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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ)
CDJ2004 683 072

Date: JUL 01 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, 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 (Ciudad Juarez), 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 U.S. citizen and has two U.S. citizen children. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The district director found that based on the evidence in the record, the applicant failed to establish that his qualifying relative would suffer extreme hardship as a result of his continued inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated May 22, 2006.

On appeal, counsel asserts that the applicant did establish that her spouse would suffer extreme hardship as a result of her continued inadmissibility and that the district director failed to take into account the totality of the circumstances in rendering the decision. *Form I-290B*, dated June 22, 2006.

Counsel also states that section 212(a)(9)(B) of the Act denies the applicant and his spouse the right to marry in violation of the U.S. Constitution. *Counsel's Brief*, dated September 18, 2006. The AAO notes that nothing in the Act precludes a male and a female from marrying in the United States, the applicant and his spouse were able to legally marry in the United States, and remain married. Furthermore, constitutional issues are not within the appellate jurisdiction of the AAO; therefore, the right to marry as a fundamental right under the U.S. Constitution will not be addressed in this decision.

The record indicates that the applicant entered the United States without inspection in February 1996. The applicant remained in the United States until July 4, 2005. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted until July 4, 2005, the date she departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of her July 4, 2005 departure from the United States. Therefore, the applicant is 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.

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.

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 first dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. Hardship the applicant or her children experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse.

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 applicant 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.

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). Once 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).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Mexico and in the event that he resides in 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.

The record of hardship in the applicant's case includes counsel's brief, a statement from the applicant's spouse, and country condition reports for Mexico.

Counsel asserts that a family being uprooted and separated, as the applicant's family has been, on its face, is extreme hardship. *Counsel's Brief*, dated September 18, 2006.

The AAO notes that the Ninth Circuit Court of Appeals has stated, "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). The AAO recognizes the importance of giving predominant weight to the factor of family separation when analyzing extreme hardship, but several factors in the applicant's case, discussed below, preclude a finding that the applicant's family's situation rises to the level of extreme hardship.

The applicant's spouse states that he has been married to the applicant for six years and they have two children together, ages 2 and 5 years old. *Spouse's Statement*, dated December 21, 2005. He states that his two children moved to Mexico to be with the applicant because he needed to work to support the family. He states that he is now paying for two households, which is causing him financial hardship. The applicant's spouse also states that he is planning on enrolling his five year old daughter in private school in Mexico, because the public schools are so bad and that he has been traveling to Mexico to see his family as much as he can. The applicant's spouse states that the stress and financial hardship this situation is causing him is also hurting him emotionally. He states that he cannot relocate to Mexico as he has a lot of financial responsibilities and his current job is his only source of employment. He states that he would not be able to find employment in Mexico that would produce the amount of income he would need to support his family. *Id.*

The record also includes a report on country conditions in Mexico from the Center for Security Policy, entitled, "Mexico's Glass House." The report describes how the Mexican constitution treats foreign residents, workers and naturalized citizens. In summary, the report states that the Mexican constitution bans immigrants from public political discourse, denies them certain property rights, equal employment rights, and rights of due process, as well as other benefits that natural born Mexican citizens would be entitled to. The AAO notes that the record does not demonstrate that this

report is relevant to the applicant's spouse's situation. The applicant and her spouse were born in Mexico, the record does not indicate that the applicant's spouse has renounced his Mexican citizenship and thus would be treated as a foreign visitor or an immigrant upon relocation to Mexico.

Furthermore, the record does not include any financial records to support the applicant's spouse's claims, nor does it support a finding that separation alone is extreme hardship for the applicant's spouse. The applicant's spouse is free to relocate to Mexico to be with the applicant and the current record does not show that this relocation would cause extreme hardship. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

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 recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he 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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse 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.