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U.S. Citizenship
and Immigration
Services

H9

[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX DISTRICT OFFICE

Date: **JAN 28 2005**

IN RE:

[REDACTED]

APPLICATION:

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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Mexico who was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a lawful permanent resident (LPR). The applicant seeks a waiver of inadmissibility in order to remain in the United States to reside with her spouse and children.

The district director found that the applicant had failed to establish extreme hardship to her (LPR) spouse and denied the application accordingly. *Decision of the District Director* (July 15, 2002). The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO* (May 9, 2003).

The regulations governing these proceedings, 8 C.F.R. § 103.5(a), state in pertinent part:

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the applicant does not require a waiver, that the AAO relied on incorrect precedent in analyzing the hardship in this case, that refusal of admission of the applicant in this case would be contrary to the United States Constitution, and submits new evidence of hardship in the form of a family “psychosocial” evaluation and country conditions information. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(v) 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 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 U.S. 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 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 indicates that the applicant entered the United States without inspection August 1988. In May 1993, a petition for alien relative filed on her behalf by her husband was approved. On January 25, 1999, the applicant filed an *Application to Register Permanent Residence or Adjust Status* (Form I-485). The applicant was subsequently issued *Authorization for Parole of an Alien into the United States* (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States, entering on July 30, 1999.

The accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997. Additionally, the proper filing of an affirmative application for adjustment of status has been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. See *Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The applicant therefore accrued unlawful presence from April 1, 1997, until January 25, 1999, the date the Form I-485 was properly filed, or a period of over one year and nine months. In applying to adjust her status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of her 1999 departure from the United States. The applicant is, therefore, 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.

Counsel argues that the applicant is not inadmissible because, first, her travel and return to the United States was pursuant to advance parole issued by the former Immigration and Naturalization Service (INS). Second, she contends that INA § 212(a)(9)(B) does not apply to beneficiaries of former INA § 245(i), such as the applicant. Finally, counsel contends that § 212(a)(9)(B) applies only to aliens who were previously removed.

With respect to advance parole, counsel contends, "Congress did not intend to punish applicants when they were given express permission by INS allowing them to travel . . . the intent of Congress was to punish those who were removed or deported by the INS from the United States not to those [*sic*] who traveled with INS permission." *Motion to Reopen/Reconsider* (June 6, 2003) at 2, fn. 1. Counsel also notes that there are no cases or regulations to support her "interpretation" of the applicable statute. *Id.*

Based on the plain language of the statute at issue, the three elements necessary to find an alien inadmissible under § 212(a)(9)(B)(i) are present in this case. See Memorandum of INS Office of Programs, *Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days* (Washington, DC: 26 November 1997). First, the alien must be unlawfully present for the applicable period of time, in this case, over one year. As the applicant admittedly entered the United States by evading proper inspection by U.S. authorities, her unlawful presence in the United States is not contested. Second, the applicant must have departed voluntarily. The applicant does not dispute having departed the United States of her own volition. Finally, the applicant must be seeking re-admission to the United States within the applicable period, in this case, within 10 years from her 1999 departure. By applying to adjust her status as a lawful permanent resident, the applicant is seeking admission. There is no provision in the statute for an exception to inadmissibility, once found, based on the granting of advance parole or otherwise. CIS is not authorized to modify the statutory provisions, but only to implement the statute and carry out the intent of Congress as expressed in the language of the statute itself. In light of the serious adverse consequences of departure from the United States after periods of unlawful presence, the advance parole document itself was modified to include the following warning, as it appears on the applicant's own I-512:

UNLAWFUL PRESENCE GROUNDS

...

