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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

#6 #2

[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: DEC 08 2009
CDJ 2004 844 045 (relates)

IN RE: [redacted]

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:

[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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Rhew

Perry Rhew
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, [redacted] 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 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 admission within 10 years of his last departure from the United States. The applicant 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), in order to return to the United States to join his U.S. citizen spouse and child.

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred as a matter of law and abused its discretion. Counsel contends that USCIS should properly weigh the factors and grant the waiver application.

In support of the application, the record contains, but is not limited to, a brief from counsel; conviction records; letters from the applicant's friends; letters from the applicant's mother-in-law; a letter from the applicant's sister-in-law; letters from the applicant's spouse's grandmother; letters from the applicant's spouse; child custody documentation; two psychological evaluations of the applicant's spouse, respectively dated February 19, 2006 and March 19, 2007; a letter from the applicant's spouse's nursing school; family photographs; the applicant's employment verification letter; a letter from the applicant's pastor; a letter from the applicant's son's pastor; letters from the applicant's son's primary school; the applicant's son's school records; a letter from the applicant's son; the applicant's son's birth certificate; the applicant's spouse's birth certificate; and the applicant's marriage certificate. The entire record was reviewed and considered in rendering a decision on the appeal.

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-
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> . . . .
>
> (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 shows that the applicant entered the United States without inspection in October 1989. The applicant remained in the United States until departing in February 2006. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until February 2006. The applicant does not dispute this on appeal. The applicant is attempting to seek admission into the United States within ten years of his February 2006 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 having been unlawfully present in the United States for a period of more than one year and seeking admission to the United States within ten years of his last departure.

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 first 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 the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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 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 (BIA) 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 United States 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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record reflects that the applicant wed [redacted] a U.S. citizen, on March 5, 2003. The applicant's spouse is a qualifying family member for section 212(a)(9)(B)(v) of the Act extreme hardship purposes. The applicant has a seventeen-year-old U.S. citizen child from a previous relationship, [redacted] Hardship to [redacted] will be considered insofar as it results in hardship to the applicant's spouse.

On appeal, counsel asserts in his brief, dated April 4, 2007, that [redacted] biological mother has petitioned for his custody because the applicant is not residing in the United States. Counsel states that the applicant's spouse's loss of child custody is alone evidence of hardship.

The record contains a letter from the applicant's spouse, dated March 5, 2007, which states in part, "To lose guardianship of [redacted] would put [redacted] future in great jeopardy while compounding my other concerns at hand. I have had many restless nights hoping and praying that this nightmare will end: that my husband will return and that [redacted] will remain under our supervision."

However, the AAO notes that counsel has failed to submit documentary evidence reflecting the final resolution of [redacted] custody determination. The record contains an e-mail message print-out from the applicant's mother-in-law, dated April 30, 2007, which states that the custody hearing was scheduled for May 7 or May 14. However, there is no supplementary documentation in the record related to the disposition of the May 2007 hearing. The only evidence in the record related to a child custody hearing is a subpoena issued to the applicant's spouse for her to appear at the Juvenile Court of Columbia, Tennessee on January 8, 2007.

The AAO notes further that documentation in the record indicates that there was a final resolution over the child custody dispute in January 2007. The applicant submitted with the appeal a psychological evaluation, dated March 19, 2007, from psychologist [redacted] Ph.D., which states in part:[1]

> Since her husband has been in Mexico, Mrs. [redacted] has had a much more difficult time raising [redacted] As a fifteen-year-old, he is constantly testing the limits and has become defiant. According to Mrs. [redacted], [redacted] biological mother, tells [redacted] he does not have to listen to Mrs. [redacted] In January, 2007, Ms. Seecrist took Mrs. [redacted] to court to try to get custody. *Mrs.* [redacted] *dropped the request when Mr.* [redacted] *gave her some money.* Mrs. [redacted] found the court experience very stressful. (emphasis added).

[1] The record also contains an initial psychological evaluation of the applicant's spouse, dated February 19, 2006, which was filed with the waiver application.

On April 22, 2007, Dr. [redacted] sent counsel a revised psychological evaluation. Counsel furnished the revised evaluation to the AAO as additional corroborating evidence. The revised psychological evaluation is also dated March 19, 2007. The only noticeable revision in this evaluation is that the statement, "*Mrs.* [redacted] *dropped the request when Mr.* [redacted] *gave her some money*" has been removed from the evaluation. The evaluation now states, "The case is still pending and Mrs. [redacted] is very stressed and fearful about losing [redacted]' There is no indication in the record of the reason the original statement was removed. Further, there is no attempt by counsel to resolve the inconsistencies in the record. Nor has counsel submitted the court's final custody determination for [redacted]

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant in the present case has failed to resolve the inconsistencies in the record with independent objective evidence. These unresolved inconsistencies undermine the applicant's spouse's claim that she could lose custody of her stepson as a result of the applicant's continued absence from the United States.

Counsel asserts that the applicant's spouse is suffering from health issues as a result of her separation from the applicant. Counsel cites to the applicant's spouse's appeal letter which states, in part:

> I have trudged into work many days physically exhausted with the strains of being the sole income provider while juggling my mental concerns. Since December I have been to the doctor multiple times to help me with my sinus infections, cough, and occasional chest pains. After three ten day doses of antibiotics spread out over two and a half to three months, one would think that I should be without infection. Yet as my immune system has been affected by my stress and excess pressure, medicine has only made very minimal improvements.

Further, in Dr. [redacted] initial psychological evaluation, dated February 19, 2006, she notes that, [redacted] has recently been diagnosed with Pre-ventricular contractions and an irregular heart beat. She has seen several cardiologists and one recommended that she take medication to regulate her heart."

