



U.S. Citizenship
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Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 09 2009

IN RE:

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director of the California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a 35-year-old 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 is married to a U.S. citizen, and he seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with his wife and children in the United States.

The Director found that the applicant failed to establish extreme hardship to his citizen spouse, and denied the application accordingly. *Decision of the Director*, dated Apr. 3, 2007. On appeal, the applicant's spouse contends that she will suffer extreme hardship if her husband is denied a waiver. *See Form I-290B, Notice of Appeal*, dated Apr. 23, 2007.

The record contains, *inter alia*, a copy of the applicant's wife's Certificate of Naturalization, dated Sept. 26, 2006; a copy of the couple's marriage certificate, issued in Oakland, California on August 2, 2003; copies of the birth certificates for the couple's two U.S. citizen children; a letter from the applicant, dated March 5, 2007; a copy of the couple's residential lease; copies of various bills; and documents relating to the applicant's employment. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9)(B) of the Act provides:

(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

[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.

8 U.S.C. § 1182(a)(9)(B). The record shows that the applicant entered the United States without inspection in or around December, 1996. *See Form I-601, Application for Waiver of Grounds of Inadmissibility; Decision of the Director, supra* at 2. The applicant's spouse, [REDACTED], filed Form I-130, Petition for Alien Relative, on September 17, 2003, and USCIS approved the petition on April 11, 2005. *See Form I-797, Notice of Action*. The applicant departed the United States in November, 2003, and returned without being inspected and admitted in January, 2004. *See Decision of the Director, supra* at 2; *Letter from [REDACTED]*, dated Mar. 5, 2007. The applicant's unlawful presence for one year or more after April 1, 1997, and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006).

In order to obtain a section 212(a)(9)(B)(v) waiver, an applicant must show that the ten-year bar imposes an extreme hardship on the applicant's U.S. citizen or lawfully resident spouse or parent. *See* 8 U.S.C. § 1182(a)(9)(B)(v). Hardship to the applicant himself, or to his children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (omitting consideration of hardship to the applicant and to his or her children). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she accompanies the applicant to the home country, and in the event that he or she remains in the United States. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is 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 (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the INA that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish extreme hardship unless combined with more extreme impact. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the U.S. Supreme Court held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

On appeal, the applicant contends that his wife will suffer extreme financial hardship if he is denied a waiver. See *Form I-290B, Notice of Appeal, supra*; *Letter from [REDACTED] supra*. The applicant’s wife states that she stopped working in November, 2006, after the birth of the couple’s second child, because she “was going to pay more for [a] babysitter than [she] was going to make at Safeway where [she] used to work.” *Form I-290B, Notice of Appeal, supra*. [REDACTED] states that the applicant makes \$13.00 per hour, and he pays all of the bills, including rent in the amount of \$750.00 per month. *Id.*; *Residential Lease; Copies of Bills*. The applicant fears that his wife and children would have to rely on welfare if he is not able to provide financial support. See *Letter from [REDACTED] supra*. Although it appears that the applicant’s wife could have financial difficulties if the applicant is denied a waiver, the record does not contain sufficient documentation, such as evidence of [REDACTED] former income and the cost of child care, to corroborate the claims of financial hardship. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998).

The record also contains some evidence regarding the emotional hardships that would be imposed as a result of family separation. For instance, the applicant and his wife have been married for almost six years. See *Marriage Certificate*, issued Aug. 2, 2003. The couple’s son [REDACTED] was born on October 4, 2004, in Berkeley, California. See *Birth Certificate for [REDACTED]* [REDACTED] was born to the couple on August 3, 2006, in Oakland, California. See *Birth Certificate for [REDACTED]*

The applicant's spouse states that her husband is "a good husband and a great father and provider." See *Form I-290B, Notice of Appeal, supra*. However, the record is insufficient to show that the emotional hardship of separation would rise above the common results of deportation or removal, to constitute extreme hardship. See *Matter of O-J-O-*, 21 I&N Dec. at 383.

Additionally, the applicant has not provided any evidence regarding the hardships that his wife would suffer if she were to relocate to Mexico to live with him. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565 (setting forth list of relevant hardship considerations). Given the applicant's wife's equities in the United States, it appears that relocation to Mexico could cause difficulties for her. However, the applicant did not present any evidence regarding these potential hardships, and these factors cannot be considered. See *Matter of Soffici*, 22 I&N Dec. at 165.

In sum, although the applicant's spouse has presented some evidence of harm based on family separation, the record does not contain sufficient evidence to show that the difficulties encountered by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. See *Perez*, 96 F.3d at 392; *Matter of Pilch*, 21 I&N Dec. at 631. Although the distress caused by separation from one's family is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal. See *id.* The AAO therefore finds that the applicant has failed to establish extreme hardship to his spouse, as required under section 212(a)(9)(B)(v) of the Act.

Additionally, the applicant is inadmissible under section 212(a)(9)(C) of the Act as an alien who "has been unlawfully present in the United States for an aggregate period of more than 1 year . . . and who enters . . . the United States without being admitted." 8 U.S.C. § 1182(a)(9)(C).¹ An applicant who is inadmissible under section 212(a)(9)(C) of the Act may not reapply for admission unless the applicant has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States, and USCIS has consented to the applicant's reapplication for admission.

Here, the applicant's last departure from the United States occurred in November, 2003, and he returned without being inspected and admitted in January, 2004. See *Decision of the Director, supra* at 2; *Letter from [REDACTED], supra*. Because the applicant has not remained outside the United States for 10 years since his last departure, he is currently statutorily ineligible to reapply for admission.

¹ Although this ground of inadmissibility was not identified by the Director of the California Service Center, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).

In proceedings for an application for a waiver of the grounds of inadmissibility, 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.