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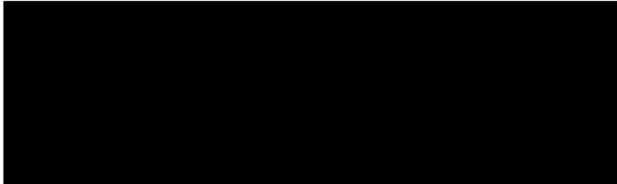
U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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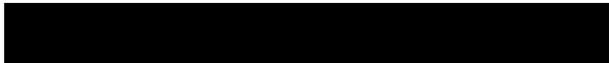
Office: EL PASO, TEXAS

Date:

MAY 12 2010

IN RE:

Applicant:



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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, El Paso, Texas, and 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 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 sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to adjust status in the United States. The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, December 9, 2005. The applicant filed a timely appeal.

On appeal, counsel asserts that the applicant's husband, parents, and children live in the United States and are her qualifying relatives. He contends that the applicant must remain in the United States to assist her parents. Counsel declares that a hardship will result if the applicant is separated from her children. Counsel maintains that the applicant's husband has never lived in Mexico. He conveys that the applicant's oldest child is in school and the applicant's three-year-old child has been to Mexico. Counsel claims that it would be difficult for the applicant's husband to make a living in Mexico and for her children to attend school there. Counsel avers that the country conditions and economic and educational opportunities in Mexico are not the same as they are in the United States.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant states in her

immigrant interview that in January 1997 she entered the United States using her Border Crossing Card. She states that she left the United States in April 1999. Her waiver application indicates that in February 2000 she used her border crossing card to gain admission into the United States to resume her illegal residency. The record contains a copy of the applicant's Form DSP-150, B-1/B-2 Visa/BCC issued on September 19, 2001.

Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is present after the expiration of the period of stay authorized by the Secretary of Homeland Security or present without being admitted or paroled.¹ When nonimmigrants are admitted to the United States, the period of stay authorized is generally noted on the Arrival/Departure Record (Form I-94).²

Forms I-186 and I-586, Nonresident Alien Border Crossing Card, were the cards issued by the legacy Immigration and Naturalization Service through March 31, 1998, to Mexican nationals residing in Mexico at time of application. On October 1, 2001, the INS began implementing the legal requirements for the new biometric Mexican BCCs. Holders of the old BCCs, Form I-186 or I-586, were required to replace them with the new biometric, machine-readable cards (DSP-150). The new card, issued by the Department of State (DOS), is both a BCC and a B-1/B-2 visitor's visa (B-1/B-2 NIV/BCC). See 22 C.F.R. § 41.32.

The AAO has previously determined in another case involving similar facts that since the alien did not appear to be subject to section 222(g) of the Act, he had not accrued unlawful presence during his residence in the United States. The AAO will further explain and clarify its position in this decision.

Section 222(g) of the Act provides, in pertinent part:

(1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

The Immigration and Naturalization Service, in cooperation with the Department of State, adopted essentially the same interpretation of "remain in the United States beyond the period of stay authorized by the Attorney General" for unlawful presence under section 212(a)(9)(B) of the Act and the automatic voidance of nonimmigrant visas under section 222(g) of the Act.³

¹ Memo. from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 11 (May 6, 2009).

² *Id.*

³ Memo. from Michael A. Pearson, Exec. Assoc. Commr., Office of Field Ops., Immigration and Naturalization Serv., to Reg. Dirs., Dep. Exec. Assoc. Commr., Immigration Serv. Div., Act. Exec., Office of Int. Aff., *Section 222(g) of the Immigration and Nationality Act (Act)* 1 (March 3, 2000).

