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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

H6

[redacted]

FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: NOV 1 0 2010

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion 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 Officer-in-Charge, Ciudad Juarez, Mexico, and 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, and 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 more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The officer-in-charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer-in-Charge*, at 5, dated January 5, 2007.

On appeal, the applicant's spouse states that she is submitting documents, letters, personal statements, and previously overlooked evidence of extreme hardship. *Form I-290B*, received February 1, 2007.

The record includes, but is not limited to, a psychotherapist's letters for the applicant's spouse, the applicant's and his spouse's statements, financial and medical records for the applicant's spouse, statements from the applicant's spouse's son and grandson, statements from the applicant's spouse's mother and sister, information on panic attacks and ulcers, medical records for the applicant's spouse's grandson, and a termination of employment letter for the applicant's spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in December or January 1999 and departed the United States on January 21, 2003 pursuant to a voluntary departure order issued November 12, 2002. The applicant accrued unlawful presence from May 1999, the date he entered to the United States, until he was granted voluntary departure on November 12, 2002. 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 January 21, 2003 departure from the United States.

Section 212(a)(9)(B) 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.
>
> . . . .
>
> (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.

The record reflects that the applicant was convicted of First Degree Criminal Trespass in violation of Colorado Statutes § 18-4-502 in regard to a June 15, 2002 offense. This statute states:

> A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another or if such person enters any motor vehicle with intent to commit a crime therein. First degree criminal trespass is a class 5 felony.

As the applicant's conviction may have been for a crime involving moral turpitude, depending on the part of the statute he was convicted under and the specifics of his case, the AAO requested documents from him on May 5, 2010 to clarify the record. The applicant responded with documents, but these documents do not clarify the record. As the burden of proof is on the applicant in these waiver proceedings to establish that he did not commit a crime involving moral turpitude, the AAO finds that his conviction for First Degree Criminal Trespass in violation of Colorado Statutes § 18-4-502 was for a crime involving moral turpitude and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The Tenth Circuit Court of Appeals has found a conviction under Colorado Statutes § 18-4-502 for criminal trespass of a dwelling to be a crime of violence. *U.S. v. Venegas-Ornelas*, 348 F.3d 1273, (10th Cir. 2003). As the applicant has not established that he was not convicted under this prong of the statute, the AAO also finds that he has committed a violent or dangerous crime and is subject to the heightened discretionary standard set forth in the regulation at 8 C.F.R. § 212.7(d), which provides:

> The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an

> immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Therefore, to establish eligibility for a waiver of inadmissibility in the present case, the applicant must show that "extraordinary circumstances" warrant its approval. Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative. *Id.* We note that the regulatory standard of exceptional and extremely unusual hardship found in 8 C.F.R. § 212.7(d) is more restrictive than the extreme hardship standard set forth in section 212(h) of the Act. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993).

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme

> hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent's minor children was demonstrated by evidence that they "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives." *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent's case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

> While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children's father, her U.S. citizen children's unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

The AAO now turns to a consideration of whether the record establishes that a qualifying relative will experience exceptional and extremely unusual hardship if the applicant's waiver application is denied. We note such hardship must be established whether the qualifying relative accompanies the applicant or remains in the United States as he or she is not required to depart the United States as a consequence of the applicant's inadmissibility. The applicant's spouse is a qualifying relative for the purposes of determining exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d).

The first part of the analysis requires the applicant to establish exceptional and extremely unusual hardship to a qualifying relative in the event of relocation to Mexico. The record reflects that the applicant's spouse has been travelling back and forth between Mexico and the United States since the applicant's departure from the United States. *Applicant's Spouse's First Statement*, dated February 20, 2006. The applicant's spouse states that the pay in Mexico is $10.00 per day; the applicant lives with his 13 family members in a two-bedroom house; she could not believe the poverty she saw in Mexico including no running water, bathrooms, telephones, police and hospitals; her mother, son and sisters became depressed when she told them she was going to join the applicant for her own well-being; her grandson went to counseling for depression as he thought he was going to lose her; her mother has vertigo and a bad heart; she experienced the same physical and mental suffering leaving her family in the United States as she did when she left the applicant in Mexico; and she is not adapted to the lifestyle and living environment in Mexico. *Applicant's Spouse's First Statement*, at 2-5. The AAO notes that many of these claims are not supported by documentary evidence. 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 applicant's spouse's psychotherapist states that he has been treating the applicant's spouse for four years for depression, stress and anxiety, and that the applicant and the applicant's spouse's family are under great stress, which aggravates her conditions. *Psychotherapist's Letter*, dated January 24, 2007. The AAO notes that this treatment occurred during the time period in which the applicant's spouse was travelling to and from Mexico. As such, it is pertinent to this prong of the analysis.

