and issues in this case. Accordingly, it denies the request for oral argument and turns to a consideration of the applicant's waiver request.

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

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.

The record indicates that the applicant was admitted to the United States on March 10, 2001 as the K-1 beneficiary of a Form I-129F fiancé(e) petition filed by an individual other than her current spouse. The applicant did not marry this individual. When the applicant's K-1 nonimmigrant visa expired on June 9, 2001, she remained in the United States, departing the United States on March 9, 2006 for her immigrant visa interview in Bogota. Accordingly, the applicant accrued unlawful presence from June 9, 2001 until March 9, 2006, a period of nearly five years. In applying for an immigrant visa, the applicant is seeking admission within ten years of her 2006 departure from the United States and is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

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 to the U.S. citizen or lawful permanent resident spouse and/or parent of an applicant. Hardship that an applicant or other family members experience as a result of the applicant's inadmissibility is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it causes hardship to the applicant's spouse and/or parent. In the present case, the applicant's qualifying relative is her spouse, [REDACTED]

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)].

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 inconvenience and hardship experienced by the families of most aliens being deported.

The AAO notes that extreme hardship to [REDACTED] must be established whether he joins the applicant in Colombia or remains in the United States, as he is not required to reside outside the United States based on the denial of the applicant’s waiver request.

In support of the applicant’s claim to hardship, the record contains the following evidence: counsel’s brief on appeal, undated; statements from [REDACTED], dated March 17, 2006 and April 5, 2007; an evaluation of [REDACTED] mental status prepared by [REDACTED] a licensed professional counselor, dated April 16, 2007; a range of country conditions information on Colombia, including a travel warning for Colombia issued by the Department of State on January 18, 2006; letters from [REDACTED] business partner, dated March 15 and March 16, 2006, and April 11, 2007; an affidavit sworn by [REDACTED] sister, dated March 1, 2006; an affidavit sworn by [REDACTED] parents, dated March 14, 2006; a series of decisions issued by the Ninth Circuit Court of Appeals, the Board of Immigration Appeals (BIA) and the AAO related to the establishment of extreme hardship; and

letters from [REDACTED] and [REDACTED] center regarding the health of [REDACTED] grandmother, dated January 27, 2009 and January 20, 2009 respectively.

On appeal, counsel contends that, if [REDACTED] were to join the applicant in Colombia, he would be in grave danger as a result of the current political situation in that country; would suffer a major financial loss, including his current employment; would be subject to significant health conditions as he would be unable to obtain suitable medical care; and would experience the negative emotional impact of being separated from his family, specifically his parents who are in need of permanent care. In his affidavit, [REDACTED] states that he does not want to live in Colombia, which he states is a drug and violence-plagued country. He also indicates that he does not speak Spanish and that it would take him several years to become fluent. [REDACTED] further asserts that his job skills as a provider of low-cost loans to local governments in Virginia could not be transferred to Colombia and that the financing of capital projects in Virginia would be significantly jeopardized were he to leave the United States. [REDACTED] also states that all of his family and friends live near him in Virginia. Letters from members of [REDACTED] family indicate that his departure from the United States would have a detrimental impact on them. In their letter, [REDACTED] parents state that they live near him and, as they age, will become increasingly dependent on his help. The letters from [REDACTED] business partner indicate that his departure from the United States would have a crippling effect on their company's financing program.

The AAO also notes that the record contains recent correspondence from [REDACTED] regarding his grandmother's serious health concerns and that [REDACTED] statements regarding her medical condition are supported by a letter from [REDACTED] of [REDACTED] Medical Center. [REDACTED] states that he and his parents are his grandmother's sole caregivers as she cannot afford a nurse and refuses to enter a convalescent center. He contends his relocation to Colombia would result in significant hardship to his grandmother and his parents.

Although the AAO is sympathetic to [REDACTED]'s concerns regarding his grandmother's health, it notes that any hardships she or other family members experience as a result of his relocation to Colombia are not directly relevant to the applicant's eligibility for a waiver. As previously discussed, hardship to [REDACTED]'s family members will be considered only to the extent that it affects [REDACTED] the qualifying relative in this proceeding. As the record does not address how the hardships experienced by [REDACTED] grandmother will affect him should he move to Colombia, this issue has not been considered in determining the applicant's claim to extreme hardship.

