



U.S. Citizenship
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MAY 19 2010

FILE:

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Office: MEXICO CITY (CIUDAD JUAREZ)

Date:

CDJ 2005 640 259

IN RE:

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APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v)
of the Immigration and Nationality Act, 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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. She 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 seeks waivers of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v). 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 Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the director failed to describe the circumstances associated with the applicant's misrepresentation and fraudulent use of documents. He further asserts that the immediate family members of the applicant will experience extreme hardship if the waiver is not granted.

As an initial matter, we note that the director found the applicant to be inadmissible under section 212(a)(9)(B) of the Act for unlawful presence. The director never suggested that the applicant was inadmissible for seeking admission into the United States by fraud or willful misrepresentation.

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

In the waiver application, the applicant states that she entered the United States with a valid “laser visa” on July 9, 2001, and remained in the United States until September 8, 2006.

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.

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

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)

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).

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 applicant states in the waiver application that she entered the United States with a valid “laser visa” on July 9, 2001, and remained in the United States until September 8, 2006. The consular officer’s interview notes indicate that the applicant entered the United States in July 2001 with a valid B1/B2 visa and remained until September 2006. We note that the consular officer also indicated that the applicant stated under oath that she entered the United States with a valid laser visa in January 2002 and obtained an I-94 permit, but remained in the United States for four years without renewing the permit. Although the AAO cannot conclusively determine whether the applicant entered the United States in July 2001 or January 2002, we find that the record sufficiently

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.*

demonstrates that she entered the United States with a valid laser visa, which is the Form DSP-150 (B-1/B-2 NIV/BCC). Consequently, the applicant is subject to section 222(g) of the Act, accrued unlawful presence from July 2001 until her departure in September 2006, and triggered the ten-year bar when she left the country, rendering her inadmissible under section 212(a)(9)(B) of the Act.

The waiver under section 212(a)(9)(B)(v) 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 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(a)(9)(B)(v) 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 is the applicant's naturalized citizen spouse. 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

"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 husband must be established in the event that he remains in the United States without the applicant, and alternatively, if he joins 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.

With regard to remaining in the United States without the applicant, the applicant's husband conveys in his letter dated September 24, 2006, that he has lived in the United States for 26 years and does not wish to be separated from his wife and U.S. citizen child and the baby they are expecting. He states that his wife lived in the United States for five years and that they have a four-year-old son

who is to start a speech program because of not speaking clearly. He asserts that he has insurance for his wife's pregnancy, but that she is in Mexico without insurance, money, or a job. He states that his son is losing weight and does not want to eat, and does not want him to return to Mexico, which he must do to pay bills. The record contains a document showing that the applicant's son was to begin a head start program in Anaheim, California, prior to the applicant's adjustment of status interview.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision denying an application for suspension of deportation, noting that "[s]eparation from one's spouse entails substantially more than economic hardship." *Id.* at 1005. Similarly, the Third Circuit in *Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979) explicitly stressed the importance to be given the factor of separation of parent and child.

The hardship factors asserted here are separation from the applicant and the availability of medical insurance in the United States. In view of the substantial weight that is given to family separation in the hardship analysis, and in light of the significant emotional impact that separation from the applicant has had on her husband, we find the applicant has demonstrated that the hardship that her husband will experience as a result of separation is extreme.

With regard to the hardships associated with joining his wife to live in Mexico, the applicant's husband indicates that his wife is expecting a baby within a few days and that he does not have a job, medical insurance, or money in Mexico. The applicant's husband states during the immigrant interview that he does not have enough money to travel to Guadalajara, where the applicant's family lives. We note that even though the applicant's husband conveys that he does not have a job or medical insurance in Mexico, no documentation has been provided to demonstrate that he will be unable to obtain employment in Mexico that will support his family or that after the birth of his baby he will be unable to afford or obtain medical insurance and/or medical care that is similar to what he has in the United States.

Because the applicant is statutorily ineligible for relief, no purpose is 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)(v) 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.