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

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FILE:

Office: SACRAMENTO, CALIFORNIA

Date:

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), and Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Sacramento, California. 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 and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for submitting an asylum application under a false identity. He is married to a naturalized United States citizen and has three U.S. citizen children. 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) and section 212(i) of the Act, 8 U.S.C. § 1182(i).

The Acting Field Office Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) on July 31, 2007.

On appeal, the applicant, through counsel, contends that United States Citizenship and Immigration Services (USCIS) incorrectly applied the extreme hardship standard, failed to consider all the relevant factors and did not weigh the positive and negative factors in the applicant's case.

Section 212(a)(2)(A) of the Act states in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . is inadmissible.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), states that "conviction" means:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The Administrative Appeals Office reviews appeals on a de novo basis. Upon examination of this record, it was revealed that the applicant has a criminal conviction for drug possession. On February 10, 1992, the applicant was convicted of Possession of Cocaine, § 11350 of the California Health and Safety Code, a Felony, in the Municipal Court of California, County of San Mateo. The record indicates that the applicant was given probation, and the charge was diverted pursuant to § 1000.3 of the California Penal Code (CPC).

In *Lujan-Armendariz v. INS*, 222 F.3d 740 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that the 1996 statutory amendment adopting a new definition of "conviction" for immigration purposes did not repeal or abrogate the Federal First Offender Act, under which rehabilitative expungement of first-time simple possession drug offenses would not result in deportation. The Court also stated that "if [a] person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Id.* at 738. As the record indicates that the applicant's charge for Cocaine Possession was diverted under California law, it is amenable to the federal first offender exception under the previous definition of a "conviction" for immigration purposes within the jurisdiction of the Ninth Circuit. Accordingly, the applicant is not inadmissible due to his drug related conviction.

The Acting Field Office Director determined that the applicant was inadmissible to the United States pursuant to sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act.

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.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, 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 Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien

The AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for the purposes of determining the bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., dated May 6, 2009.* The record indicates that the applicant filed his first Form I-485, Application to Register Permanent Residence or Adjust Status, on August 26, 1996 and that this application was not denied until September 19, 2001. In that the applicant was in an authorized period of stay on April 1, 1997, the effective date of the unlawful provisions under the Act, until he departed the United States on advance parole on or about September 18, 1998, he accrued no unlawful presence and is not inadmissible under section 212(a)(9)(B) of the Act.

The record does establish, however, that, in 1991, the applicant filed an asylum application under a false identity. He is, therefore, inadmissible to the United States under 212(a)(6)(C)(i) of the Act for having sought to obtain an immigration benefit through fraud or the willful misrepresentation of a material fact and must seek a waiver under section 212(i).

A waiver of inadmissibility under section 212(i) of the Act 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 his children is not directly relevant in section 212(a)(9)(B)(v) or 212(i) 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*, 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).

This matter arises within the jurisdiction of the Ninth Circuit Court of Appeals. That court has 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). 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). However, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

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 documentation previously filed in conjunction with the applicant’s prior Form I-485 and Form I-601. In relation to the instant waiver application, the record includes, but is not limited to, criminal records for the applicant; statements from the applicant and his spouse; a home loan statement; bank account statements for the applicant and his spouse; medical documentation for

the applicant's spouse and his older daughter; tax records for the applicant and his spouse; a copy of an individual education Program (IEP) for the applicant's older daughter; a letter documenting health insurance coverage; and copies of the applicant's birth and marriage certificates. The entire record was considered in rendering a decision on the appeal.

Counsel for the applicant states on appeal that the Acting Field Office Director failed to consider all the factors impacting the applicant's spouse, and that the record establishes that she and the applicant's children will experience extreme hardship. He further contends that the applicant's spouse is unable to work because she must care for her three children, that she would lose the family's home as she would be unable to afford the mortgage and taxes, and that she and her children would not have health care coverage as their health insurance is provided through the applicant's employer. Counsel also states that the applicant's spouse and one of her children are being treated for skin conditions.

The applicant's spouse states that she had to leave her previous employment in order to care for her children but that, even if she returned to her former job, her salary would not cover her and her children's living expenses. She also asserts that without the applicant's financial support, she will not be able to keep their home and that it is his employment through which the family receives health insurance.

The record includes documentation that establishes that the applicant and his spouse own a home, that the family's health insurance is provided through the applicant's job, and that the applicant's spouse's prior employment provided her with an annual income of approximately \$22,900, an income that is only marginally above the federal poverty guideline of \$22,050 for a family of four. Accordingly, the evidence in the record indicates that the applicant's spouse will experience financial hardship as a result of the applicant's exclusion. However, the AAO notes that a finding of extreme hardship may not be based on financial hardship alone. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981); *see also Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985)(affirming that the loss on sale of a home and loss of present employment and its benefits did not constitute extreme hardship, but were normal consequences of removal). Moreover, the record fails to demonstrate, through documentary evidence, that the applicant would be unable to obtain employment in Mexico and financially assist his spouse from outside the United States. The record also fails to establish that the applicant's spouse would be unable to obtain employer-provided health insurance if she returned to her former employment.

The record indicates that the applicant's spouse has been diagnosed with psoriasis for which she has been treated with little success. It also demonstrates that the applicant's older daughter is receiving treatment for eczema. There is, however, no evidence of the severity of either condition or that either, in any way, affects the ability of the applicant's spouse and/or her daughter to function and, in the applicant's spouse's case, to obtain employment. Without further evidence of the nature of these medical problems, the AAO is unable to determine how the applicant's spouse would be affected by her own or her daughter's health concerns in the applicant's absence.

The record also contains an IEP for the applicant's older daughter, who was found to have a speech deficit in 2004. While the IEP lists the applicant's spouse as her daughter's provider for the purposes of the IEP, it does not indicate what, if any, role the applicant's spouse is to play in the educational program for her daughter. Further, there is nothing in the record on appeal that indicates an IEP is still in place and the AAO notes that the 2004 IEP indicates that there is no intention to extend it beyond the year as the applicant's daughter's disability is "not severe enough to cause undue regression by [the] interruption of services." Accordingly, the AAO is unable to determine what, if any, impact her daughter's past speech problems have had or would have on her mother, the only qualifying relative in this proceeding, if the applicant's waiver application were to be denied.

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. In this case, the applicant fails to address the impacts that relocation to Mexico would have on his spouse. As such, the record does not establish that she would experience extreme hardship if she were to join the applicant in 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 spouse would face extreme hardship if he is refused admission. The AAO recognizes that the applicant's spouse will experience hardship as a result of the applicant's inadmissibility. The record, however, fails to distinguish her hardship from that commonly associated with removal and exclusion, and it does not, therefore, 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, the AAO will not address counsel's assertions regarding the exercise of discretion in this matter as it finds that no useful purpose would be served.

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.