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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
(CDJ 2004 794 612)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: MAY 05 2010

IN RE:

[REDACTED]

APPLICATION:

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

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).

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 is a 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 and seeking readmission within ten years of his last departure from the United States. The applicant's spouse is a U.S. citizen and he seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the District Director*, at 4, dated December 6, 2006.

On appeal, counsel states that the district director erred in concluding that the applicant had been deported or removed from the United States, that extreme hardship to the children of an alien is "off point" and that the applicant's spouse's letter is not in evidence. *I-290B Attachment*, received December 19, 2006. Counsel also asserts that the district director improperly cited case law and failed to fully consider the applicant's spouse's letter. *Id.*

The record includes, but is not limited to, counsel's brief and the applicant's spouse's statement. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO notes counsel's concern that the cases cited by the district director are not applicable to the applicant's case.¹ *Brief in Support of Appeal*, at 7, dated January 9, 2007. The AAO notes that *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) were inappropriately cited as they involve the exercise of discretion in cases involving permission to reapply for admission after deportation or removal, not the determination of extreme hardship. However, the AAO finds the district director to have cited the other decisions to establish the general principles for determining extreme hardship, rather than as examples of cases involving similar facts. The AAO will adjudicate the applicant's appeal based on the relevant case law.

The record reflects that the applicant entered the United States without inspection in June 2002 and departed the United States in July 2003. The applicant accrued unlawful presence during this entire period of time. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his July 2003 departure from the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

¹ Counsel also asserts that the district director incorrectly found the applicant to have been removed from the United States. The district director's decision does not make such a finding.

(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 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 Attorney General [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.

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 to an applicant or his or her children is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. The AAO notes that the record does not contain birth certificates for or other reliable evidence of the applicant's child or stepchild. As such, any hardship that they may experience and its effect on the applicant's spouse will not be considered. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or United States citizen spouse or parent in this country, the qualifying relative's family ties outside the United States, the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries, the financial impact of departure from this country, and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or in the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Mexico. Counsel states that the applicant has headaches, was badly burned on the left side of his head and cannot find any work in Mexico. *Brief in Support of Appeal*, at 14. The record does not include documentary evidence of the applicant's physical problems or how they would affect his spouse, the only qualifying relative. The record also fails to document e.g., published country conditions reports, that the applicant's spouse cannot find employment in Mexico. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There are no other claims of hardship to the applicant's spouse if she relocates to Mexico. The record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the applicant's spouse would suffer extreme hardship if she relocated to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant and his spouse lived together for three years and provided for their children emotionally and financially; he made \$350 per week and used that to support his family; the applicant's spouse will lose her education and her profession without the applicant's support; the applicant's spouse's monthly rent is \$250, down from \$350 when the applicant was here to help her financially; she is using Medicaid to see her doctor; both of the applicant's children are suffering without the applicant and the applicant's spouse suffers extreme hardship watching them suffer the loss of their father and this causes her to cry frequently; and the applicant was an active father with his children and his daughter's grades are suffering because the applicant's spouse does not have enough time to help her. *Brief in Support of Appeal*, at 2-3. The record does not include supporting documentary evidence of counsel's claims. The AAO notes that without documentary evidence to support these claims, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant's spouse states that the applicant's children really miss the applicant and need him by their side, she misses him, their son is constantly saying daddy, the applicant is missing his children growing up, she is working four hours a day and going to school to become a teacher, and she needs the applicant to support her so she can continue her education. *Applicant's Spouse's Statement*, dated December 5, 2005. As previously noted, the record fails to document that the applicant has children. Further, the record does not include documentary evidence that demonstrates how the applicant's children's hardship is affecting the applicant's spouse. The record also contains no documentary evidence in support of the applicant's spouse's claims regarding her school attendance or her financial situation. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See 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)). The record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the applicant's spouse would suffer extreme hardship if she remained in the United States.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.