

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H6

DATE: NOV 17 2011 OFFICE: MEXICO CITY, MEXICO

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(1)(A)(iii) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(1)(A)(iii) and 1182(a)(9)(B)(i)(II)

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 \$630. 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 Acting District Director, Mexico City, 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)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(a)(iii), for having a physical or mental disorder with associated harmful behavior 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 admission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen. He seeks waivers of his inadmissibilities in order to reside in the United States.

The Acting District Director found that the applicant, a K-3 nonimmigrant visa beneficiary, had failed to establish that the bars to his admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Acting District Director*, dated August 22, 2008.

On appeal, the applicant contends that the applicant is seeking admission to the United States as a K-3 nonimmigrant and that United States Citizenship and Immigration Services (USCIS) erred in requiring him to establish waiver eligibility under sections 212(a)(9)(B)(v) and 212(g) of the Act, which are imposed on immigrants. Counsel asserts that as the applicant is seeking nonimmigrant admission to the United States, his waiver request must be considered under section 212(d)(3) of the Act, 8 U.S.C. § 1182(d)(3). *Form I-290B, Notice of Appeal or Motion*, dated September 22, 2008.

The evidence of record includes, but is not limited to: counsel's briefs, including comments provided in response to USCIS' 2009 publication of proposed changes to 8 C.F.R. § 212.7; a statement from the applicant's spouse; country conditions material on Mexico; an employment letter for the applicant's spouse; proof of the applicant's spouse's benefits through her employment; and research articles on alcohol consumption. The entire record was reviewed and all relevant evidence considered in reaching this decision.

Section 212(a) of the Act states, in pertinent part:

(a) Classes of Aliens Ineligible for Visas or Admission.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.—

(A) In general.—Any alien-

....

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible.

The psychologist who conducted an evaluation of the applicant prior to his May 4, 2007 visa interview diagnosed him as suffering from Alcohol Abuse with Associated Harmful Behavior, resulting in a determination that he had a "Class A" medical condition and a finding of inadmissibility under section 212 (a)(1)(A)(iii) of the Act. The psychologist also reported that the applicant had driven under the influence of alcohol on several occasions and that the likelihood of alcohol-related harmful behavior was still present.

In the brief filed in support of the applicant's Form I-601, counsel contends that the finding of inadmissibility under section 212(a)(1)(A)(iii) is flawed. He submits two research articles on alcohol consumption that, he states, show the applicant's use of alcohol is "not only well below moderate, but healthy for his cardiovascular and neurological systems." He further asserts that neither the applicant nor the psychologist were qualified to determine whether the applicant had "driven under the influence," as neither knew whether the applicant had ever driven while his blood alcohol content was above the statutory limit.

While the AAO notes counsel's assertions regarding the flawed nature of the applicant's medical examination, the determination of whether a visa applicant is inadmissible to the United States on the basis of a physical or mental condition is a medical decision made, after appropriate consultation, by an overseas panel physician who operates under regulations issued by the Department of Health and Human Services. Pursuant to 42 C.F.R. § 34.3(i), overseas panel physicians carry out their examinations in accordance with the Technical Instructions for Medical Screening of Aliens issued by the Division of Global Migration and Quarantine (DGMQ), Centers for Disease Control. As a review of the record fails to identify any anomalies in the medical examination or process through which the determination of the applicant's Class A status was reached, the AAO finds him to be inadmissible to the United States pursuant to section 212(a)(1)(A)(iii) of the Act based on the panel physician's determination that the applicant suffers from Alcohol Abuse with Associated Harmful Behavior.

Section 212(a)(9)(B) of the Act states 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.

The record reflects that applicant entered the United States without inspection in September 1997 and remained until he departed on May 1, 2007 for a consular interview in Ciudad Juarez. Based on this history, the applicant accrued unlawful presence from the date of his unlawful entry until his 2007 departure from the United States. As the applicant accrued unlawful presence in excess of one year and is seeking admission to the United States within ten years of his 2007 departure, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

On appeal, counsel contends that USCIS erred in considering the applicant's waiver request under sections 212(a)(9)(B)(v) and 212(g) of the Act as the applicant is a nonimmigrant whose eligibility for a waiver of inadmissibility must be considered under section 212(d)(3) of the Act.¹

Section 212(d)(3) states in pertinent part:

(3)(A) Except as provided in this subsection, an alien

(ii) who is inadmissible under subsection (a) . . . but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General [now Secretary of Homeland Security]

In *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978), the Board of Immigration Appeals (BIA) held that:

In deciding whether or not to grant an application under section 212(d)(3)(B) [now section 212(d)(3)(ii)], there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's immigration law, or criminal law, violations, if any.

