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U.S. Citizenship
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Services

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FILE:
CDJ 2004 473 276

Office: MEXICO CITY (CIUDAD JUAREZ) Date:

JUL 01 2009

IN RE: Applicant:



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:

SELF-REPRESENTED

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 that reads "John F. Grissom".

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, 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 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.

The applicant sought 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 concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 7, 2006. The applicant submitted a timely appeal.

On appeal, the applicant's spouse, [REDACTED], states that she has a gastric ulcer and allergies and that she can no longer afford health insurance. She states that she takes medication, an acid reducer pill, every day for her gastric ulcer. Since her husband left the country, she states that she has not gone to the doctor's office, and that before he left she would go to the doctor's office two to three times a month. She states that she needs to seek psychotherapy for the anxiety she feels when her daughter cries herself to sleep and wakes up crying for her father. [REDACTED] states that she works long hours and is depressed and unable to function. Since her husband left, [REDACTED] states that she has accumulated \$7,000 in debt, owing \$3,800 on a credit card, \$2,000 to her father, and \$1,000 to a friend. She states that her monthly financial obligations are \$191 for her car and \$91 for its insurance, \$500 for rent, \$120 for gasoline, \$200 for childcare, \$200 for food, and \$200-300 for her husband in Mexico, totaling \$1,320. [REDACTED] conveys that she earns \$1,400-\$1,900, depending on overtime; she states she works from 6:30 A.M. until 4:00 P.M. and that she tries to work overtime every day to make ends meet, staying until 6:00 P.M. She indicates that she is burning out working long hours with no relief in sight. She states that without her husband's income if she earns \$1,400 a month and her basic expenses are \$1,520 she will incur debt. She points out that medication, doctor's visits, clothing, and other incidentals are not included in her expenses. Ms. [REDACTED] states that her mother takes care of her child 12 hours a day and that all of her immediate family members are in the United States. She states that her husband had put her daughter to sleep and that it pains her to see her daughter suffering. [REDACTED] conveys that she cannot afford to visit her husband. She states that her husband "tells me he tries to get work in Mexico but it is impossible." [REDACTED] states that she cannot go to Mexico. She states that she earns low wages because she lacks an education and states that it would pain her if her daughter struggles at school the way she had. She does not want to take her daughter to Mexico because when her daughter returns to the United States and does not speak English she will not be able to obtain employment

The AAO will first address the finding of inadmissibility under section 212(a)(9) of the Act.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) 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, or

(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.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired 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, 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* Memo, note 1.

The record reflects that the applicant entered the United States without inspection in 2001, remaining until October 2005. When the applicant left the United States after having been unlawfully present for more than one year, he triggered the ten-year-bar of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which provides that:

¹ Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

² *Id.*

- (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 an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In support of the waiver application, the record contains birth certificates, invoices, a marriage certificate, a wage statement, letters, and other documentation. In rendering this decision, the AAO has carefully considered all of the documentation in the record.

“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, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant’s qualifying relative and 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 565-566.

The factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines “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 [REDACTED] must be established in the event that she remains in the United States without her husband, and alternatively, if she were to join him to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

states that she works long hours to provide for herself and her daughter and her husband in Mexico. The evidence in the record shows that her daughter was born on November 11, 2002. The Chase Card Services invoice shows [REDACTED] owes \$3,749 with a minimum monthly payment of \$74; a letter by [REDACTED] states that his daughter [REDACTED] owes him \$2,000; a letter by [REDACTED] brother-in-law, indicates that she owes \$1,000; a statement shows she has monthly payments of \$190, with a total balance due of \$8,929; her car insurance is \$513, but the statement does not indicate whether this is to be paid quarterly. Her wage statement shows she earns \$10.75 per hour, with overtime at \$16.13. Contained in the record are documents showing Ms. [REDACTED] three sisters and brother are either lawful permanent residents or citizens of the United States.

Courts 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, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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). As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)).

The hardship presented in this case is in part financial and in part emotional. [REDACTED] income of \$10.75 per hour has been used to support [REDACTED] and her daughter in the United States, and her husband in Mexico. The submitted evidence shows that her monthly after-tax income without overtime is approximately \$1,516. As listed by [REDACTED], her monthly expenses, exclusive of doctor's visits, gastric medication, or clothing, range from \$1,576 to \$1,676, with the higher figure reflecting increased financial assistance to her husband. [REDACTED] worries about not having health insurance, something she could afford when her husband worked in the United States. [REDACTED] has immediate family members living in the United States; her mother takes care of her daughter while she works. [REDACTED] is anxious about the long-term effects that separation from the applicant will have on her daughter. In light of the submitted evidence, the AAO finds that the record shows that family separation has had a cumulative general emotional effect on [REDACTED], and that this, combined with the increased financial burden of maintaining two households, render the hardship in this case beyond that which is normally experienced in most cases of removal. Accordingly, the AAO finds that the applicant has established that his wife would experience extreme hardship if she remained in the United States without him.

██████████ in her October 22, 2005 letter, states that if she were in Mexico she would be without her relatives, her husband would be without a job, her daughter would be unprepared to return to the United States, and their life would be miserable. Difficulty in finding employment and inability to find employment in one's trade or profession were not sufficient to justify relief in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996). Regarding ██████████ separation from her family members in the United States, in *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt; and that courts have upheld orders of the BIA that resulted in the separation of aliens from members of their families. ██████████ states that if her daughter were educated in Mexico she would be unprepared to live in the United States. However, the educational hardship imposed on ██████████'s daughter is not sufficient to establish extreme hardship to ██████████. The record presented here, consequently, fails to establish extreme hardship to ██████████ if she were to join her spouse to live in Mexico.

The applicant has established extreme hardship to his wife if she were to remain in the United States without him. However, in considering the hardship factors raised, both individually and in the aggregate, the AAO finds that the factors raised do not establish extreme hardship to the applicant's spouse if she were to join him to live in Mexico. As such, extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), has not been established.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of establishing that the application merits approval 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. The waiver application is denied.