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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:



(CDJ 2004 694 375)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date:

MAY 06 2009

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v)

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, 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. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen. He seeks 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 District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 5, 2006.

On appeal, counsel for the applicant states that there has been a slow deterioration of the family as a result of the applicant's absence, resulting in depression, long work hours and extreme hardship for the applicant's wife.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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.

The record reflects that the applicant entered the United States without inspection in 1997 and remained until he departed voluntarily in July 2005. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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 the applicant or other non-qualifying relatives is not directly relevant in section 212(a)(9)(B)(v) proceedings and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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).

U. S. courts have 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). As this case arises within the jurisdiction of the 9th Circuit Court of Appeals, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant’s waiver request.

The record includes, but is not limited to, the following evidence:

1. Statement from the applicant's spouse stating that she is lonely and depressed, struggling to support her family on her own, is currently taking depression medication that she cannot afford, and fears she will have a nervous breakdown if the applicant is not admitted. She further asserts that her four children from a previous marriage depend on the applicant for moral support.
2. Statement from [REDACTED] and [REDACTED] who employ the applicant's spouse as "domestic househelp," asserting that they have witnessed a slow deterioration in her family in the absence of the applicant. The sisters further state that the applicant's spouse is overworked and stressed, has gained a lot of weight, cannot sleep, cannot concentrate and has called in to work sick on numerous occasions. In a second statement, [REDACTED] contends that it would be financially and emotionally stressful for the applicant's spouse if the applicant resides in Mexico.
3. Seven statements from family and friends asserting the applicant's wife is struggling to provide for her family and that she is suffering emotionally due to the exclusion of her husband.
4. A letter written to the applicant by his youngest stepson.
5. Tax return for the applicant's spouse for the year 2005.
6. Statement from [REDACTED], indicating that the applicant has been seen in his clinic on numerous occasions for treatment of anxiety, depression and insomnia since October 8, 2002. The applicant's spouse has informed him that the stress and anxiety she feels is being aggravated by her husband's absence.
7. Medical records from the [REDACTED] which relate to the applicant's visits for anxiety, depression and insomnia between 2002 and 2006.
8. Pictures of the applicant with his spouse and her children.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel asserts that the applicant has suffered extreme hardship as a result of the prolonged absence of the applicant. He further asserts that there has been a slow deterioration of the family, and that the applicant's spouse has fallen into depression and is receiving treatment. Although counsel states that the applicant's spouse has been diagnosed with clinical depression, the medical letter and reports in the record do not support this claim. The AAO acknowledges that the letter from [REDACTED] states that the applicant has been treated for depression, anxiety, and insomnia over the period 2002 – 2006, and that later reports indicate the applicant spouse is experiencing emotional hardship in relation to the applicant's absence. However, the submitted medical documentation does not demonstrate that the characterization of the applicant's spouse's mental state is the result of a diagnosis by a licensed mental health practitioner. It also fails to indicate on what basis the spouse was determined to suffer from depression and anxiety or the severity of these conditions. As such the documentation is of limited value in determining that the applicant's spouse's emotional hardship is greater than that experienced by the spouses of other individuals who have been excluded from the United States.

Counsel states that there has been a slow deterioration of the applicant's spouse's family as a result of the applicant's absence as her children from her previous marriage look to the applicant for moral

support and discipline. Counsel lists several discipline problems evidenced by the applicant's stepchildren to support this claim, but the AAO notes that there is no documentation of any these problems in the record or that such behavior has been attributed to the applicant's absence by a licensed mental health practitioner. The AAO further notes that the applicant's stepchildren are not qualifying relatives in this proceeding. Any impact on non-qualifying relatives is not directly related to a determination of extreme hardship except as it relates to the qualifying relative. In this case, the record does not establish that the impact of the applicant's absence on his stepchildren affects the applicant's spouse. While a 2002 medical report in the record indicates that the applicant's spouse was treated at the [REDACTED] for anxiety, depression and insomnia as a result of her problems with her children, there is no such linkage made by the 2005 and 2006 medical reports submitted to establish the emotional impact of the applicant's absence on his spouse.

Counsel asserts that the applicant's spouse has had to work long hours to support her family without any financial help from the applicant. The applicant's spouse states that her former husband is also unable to help her financially. The record contains statements from family and friends attesting to the employment situation of the applicant's spouse. Although the record contains a tax return indicating that the applicant's spouse's income is below the federal poverty line, it fails to contain evidence of the applicant's spouse's expenses or to establish, through published country conditions reports, that the applicant is unable to obtain employment in Mexico and financially assist his family from outside the United States. As such, the record does not demonstrate that the applicant's spouse would suffer extreme hardship if the applicant were excluded and she remained in the United States.

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. In this case, neither counsel nor the applicant has articulated any hardship that would be suffered by the applicant's spouse if she were to relocate with him to Mexico. Therefore, the record does not establish that the applicant's spouse would suffer extreme hardship if she moved to Mexico.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if he is refused admission. The AAO recognizes that the applicant's wife will experience hardship as a result of the applicant's inadmissibility. However, the record fails to distinguish her hardship from that normally associated with removal, which does not rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. 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, the burden of proving eligibility rests 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.