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



Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date:

MAR 29 2010

CDJ 2004 828 854

IN RE:



APPLICATION:

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

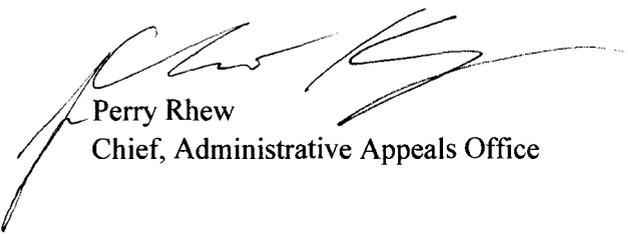
ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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).


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a 41-year-old native and citizen of Mexico who 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. The applicant is married to a citizen of the United States, and she seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her husband in the United States.

The director found that the applicant failed to establish extreme hardship to her spouse, and denied the application accordingly. *Decision of the Director*, dated June 11, 2007. On appeal, the applicant's husband contends that the denial of the waiver imposes extreme hardship. *See Form I-290B, Notice of Appeal*, dated July 9, 2007; *Letter in Support of Appeal*, dated July 8, 2007. The applicant's husband also explains that the applicant erroneously stated to the U.S. consular officer that she left the United States in 1996 and returned in 1997. *Id.*

The record contains, among other things, letters from the applicant and her husband; several financial documents; and family photographs. The entire record was reviewed and considered in rendering this decision on appeal.

Section 212(a)(9) 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.

....

(iii) Exceptions

....

(II) Asylees

No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such

period was employed without authorization in the United States. . . .

(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 applicant claims that she entered the United States without being inspected and admitted in or around 1992. The record reflects that the applicant filed an application for asylum (Form I-589), on May 11, 1993. Although the applicant initially claimed that she departed from the United States in 1996 and returned in 1997, the applicant states on appeal that she actually departed from United States on January 13, 2006.¹ The applicant's spouse filed a Petition for Alien Relative (Form I-130) on her behalf, which U.S. Citizenship and Immigration Services approved on November 4, 2004. On January 18, 2007, an immigration judge deemed the applicant's asylum claim abandoned, and issued a final order of removal.

The applicant did not accrue unlawful presence while her bona fide asylum application was pending, unless she engaged in unauthorized employment. Section 212(a)(9)(B)(iii)(II) of the Act. Here, the record shows that the applicant had a pending asylum application during the period from April 1, 1997, the effective date of the unlawful presence bar, to her departure from the United States on January 13, 2006. On her Biographic Information Form (Form G-325), which she signed and dated January 17, 2006, the applicant stated that she was employed by [REDACTED] in Atlanta, Georgia, from July, 2001, to January, 2006. However, the record does not show that the applicant obtained authorization for employment after May 20, 2001. Accordingly, the record indicates that the applicant worked without authorization from July, 2001 to January, 2006 and consequently does not fall within the exception to the unlawful presence bar set forth in section 212(a)(9)(B)(iii)(II) of the Act. The applicant's unlawful presence for one year or more after April 1, 1997, and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See*

¹ The applicant's misrepresentation regarding a 1996 departure from the United States it is not material because it does not affect her admissibility. *See Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; A.G. 1964) (finding misrepresentation not material where it did not affect admissibility); *Matter of S- and B-C-*, 9 I&N Dec. 436, 447-49 (BIA 1960; A.G. 1961) (stating that a misrepresentation is material if the alien is ineligible on the true facts or if the misrepresentation shut off a line of inquiry which may have resulted in ineligibility). Accordingly, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

Matter of Rodarte-Roman, 23 I&N Dec. 905, 909 (BIA 2006).²

In order to obtain a section 212(a)(9)(B)(v) waiver for unlawful presence, an applicant must show that the ten-year bar imposes an extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse or parent. *See* 8 U.S.C. § 1182(a)(9)(B)(v). Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-68 (BIA 1999) (en banc) (considering the hardships of family separation and relocation). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) ("When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the Act that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

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, e.g., economic detriment due to loss

² The director erred in characterizing the ground of inadmissibility in section 212(a)(9)(B)(i)(II) of the Act as a "permanent bar to admission." *See Decision of the Director, supra* at 3. Rather, departure after unlawful presence of one year or more triggers a ten-year bar to admission. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the U.S. Supreme Court held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.³

The record reflects that the applicant’s spouse, [REDACTED] is a 61-year-old native and citizen of the United States. The applicant and her husband have been married for over eight years, and it appears that the applicant has children in the United States from previous relationships. The applicant’s spouse asserts that he is suffering hardships as a result of the denial of the waiver.

Regarding the hardships of separation, the applicant’s spouse states that he loves his wife and that her absence leaves a void in his life. See *Letter from* [REDACTED] dated Jan. 14, 2006. [REDACTED] notes that he is “growing older and older each day,” and that the applicant assisted him with household chores and with paying the bills. *Letter from* [REDACTED], dated July 8, 2007. Additionally, [REDACTED] states that it is getting “harder and harder to send money” to the applicant, and that he cannot afford to visit her in Mexico. *Id.*

Although the record shows that separation from the applicant has caused various hardships to the applicant’s husband, the evidence in the record does not demonstrate that the difficulties encountered by [REDACTED] considered cumulatively, constitute extreme hardship. First, while the emotional hardship of separation is apparent from [REDACTED] letters, the applicant did not provide medical records, probative testimony, or other evidence to show that the psychological hardships he faces are unusual or beyond what would be expected upon family separation due to one member’s inadmissibility. Second, without evidence of [REDACTED] income and expenses, the AAO cannot conclude that family separation has caused extreme financial hardship to [REDACTED]. Further, a showing of economic detriment generally is not sufficient to warrant a finding of extreme hardship. See *Hassan*, 927 F.2d at 468.

³ The District Director erred in citing to *Matter of Tin*, 14 I&N Dec. 371 (Reg. Commr. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Commr. 1978), because these decisions discuss the factors relevant to consent to reapply for admission after deportation from the United States, which are not applicable to this case. Because the AAO is dismissing this appeal after a de novo review, see 5 U.S.C. § 557(b), this error is harmless.

Additionally, the record lacks evidence to support a finding that relocation to Mexico would cause extreme hardship to the applicant's husband. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66 (recognizing importance of 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). In his letters, [REDACTED] does not discuss the possibility of relocating to Mexico to join the applicant and avoid the hardship of separation.

In sum, although the applicant's spouse claims hardships based on the denial of the waiver, the record does not support a finding that the difficulties, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. *See Perez*, 96 F.3d at 392; *Matter of Pilch*, 21 I&N Dec. at 631. Although the distress caused by separation from one's family is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal. *See id.* The AAO therefore finds that the applicant has failed to establish extreme hardship to her spouse, as required under section 212(a)(9)(B)(v) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.