NOTICE TO APPLICANTS: PRESENTATION OF THIS AUTHORIZATION WILL PERMIT YOU TO RESUME YOUR APPLICATION FOR ADJUSTMENT OF STATUS UPON YOUR RETURN TO THE UNITED STATES. IF YOUR ADJUSTMENT APPLICATION IS DENIED, YOU WILL BE SUBJECT TO REMOVAL PROCEEDINGS UNDER SECTION 235(b)(1) OR 240 OF THE ACT. IF, AFTER APRIL 1, 1997, YOU WERE UNLAWFULLY PRESENT IN THE UNITED STATES FOR MORE THAN 180 DAYS BEFORE APPLYING FOR ADJUSTMENT OF STATUS, YOU MAY BE FOUND INADMISSIBLE UNDER SECTION 212(a)(9)(B)(i) OF THE ACT WHEN YOU RETURN TO THE UNITED STATES TO RESUME PROCESSING OF YOUR APPLICATION. IF YOU ARE FOUND INADMISSIBLE, YOU WILL NEED TO QUALIFY FOR A WAIVER OF INADMISSIBILITY IN ORDER FOR YOUR ADJUSTMENT OF STATUS APPLICATION TO BE APPROVED.

Form I-512, (reverse) (emphasis added). The application of the terms of this statute as described above, including in cases where advance parole was granted, were thereby specifically and personally identified to affected aliens prior to their departure from the United States. Counsel's contention that inadmissibility under this section does not apply where the alien was granted advance parole therefore is inconsistent with the law as consistently applied by CIS, and will not be adopted in this case.

Counsel also contends that inadmissibility under INA § 212(a)(9)(B)(i) does not apply to beneficiaries of former INA § 245(i), which provided, in pertinent part:

(1) ... [A]n alien physically present in the United States—

(A) who—

(i) entered the United States without inspection ...

(B) who is the beneficiary . . . of—

(i) a petition for classification under section 204 [Procedure for Granting Immigrant Status] that was filed with the Attorney General on or before April 30, 2001 . . .

may apply to the Attorney General for the adjustment of his or her status to the of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1000 . . .

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence *if*—

(A) the alien is eligible to receive an immigrant visa *and is admissible to the United States for permanent residence . . .*

8 U.S.C. § 1255(i) (2000) (emphasis added). Despite the contentions of counsel, by the plain language of this section, including the conditional clause beginning with “if” above, it is clear that Congress did not intend for this provision to operate as a waiver of grounds of inadmissibility. As counsel states, this section “forgives applicants who entered without inspection,” and were thus ineligible to adjust status pursuant to INA § 245(a), which provides that adjustment may be granted only to aliens who were “inspected and admitted or paroled into the United States.” 8 U.S.C. § 1255(a). This provision exclusively permits aliens who were not inspected and admitted or paroled to adjust status, and expressly does not waive any other grounds of ineligibility for adjustment or inadmissibility to the United States. Therefore, the finding of inadmissibility under INA § 212(a)(9)(B)(i)(II) was not improper by virtue of the applicant’s payment of the penalty fee under former INA § 245(i).

Finally, counsel contends that the context of INA § 212(a)(9)(B) demonstrates that it was intended to bar only those who were “detained by Service [*sic*] and are either threatened to be put in removal proceedings or are actually placed in removal proceedings and who subsequently depart the country. . .” *Motion to Reopen/Reconsider* (June 6, 2003) at 3. Counsel bases this position in part on the title heading of INA § 212(a)(9), which reads, “Aliens previously removed.” The AAO notes that, despite the heading, it is clear that Congress did not intend to limit inadmissibility under this section only to aliens previously removed. Turning to the individual grounds of inadmissibility addressed in separate sub-sections, the AAO notes that subsection (a)(9)(A) is titled, “Certain aliens previously removed.” 8 U.S.C. § 1182(a)(9)(A). Nevertheless, under that heading, Congress specifically provides in section 212(a)(9)(A)(i) that this ground of inadmissibility applies to “[a]ny alien who has been *ordered removed* . . . and who again seeks admission within 5 years of the date of such removal.” 8 U.S.C. § 1182(a)(9)(A)(i) (emphasis added). Further, section (a)(9)(A)(ii) applies to “[a]ny alien not described in clause (i) who . . . has been *ordered removed* . . . or . . . departed the United States while an *order of removal* was outstanding, and who seeks admission within 10 years of the date of such alien’s departure or removal . . .” Similarly, subsection (C), entitled “Aliens unlawfully present after previous immigration violations,” describes its application in paragraph (C)(i)(II) as pertaining to an alien who “has been *ordered removed* . . . and who enters or attempts to reenter the United States without being admitted. . .” INA § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) (emphasis added). The previous paragraph in the same section, § 212(a)(9)(C)(i)(I), does not mention the requirement

