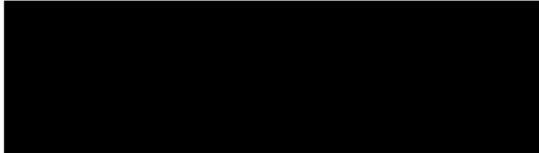


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FILE:



Office: MEXICO CITY (CIUDAD JUAREZ)

Date:

**JAN 08 2010**

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:



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 Summary*

for 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 children.

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 the applicant's spouse has demonstrated extreme hardship to herself and the applicant. Counsel states that all the required characteristics for a favorable determination are present in the case. Counsel states that the consulate failed to follow case law and the decision was an abuse of discretion. Counsel contends that the applicant's waiver application should be approved and his visa should be granted.

In support of the application, the record contains, but is not limited to, letters from the applicant's spouse and a copy of the applicant's child's birth 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-

....

(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 1997. The applicant remained in the United States until departing in August 2004. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of unlawful presence provisions under the Act, until August 2004. The applicant does not dispute this on appeal. The applicant is attempting to seek admission into the United States within ten years of his August 2004 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 contains a letter from the applicant's spouse, dated November 14, 2005, which was initially filed with the applicant's waiver application. The applicant's spouse asserts in her letter that since the applicant's departure she has lost her opportunity to finish her college education. She states that her son has a medical problem which has caused him to be hospitalized. She states that her son's condition, called "croop" (croup) is similar to asthma and he needs breathing treatments. She states that she was hospitalized and learned that she has high blood pressure. She states that she gave birth to their son on August 5, 2004 and the applicant missed the birth because he was en route to Mexico. She states that her oldest son was in Mexico with the applicant and became sick with croup. She states that she lost her job because she had to go to Mexico to attend to him. She states that her employment did not pay enough money for rent, bills, formula and pampers. She states that she lost her apartment and still has bills that she needs to pay. The record contains a second letter from the applicant's spouse, dated July 14, 2006 (filed August 24, 2006), in which she states that she has four children, including a newborn, and she finds it hard to find a babysitter for them.

The AAO will consider financial hardship as a factor contributing to a finding of extreme hardship. However, the record in the present case fails to provide a clear picture of the applicant's spouse's financial situation. The notice of appeal was filed on October 17, 2006, over two years since the applicant's departure from the United States. The applicant's spouse failed to demonstrate, on appeal, how she is supporting herself and her four children without the applicant's presence in the United States. There is no documentation in the record of her expenses and other liabilities. Nor does the record indicate her source of financial support. 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. For these reasons, the AAO cannot conclude that the applicant's spouse is suffering from financial hardship due to the applicant's inadmissibility.

Furthermore, the claims of medical hardship to the applicant's spouse and son are not supported by documentary evidence. No medical records have been submitted by the applicant to demonstrate that his spouse is suffering from high blood pressure. Nor is there any documentation in the record indicating that his son is suffering from chronic breathing problems. As stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. The applicant's spouse's unsupported assertions have been considered, but are not, alone, probative evidence of medical hardship. Therefore, the AAO cannot conclude that the applicant's spouse and child are suffering from medical conditions that contribute to a finding of extreme hardship if they remain separated from the applicant.

The AAO recognizes that the applicant's spouse and children are suffering emotionally as a result of their separation from the applicant. Their situation, however, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend

that a waiver be granted in every case where a qualifying relationship exists. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases. 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 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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); *Shoostary v. INS*, 39 F.3d 1049 (9<sup>th</sup> 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.”).

Furthermore, the applicant's spouse has only discussed the hardship she would suffer if she remains in the United States separated from the applicant. The applicant's spouse has not asserted, or submitted evidence to demonstrate, that she would suffer extreme hardship in Mexico if she relocated with her children there. Accordingly, 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.

Finally, the AAO notes that the record reflects that the panel physician who conducted the applicant's medical examination for his visa interview referred the applicant for a psychological evaluation after he reported the use of marihuana and cocaine. The psychologist classified the applicant with having the following medical conditions: Cocaine Abuse (Class A); Cannabis abuse in full remission (Class B); and Alcohol Abuse not associated with Harmful Behavior (Class B). Part 5 of the applicant's Medical History and Physical Examination Worksheet (Form DS-3026), states “The applicant's patterns of alcohol and cocaine use are maladaptive. [REDACTED] was also a marihuana user, but interrupted its consumption six years ago. He reported that the last time he inhaled cocaine was on December 2001. He combined alcohol with cocaine use. According to the psychological consultant, this condition cannot be considered in remission at this time.”

Section 212(a)(1)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iv), provides that any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict is inadmissible. According to the psychologist's report, the applicant has

abused cocaine, a substance listed in section 202 of the Controlled Substances Act, per the U.S. Department of Health and Human Services regulations at 42 C.F.R. § 34.2(g). There is no waiver available for this ground of inadmissibility.

Chapter 9 section 40.11 of the Foreign Affairs Manual provides:

Medical grounds of ineligibility.

(a) *Decision on eligibility based on findings of medical doctor.* A finding of a panel physician designated by the post in whose jurisdiction the examination is performed pursuant to INA 212(a)(1) shall be binding on the consular officer, except that the officer may refer a panel physician finding in an individual case to USPHS for review.

The director's denial notice fails to discuss the panel physician's determination that the applicant is inadmissible under section 212(a)(1)(A)(iv) of the Act. Instead, the consular officer's Refusal Worksheet (OF-194) states, "App's drug abuse is in full remission. Deleted refusal. All he needs now is a pardon for his illegal presence from 1997 to Aug 2004." There is no indication in this case that the consular officer referred the panel physician's finding to the U.S. Public Health Service (USPHS) for review to determine whether his cocaine abuse is in full remission. The consular officer's determination that the applicant's drug abuse is in full remission appears to have been made independent of a USPHS review.

Should the applicant reapply for an immigrant visa, a determination of whether he remains inadmissible under section 212(a)(1)(A)(iv) of the Act must be made by a designated health official prior to the issuance of the applicant's immigrant visa. The consular officer may refer a panel physician's finding of inadmissibility to USPHS for review.

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.