The applicant's spouse states that she has been diagnosed with chronic sinusitis, a stomach ulcer, an eating disorder, a sleeping disorder, depression, stress, and a panic disorder for which she takes Xanax; her illness worsened after her son and grandson visited her for two weeks; she has major back pain from a prior auto accident; she is unable to keep permanent employment; she has no medical or dental insurance and no transportation; her mother has a bad heart, vertigo and diverticulitis; her son was diagnosed with diverticulitis and had a recent car accident and hernia operations; and she assists her son with household chores and cares for his son. *Applicant's Spouse's Second Statement*, at 2, dated January 29, 2007. The record includes medical records reflecting that the applicant's spouse was seen for chest pain on July 25, 2005. *Medical Records*. The record does not include supporting documentary evidence of many of the applicant's spouse's medical claims, although the AAO notes that the record includes several bills related to medical treatment and December 25, 2003 Discharge Instructions that mention that the applicant's spouse has an early dental infection (abscess) and is taking an antibiotic and pain medicine.

The applicant's spouse's son states that he has been diagnosed with diverticulitis; he recently had an auto accident and two hernia operations; the applicant's spouse is helping him and helping take care of his son; he is very close to her; and he and her grandchildren are suffering extreme stress. *Statement from Applicant's Spouse's Son,* dated January 15, 2007. The record includes no evidence in support of these claims. While it does provide medical documentation for a child diagnosed with Arnold-Chiari Deformity Type I, no evidence establishes that the applicant's spouse has a son or grandson. *Medical Record,* dated September 18, 2003. Going on record without supporting documentation is not sufficient to 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 AAO notes that on September 10, 2010, the U.S. Department of State issued a travel warning to United States citizens thinking of traveling to Mexico. Although the applicant's spouse would not be residing in an area specifically listed in the travel warning, the AAO notes the general safety issues in Mexico.

Based on the totality of the hardship factors, the AAO does not find that the applicant's spouse would suffer exceptional and extremely unusual hardship if she resided in Mexico.

The second part of the analysis requires the applicant to establish exceptional and extremely unusual hardship in the event that a qualifying relative remains in the United States. The applicant's spouse details how she lost her employment due to not receiving a telephone message from her mother when she was in Mexico, as the ranch the applicant lives on does not have a telephone, it is a 22 hour bus ride back home and she could not afford to fly. *Applicant's Spouse's First Statement*, at 3. The record includes a letter terminating her employment. *Employer Letter*, dated October 22, 2003. The applicant's spouse states that she has incurred outstanding debts and she could never pay for her outstanding debts by herself. *Applicant's Spouse's First Statement*, at 4-5. The record includes a letter from an asset recovery officer in relation to a $6,565.94 debt owed by the applicant's spouse. *Letter from* [redacted] dated July 14, 2005. The record includes a collection notice for the applicant's spouse in the amount of $2,107.13. *Letter from* [redacted] August 23, 2005. The record includes a balance due notice for the applicant's spouse from St. Anthony Central in the amount of $2,236.94. *Balance Due Notice*, dated September 6, 2005. The record includes other hospital bills for the applicant's spouse. The applicant states that his spouse's mother has diverticulitis, her grandson has an Arnold Chiari deformity and her son has a shoulder injury; his spouse has a bad back from an auto accident, she has to watch her family and it is impossible for her to do it by herself; his spouse cannot work a lot due to her accident and health problems; and his spouse lost everything and does not have a place to stay. *Applicant's Statement*, at 2, received February 7, 2006. The AAO notes that many of these claims do not include supporting documentary evidence.

The applicant's spouse states that she has been diagnosed with chronic sinusitis, a stomach ulcer, an eating disorder, a sleeping disorder, depression, stress, and a panic disorder for which she takes Xanax; she has major back pain from a prior auto accident; she is unable to keep permanent employment; she has no medical or dental insurance and no transportation; her mother has a bad heart, vertigo and diverticulitis; her son was diagnosed with diverticulitis and had a recent car accident and hernia operations; she assists her son with household chores and cares for his son; and she needs the applicant in the United States so she can receive proper medical care and financial support. *Applicant's Spouse's Second Statement*, at 2.

The applicant's spouse's psychotherapist states that he has been treating the applicant's spouse for four years; he has treated her for depression, stress and anxiety through psychotherapy, medications, social support systems, a strong relationship with God, stress management techniques and finding a new career or stable employment; all of the methods have been of some assistance, but the inability of the applicant to come to the United States has continued to cause her serious, frequent and long-term physical, psychological, social, career, legal and financial problems; she needs to continue

ongoing treatment; he is fearful for her mental and physical health, and survival; and the applicant and the applicant's spouse's family are under great stress, which aggravates her conditions. *Psychotherapist's Letter.*

Based on the totality of the hardship factors, the AAO finds that the applicant's spouse would suffer exceptional and extremely unusual hardship if she resided in the United States without the applicant.

A review of the documentation in the record fails to establish the existence of exceptional and extremely unusual hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Accordingly, the AAO will not favorably exercise the Attorney General's (now Secretary's) discretion under section 212(h)(2) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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.[1]

ORDER: The appeal is dismissed.

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[1] The AAO notes that a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). However, no purpose would be served in addressing the section 212(a)(9)(B)(v) waiver as the more restrictive exceptional and extremely unusual hardship standard has not been met.