that the alien have been ordered removed but merely an alien who “has been unlawfully present in the United for an aggregate period of more than 1 year . . . and enters or attempts to reenter the United States without being admitted is inadmissible.” 8 U.S.C. § 1182(a)(9)(C)(i)(I). Congress specifically provides, in subparagraphs (I) and (II), two possible classes of individuals who may be found inadmissible under paragraph (C), one group who has not been ordered removed but has been unlawfully present, and the other which has been ordered removed. Likewise, INA § 212(a)(9)(B), applicable to this case, makes no mention of removal orders, detention, or imminent removal proceedings as required characteristics of the applicable class of individuals defined as inadmissible. Reading the entire section in context and giving plain meaning and effect to the statute, the AAO cannot conclude that Congress specifically cited orders of removal in some paragraphs and not in others, but meant the requirement to apply equally to all paragraphs. Rather, the appropriate reading of the statute is that, where Congress intended for a section to be applied only to individuals subject to removal orders, the language appears. Where no such limitation was intended, the language does not appear. Therefore, the AAO adheres to CIS’s consistent reading of this statute and concludes that the district director did not err in finding the applicant inadmissible under INA § 212(a)(9)(B)(i)(II).

Having found that the applicant is indeed inadmissible under INA § 212(a)(9)(B)(i)(II), the question remains whether she is eligible for a waiver. 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 upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien herself is not a permissible consideration under the statute. The qualifying relative in this case is 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 alien has established extreme hardship to a qualifying relative. 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).

In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals

(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 notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

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).

Counsel’s contention that the district director and the AAO improperly cite to *Cervantes-Gonzalez* as authority for a non-exclusive list of factors in evaluating hardship appears to be based on a misunderstanding of the applicable law. Counsel cites certain factors, particularly from cases and legal support that derive authority from statutes that governed the now-repealed form of relief known as suspension of deportation prior to April 1, 1997. *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978); *Matter of Kao & Lin*, 23 I&N Dec. 45 (BIA 2001). Factors cited by counsel include, with respect to the applicant alien, physical presence in the United States for over the minimum requirement, age, family ties in the United States and abroad, other available means for adjusting status, immigration history and involvement in the local community. These factors constitute evidence that would tend to show that the applicant him or herself would undergo extreme hardship if removed from the United States and, in the case of length of residence, an element of statutory eligibility for suspension of deportation, which is not applicable to this case. Hardship to the applicant himself is not a permissible consideration under the statute that governs the instant application for waiver. Counsel’s contention that these factors should apply to the determination under section 212(i) of the Act is in error. “Cross-application” of extreme hardship standards between different benefits, such as suspension of deportation as it existed prior to April 1, 1997, and waivers under section 212(i) of the Act, is limited by the statutes under which eligibility is determined. *See Cervantes-Gonzalez*, at 565. Such cross-application of administratively and judicially developed factors is intended to foster consistency in interpreting substantially similar statutory requirements, but may not be used to undermine or otherwise alter the terms of the applicable statute. Therefore, the factors cited by counsel and above in this paragraph are generally not relevant to the determination under section 212(i) of the Act and may be taken into account, if at all, only as to how those factors contribute to the hardship faced by the *qualifying relative*, not the applicant him or herself. If, in a particular case, any of the above factors are not present or not relevant to that determination, the law provides that they need not be considered. *Cervantes-Gonzalez*, *supra* at 566 (“not all of the foregoing factors need be analyzed in any given case, we . . . apply those factors to the present case *to the extent they are relevant* in determining extreme hardship to the respondent’s spouse.”) (emphasis added).