The AAO has reviewed the range of hardships claimed by counsel and [REDACTED]. While it does not find all to be supported by the record, it, nevertheless, concludes that the applicant has submitted sufficient evidence to establish that her spouse would experience extreme hardship if he joined her in Colombia. In reaching its conclusion, the AAO acknowledges the cultural and employment challenges that would be faced by [REDACTED] as a result of his inability to speak Spanish in a Spanish-speaking country and specifically takes note of the country conditions information documenting the security situation in Colombia. It observes that the Department of State, as of February 13, 2009, continues to update its travel warning for U.S. citizens in Colombia, finding the risk of violence to exist in all parts of the country.

The second part of the hardship analysis requires the applicant to prove that [REDACTED] would suffer extreme hardship if he remains in the United States without her. In his April 5, 2007 statement, [REDACTED] contends that the separation of a husband and wife for ten years should be considered extreme hardship. He states that since the applicant's waiver application was denied, he has been extremely distraught and depressed, has lost his appetite and that his work has suffered. In their letters, [REDACTED] parents and sister state that his separation from the applicant would be devastating for him. [REDACTED] sister asserts that she believes that he would become depressed if he were to remain separated from the applicant. She states that, as a licensed professional counselor, she has seen similar circumstances result in depression and grief issues.

To document the emotional impact of separation on [REDACTED], the applicant has submitted an evaluation prepared by [REDACTED], a licensed professional counselor. [REDACTED] finds [REDACTED] to be obviously stressed and struggling with depression as a result of his separation from the applicant. She indicates that prior to her interview with [REDACTED] he completed a depression symptom checklist and a survey of stress symptoms, which found him to be experiencing 15 of 39 depression symptoms and a high level of stress. She concludes that a prolonged separation from the applicant makes it "tangible to believe that his symptoms of depression and anxiety will only heighten to more extreme levels." [REDACTED] reports that she has referred [REDACTED] to a medical doctor for a physical examination and evaluation for depression and anxiety, and a psychologist for a mental status, psychological evaluation.

While the input of any mental health professional is respected and valuable, the AAO does not find the submitted evaluation to provide a basis for concluding that [REDACTED] would experience extreme emotional hardship if he were to be separated from the applicant during the ten-year period she will be inadmissible to the United States. [REDACTED] reports that [REDACTED] is anxious and depressed, but fails to offer a clinical diagnosis specific to [REDACTED] mental/emotional state, thereby diminishing the evaluation's value to a determination of extreme hardship. Absent a specific diagnosis, the AAO is unable to determine whether the anxiety and depression felt by [REDACTED] may be distinguished from that experienced by other individuals separated from their spouses as a result of inadmissibility. Moreover, the AAO notes that [REDACTED] conclusions appear to be based on a single interview/testing of [REDACTED] rather than the result of an established counseling relationship, thus further reducing the evidentiary weight of her evaluation. The AAO also notes that, although [REDACTED] indicates that she has referred [REDACTED] for additional medical and psychological evaluation, the record fails to offer any evidence that he has sought such assistance.

When reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, the record does not support a finding that [REDACTED] would suffer extreme hardship if the applicant's waiver application were denied and he remained in the United States. Rather, the record indicates that he would experience the distress and difficulties normally associated with separation from a spouse. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection, and emotional and social interdependence. While separation nearly always results in considerable hardship to the individuals and families involved, the Congress, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," did not intend that a waiver be granted in every case where a qualifying relationship and, thus, familial and emotional bonds exist. The

point made in this and prior AAO decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(a)(9)(B)(v) of the Act, be above and beyond the normal, expected hardship involved in such cases.

As the applicant has failed to demonstrate that [REDACTED] would suffer extreme hardship if he remains in the United States, she has failed to establish eligibility for a waiver under section 212(a)(9)(B)(v) of the Act. The applicant is, therefore, statutorily ineligible for relief and the AAO finds no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings relating to an 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.