The AAO finds that the claims of medical hardship to the applicant's spouse are not supported by documentary evidence. No medical records have been submitted by the applicant to demonstrate that his spouse is suffering from cardiovascular health issues, chronic sinus infections, or any other ailments. 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)). While the applicant's spouse's unsupported assertions are relevant and have been considered, they are of little weight in the absence of supporting evidence.

The psychological evaluation from Dr. [redacted] dated March 19, 2007, indicates that the applicant's spouse is suffering from Major Depressive Disorder as a result of her separation from the applicant. The evaluation states, in pertinent part:

> It is my professional opinion as a licensed psychologist that [redacted] a citizen of the United States, is suffering from Major Depressive Disorder and has been severely traumatized as a result of separation from her husband and fears that he might be able to return to the United States. Her symptoms include crying spells, fatigue, nausea, diarrhea, sleep disturbance, weight loss, sadness, guilt, and hopelessness. If her husband is unable to return, it is likely that she would be at risk for severe and permanent psychological damage.

The AAO observes that the record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the Major Depressive Disorder suffered by the applicant's spouse. The evaluation states that the applicant's spouse is "at risk for severe and permanent psychological damage." However, the evaluation does not propose any long and short term treatment plans. Nor does it state the prognosis of her condition if she engages in mental health treatment. Moreover, the conclusion reached in the submitted evaluation does not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

The record contains a letter from the applicant's spouse initially filed with the wavier application. In this letter, dated February 28, 2006, the applicant's spouse asserts that the applicant had supported her financially and she did not have to work. She states that this allowed her to focus her energy on nursing school. Similarly, Dr. [redacted] states in her March 19, 2007 evaluation that the applicant's spouse had hoped to obtain her Master's degree after completing her nursing studies, but she feels that her dream has been destroyed. Dr. [redacted] notes that the applicant's spouse is now the sole supporter of the family and she has no time or money for school.

The AAO recognizes that the refusal of the applicant's admission to the United States may cause economic detriment to his spouse. However, her inability to attend school or a reduction in standard of living does not necessarily result in extreme hardship. U.S. courts have held that 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); *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); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) ("the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.").

As stated, extreme hardship to a qualifying relative must also be established in the event that she accompanies the applicant abroad. The applicant's spouse asserts in her appeal letter that she has family ties and obligations in the United States. She states that she has been taking care of her sister's daughter on her day off. She states she has been available to attend her mother's doctor appointments. She states that when her mother had surgery she assisted with her mother's recovery. She states that her mother is due to have both knees replaced and she will need to be available for assistance. She states that she would like to be available to her grandmother who has been diagnosed with cancer. She states that if she moves away from her family she would be struck with an even greater despair. She states that her family would not have her nursing knowledge and support. She states that she will be stripped of her close knit ties to her family members.

The AAO acknowledges that the applicant's spouse will experience emotional hardship if she is separated from her family members. Separation from close family members who have serious medical conditions would be considered a factor contributing to a finding of extreme hardship. However, the applicant's spouse has failed to submit documentary evidence to support her assertions that her presence in the United States is necessary to care for her ailing mother and grandmother. There is no medical documentation in the record to serve as proof of their conditions. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. While the applicant's spouse's unsupported assertions are relevant and have been considered, they cannot be considered probative in the absence of supporting evidence.

Finally, the initial psychological evaluation from Dr. [redacted] dated February 19, 2006, states that the applicant's spouse fears that she would have no chance of earning a decent living in Mexico. Dr. [redacted] notes that the applicant's spouse wants to have children, and does not want them to grow up in Mexico and be deprived of the high quality of health care that is available in the United States. Dr. [redacted] states that the applicant does not want her children to be doomed to a life of poverty and limited educational opportunities and no support from extended family members.

The AAO has considered the concerns outlined in Dr. [redacted] initial evaluation and finds that the applicant's spouse has failed to detail her concerns with concrete examples of the anticipated hardship she fears she would suffer if she relocated with the applicant to Mexico. She has not indicated whether she could complete her education in Mexico. Nor has she indicated whether she has searched for employment opportunities in Mexico. Moreover, the applicant's spouse's concerns about her future children are inherently speculative, as she does not currently have any biological children, and therefore, cannot reasonably predict or anticipate the hardship they would suffer in Mexico. For these reasons, the AAO cannot determine that the applicant's spouse would suffer extreme hardship if she relocated to Mexico.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility 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.

The AAO notes that the record reflects that the applicant has been convicted of two domestic violence related crimes. On May 16, 1996, the applicant pled guilty in the Court of General Sessions, Maury County, Tennessee, to simple assault in violation of section 39-13-101 of the Tennessee Code (Tenn. Code Ann. § 39-13-101), a Class A or B misdemeanor[redacted] A "Class A" misdemeanor is punishable by a term of imprisonment not to exceed eleven (11) months and twenty-nine (29) days and a "Class B" misdemeanor is punishable by a term of imprisonment not to exceed six (6) months. Tenn. Code Ann. § 40-35-111. On March 5, 1998, the applicant was found guilty of domestic assault in violation of Tenn. Code Ann. §§ 39-13-11, 39-13-101, a Class A or B misdemeanor[redacted]

Simple assault and battery offenses generally do not involve moral turpitude. However, that determination can be altered if there are additional factors such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners, or intentional serious bodily injury to the victim. *Matter of Sanudo*, 23 I. & N. Dec. 968, 972 (BIA 2006). An alien who has been convicted of a crime involving moral turpitude is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The director did not determine whether the applicant's convictions render him inadmissible for having committed crimes involving moral turpitude. It is unnecessary for the AAO to make such a determination since the applicant is otherwise inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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 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.