The record reflects that [REDACTED] was born and raised in Mexico, where he lived until 1985 (about age 20). He and his wife met and married there. The couple has three children, two of whom were born in the United States. The record reflects that “the parents have decided the children and [REDACTED] will remain in Arizona” if the applicant is refused admission. *Psychosocial Evaluation by [REDACTED]* (June 4, 2003). The BIA has held, “[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed.” *See Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965).

Therefore, the AAO must consider whether extreme hardship would result if [REDACTED] were to relocate to Mexico with his wife and children to avoid separation.

In the United States, [REDACTED] works with his brothers, who own and manage a restaurant. The record does not reflect whether his brothers are U.S. citizens or lawful permanent residents. The rigors of the business currently require him to "spend the majority of his time" at the restaurant. *Affidavit of [REDACTED]* (August 1, 2002). He provides for most of the household income with earnings from his brothers' restaurant (about 75% of \$23,310 total household income). *U.S. Individual Income Tax Return* (2000). It appears that, like his wife, he is an employee, rather than owner-partner of the family business. *Id.*

He and the applicant own the family home. The record is silent as to whether a profit or loss would be sustained in the event it had to be sold.

In Mexico, prior to his immigration to the United States, [REDACTED] finished his secondary school education and an unspecified post-high school degree in Mexico. *Affidavit of [REDACTED]* (August 1, 2002). Although the Mexican economy reflects a higher rate of unemployment than that in the United States, it has not been shown that [REDACTED] is unemployable due to age, lack of skill, infirmity, or otherwise deprived of the means to support himself in Mexico. His father was a subsistence farmer in Mexico. *Id.* His parents apparently still live there.¹ *Form G-325, Biographic Information* (May 7, 1993).

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 husband [REDACTED] faces extreme hardship if he relocates to Mexico or remains in the United States and the applicant is refused admission. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

¹ Counsel states, "[a]ll of her husband's family lives in the United States." *Motion to Reopen/Reconsider* (June 6, 2003) at 6. However, this assertion is not supported by supporting statements or evidence and is, in fact, contradicted by the prior statement of the applicant's husband on the Form G-325, *supra*. Statements of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. lawful permanent resident spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

Finally, counsel contends that the denial of the waiver infringes upon the procedural and substantive due process rights of the applicant and her family to remain in the United States and to live together. It is noted that constitutional issues are not within the appellate jurisdiction of the AAO. However, it is well-settled that, although possibly resulting in separation of family members, immigration laws such as those at issue in the instant case do not exceed the authority of Congress to regulate immigration. *See Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. Denied* 402 U.S. 983 (1971) (“even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States.”) *See also Cervantes v. INS*, 510 F.2d 89, 91-92 (10th Cir. 1975) (“Courts have rejected similar claims based upon other constitutional provisions.” *Robles v. Immigration & Naturalization Serv.*, [485 F.2d 100, 102 (10th Cir. 1973)]; *Faustino v. Immigration & Naturalization Serv.*, 432 F.2d 429 (2d Cir. 1970), *cert. den'd*, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971); *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179 (5th Cir. 1969); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965). The petitioner in *Robles* relied on the Fifth Amendment claiming the deportation would be unconstitutional because a family would be divided and her children would be deprived of their constitutional right to the family unit's continuation. The *Robles* court rejected that argument. The court noted that in *Silverman, supra* and *Perdido, supra*, consideration was given to the incidental impact of immigration and naturalization laws on the marriage status and on the family unit where there be minor children involved, and in each case it was concluded that such incidental impact is not in and of itself significant and does not raise constitutional problems. The deportations involved herein cause only an ‘incidental impact’ on the minor child, albeit a serious one. . . . Congress clearly has ‘. . . the power to prescribe conditions under which aliens may enter and remain in the United States . . . even though their enforcement may impose hardship upon the aliens’ children . . .’ *Application of Amoury*, 307 F.Supp. 213 (S.D.N.Y. 1969) (The incidental impact on aliens’ minor children caused by the enforcement of duly-enacted conditions on aliens’ entrance and residence does not create constitutional problems.”) (footnotes omitted).

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. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed and the previous decisions of the District Director and the AAO will be affirmed.