Section 41.112 Note 7.2-2 of Chapter 9 of the Foreign Affairs Manual (FAM), provides, in pertinent part:

Classes of Aliens not Subject to INA 222(g)

a. Section 222(g) has no relevance in immigrant visa cases, nor does it apply to previous overstays relating to an alien who entered the United States without a visa. Specifically, Section 222(g) does not apply to the following:

(1) Aliens who entered the United States without inspection;

(2) Aliens who remain in the United States beyond the period of parole authorization;

(3) Aliens who were admitted with an Form I-865, Sponsor's Notice of Change of Address or Form I-586, Nonresident Alien Border Crossing Card (Canadian or Mexican Border Crossing Card (BCC)), and remain in the United States beyond the authorized period of admission;

NOTE: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by the Department are subject to INA 222(g) if they remain in the United States beyond the authorized admission

Similarly, Chapter 15 of the Inspector's Field Manual provides, in pertinent part:

15.15 Cancellation of nonimmigrant visas under section 222(g) of the Act.

(c) General Applicability. Section 222(g) of the Act applies to aliens who were "... admitted on the basis of a nonimmigrant visa(Emphasis added.) Section 222(g) does not apply to:

(1) Aliens not admitted on the basis of a nonimmigrant visa.

(A) Aliens who enter the United States without inspection;

(B) Aliens who remain in the United States beyond the period of parole authorization;

(C) Aliens who were admitted with an I-186 or I-586, Canadian or Mexican Border Crossing Card (BCC) and remain in the United States beyond the authorized period of admission. (Note: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are subject to section 222(g) of the Act if they remain in the United States beyond the authorized admission, including those who were not issued a Form I-94. However, the overstay should be documented through a sworn statement or other credible evidence.)

The AAO notes that while violating section 222(g) of the Act by remaining in the United States beyond the period of stay authorized by the Secretary of the Department of Homeland Security triggers unlawful presence under section 212(a)(9)(B) of the Act, the inverse is not true. That is, an alien's exemption from section 222(g) of the Act does not automatically render him or her immune from accruing unlawful presence. For example, aliens who enter the United States without inspection or who remain in the United States beyond the period of parole authorization are not subject to section 222(g) of the Act as this section relates only to aliens who have been admitted on the basis of a nonimmigrant visa. However, they are subject to section 212(a)(9)(B) of the Act for accruing unlawful presence.⁴ Therefore, a finding that an alien is not subject to section 222(g) of the Act is not dispositive of whether an alien has accrued unlawful presence.

As stated, aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are considered to have entered with visitor visas, and are subject to section 222(g) of the Act. They therefore accrue unlawful presence under section 212(a)(9)(B) of the Act if they remain in the United States beyond the period of authorized admission even if they were not issued a Form I-94.⁵ A Form I-94 is not required for Mexican nationals admitted as nonimmigrant visitors who have a DSP-150 (B-1/B-2 NIV/BCC) and are admitted for a period not to exceed 30 days to visit within 25 miles of the border or who are admitted at the Mexican border port-of-entries in Arizona at Sasabe, Nogales, Mariposa, Naco or Douglas to visit within 75 miles of the border for a period not to exceed 30 days. 8 C.F.R. § 235.1(h)(1)(v).

However, aliens admitted with the previously issued Mexican BCC (Form I-186 or I-586) are considered "non-controlled nonimmigrants." Such aliens, who were not issued a Form I-94 upon entry, are treated as nonimmigrants admitted for duration of status (D/S) for purposes of determining unlawful presence.⁶ For aliens admitted as D/S, the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.⁷ If U.S. Citizenship and Immigration Services (USCIS) finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied.⁸ If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order.⁹ A consular or immigration officer may revoke a BCC issued on Form I-186 or Form I-586 if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a resident and/or citizen of Mexico. 22 C.F.R. § 41.32(c).

The record reflects that at the time of the applicant's immigrant visa interview, she testified that she had entered the United States with a BCC in January 1997 and left the United States in April 1999. Her waiver application indicates that she returned to the United States in February 2000 and since then has not left the United States. We note that the applicant's B-1/B-2NIV/BCC was issued on

⁴ Memo. from Donald Neufeld at 11.

⁵ Memo. from Michael A. Pearson at 3.

⁶ Memo. from Donald Neufeld at 25.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

September 19, 2001. The record does not indicate that the applicant entered with the previously issued Mexican BCC (Form I-186 or I-586) or with a combination B-1/B-2 NIV/BCC. Nor does the record reflect that while the applicant was residing in the United States a determination was made by an immigration officer or an immigration judge that she violated her nonimmigrant status by ceasing to be a resident and/or citizen of Mexico. In the absence of such evidence, the AAO cannot conclude that the applicant accrued unlawful presence during her residence in the United States. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Although not addressed by the director, the AAO notes that the record reveals that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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 Act is inadmissible.

USCIS records reflect that the applicant admitted to residing illegally in the United States from January 1997 until April 1999. In February 2000, when she sought admission into the United States to continue her illegal residency, she presented to the U.S. Border Inspector her border crossing card. In presenting the border crossing card the applicant misrepresented her true intention in seeking admission into the United States. The applicant had no intention of continuing residency in Mexico or of remaining in the United States for a temporary period in accordance with the requirements of the border crossing card. Instead, her true intention was to resume her illegal residency in the United States. Based on the record, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C) of the Act for having willfully misrepresented the material fact of her true intention in procuring admission into the United States, and her eligibility for admission into the United States.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the

application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 [Secretary] 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 waiver under section 212(i) of the Act requires the applicant show that the bar to admission imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(i) of the Act. Hardship to the applicant and to his child will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's U.S. citizen spouse, and her lawful permanent resident mother and naturalized citizen father. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In rendering this decision, the AAO will consider all of the evidence in the record as it relates to the applicant's section 212(a)(9)(B)(v) and 212(i) waivers.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. The factors include the presence of a 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. *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994)).

Extreme hardship to the applicant's spouse and parents must be established in the event that they remain in the United States without the applicant, and alternatively, if they join her to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel contends that the applicant must remain in the United States to assist her elderly parents,

and he states that separation from her children will create a hardship. Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“the most important single hardship factor may be the separation of the alien from family living in the United States”). However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship)). In *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)).

Although counsel claims that the applicant must remain in the United States to assist her parents, there is no corroborating evidence demonstrating that her parents will experience extreme hardship if they remained in the United States without their daughter. The AAO acknowledges that the applicant's husband and parents will experience emotional hardship as a result of separation from the applicant. However, we find that the applicant has not fully demonstrated how the emotional hardship of her husband and parents “is unusual or beyond that which is normally to be expected” from an applicant's bar to admission. Furthermore, the AAO notes that the applicant has not fully established how separation from her children will result in extreme hardship to her parents and husband.

The hardship factors presented here are the assistance the applicant provides to her parents, and the emotional hardship of her parents and husband as a result of separation from the applicant. Although the AAO recognizes that the applicant's husband and parents will experience emotional hardship as a result of separation, we find that the applicant has not fully established how their emotional hardship “is unusual or beyond that which is normally to be expected” from an applicant's bar to admission and how the emotional hardship of the applicant's children will result in extreme hardship to her husband and parents. No documentation has been provided in support of counsel's assertion that the applicant must remain in the United States in order to assist her elderly parents. When the combination of hardship factors is considered in the aggregate, the AAO finds they fail to establish extreme hardship to the applicant's husband and parents if they remain in the United States without her.

With regard to joining the applicant to live in Mexico, the applicant states in her letter dated September 1, 2005, that her children would suffer if they joined her in Mexico because they are “educated in the American way of life.” She claims that attending a school in Mexico will be devastating to her eight-year-old child. However, the applicant has not demonstrated how these hardships to her children will result in extreme hardship to her husband and parents. Counsel declares that the applicant's husband has never lived in Mexico and that it would be difficult for him to earn a living there. However, there is no documentation in the record of the social and economic conditions in Mexico, or of the educational level and employment history of the applicant and her husband and her parents. Such documentation is needed to establish that the applicant and her husband and parents will be unable to obtain employment in Mexico that will be sufficient to support their family. Lastly, although counsel claims that Mexico's country conditions and economic and

educational opportunities are not the same as they are in the United States, there is no documentation in the record of its conditions, economy, or educational system, and no showing of how these factors will make living in Mexico an extreme hardship to the applicant's husband and parents.

The hardship factors presented here are the hardships to the applicant's children in attending school in Mexico and adjusting to a different foreign country, the difficulties in obtaining employment, and the conditions in Mexico in general. While the AAO acknowledges that there are inevitable hardships in relocating to Mexico, we find that the applicant has not fully demonstrated how the hardships of her children will result in extreme hardship to her husband and parents; or how, in view of their educational level, skills, and employment history, the social and economic conditions in Mexico will impact their ability to obtain employment in Mexico. When the combination of hardship factors is considered in the aggregate, the AAO finds they fail to establish extreme hardship to the applicant's husband and parents if they joined the applicant to live in Mexico.

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.