¹ The AAO notes counsel's assertions that both the Board of Immigration Appeals (BIA) and the Seventh Circuit Court of Appeals have held that K-3 nonimmigrants must apply for waivers of inadmissibility under section 212(d)(3) of the Act. In two unpublished decisions involving a K-3 beneficiary from Nigeria who applied for a waiver under section 212(i) of the Act, the BIA found that the respondent was ineligible to benefit from a 212(i) waiver application as she was not an immigrant. In considering this same case on appeal, the Seventh Circuit Court of Appeals also held that the respondent was statutorily ineligible for 212(i) waiver of inadmissibility based on the Act's limitation of 212(i) relief to immigrants. *Atunnise v. Mukasey*, 523 F.3d 830 (7th Cir. 2008).

The third factor is the nature of the applicant's reasons for wishing to enter the United States.

Counsel states that, if considered under the factors established by *Hranka*, the applicant should be granted a waiver as his admission would present no risk to the United States; he has never been arrested for or convicted of any crime and has only one immigration violation, his unlawful entry in 1997; and his purpose in seeking entry to the United States is to join his U.S. citizen spouse and start a family.

While the AAO agrees that the applicant as a K-3 nonimmigrant is eligible for waiver consideration under section 212(d)(3) of the Act, we also note that the regulation at 22 C.F.R. § 41.81 instructs Department of State consular officers to determine the eligibility of an alien to receive a K nonimmigrant visa "as if the alien were an applicant for an immigrant visa." 22 C.F.R. § 41.81(d). We also observe that 9 FAM § 41.81 N9.1 provides Department of State consular officers with the following instructions:

[P]rocessing an INA 212(d)(3)(A) waiver would not be appropriate unless an immigrant waiver is also available when the K visa holder applies to adjust status to [lawful] permanent resident. To determine whether a waiver is available for a K applicant, the consular officer must, therefore, first examine whether the particular INA 212(a) ineligibility is waiveable for immigrant spouses of U.S. citizens . . .

The AAO observes that the "Instructions for I-601, Application for Waiver of Grounds of Inadmissibility Form I-601," which establish regulatory requirements² that a K-3 beneficiary must meet to demonstrate eligibility for nonimmigrant admission under the Act, reflect this same emphasis on ensuring immigrant eligibility when K-3 visas are issued. By imposing almost all of the same waiver requirements on K-3 spouses as on immigrant spouses, USCIS seeks to ensure that K-3 visa beneficiaries do not enter the United States as nonimmigrants only to be found ineligible for adjustment of status.

In the present matter, the applicant is inadmissible pursuant to the health-related grounds of section 212(a)(1)(A)(iii) of the Act and the unlawful presence provisions of section 212(a)(9)(B)(i). To obtain a waiver of his inadmissibility under section 212(a)(1)(A)(iii), the I-601 Instructions, at page 3, subsection "3. Applicants With Physical or Mental Disorder and Associated Harmful Behavior," require the applicant to "submit a complete medical history and a report that addresses the following:

² The regulation at 8 C.F.R. § 212.7(a) states:

(1) Form I-601 must be filed in accordance with the instructions on the form. . . .

The regulation at 8 C.F.R. § 103.2(a) states:

(1) *General*. Every application, petition, appeal, motion, request, or other document submitted on any form prescribed by this chapter I, notwithstanding any other regulations to the contrary, must be filed with the location and executed in accordance with the instructions on the form, such instructions being hereby incorporated into the particular section of the regulations in this chapter I requiring its submission. . . .

- A. Your physical or mental disorder, and the behavior associated with the disorder that poses, has posed, or may pose in the future a threat to the property, safety, or welfare of you or other individuals. The report should also provide details of any hospitalization, institutional care, or any other treatment you may have received in relation to this physical or mental disorder;
- B. Findings regarding your current physical condition, including, if applicable, reports of chest X-rays and a serologic test, if you are 15 years of age or older, and other pertinent diagnostic tests; and
- C. Findings regarding the current mental or physical condition, including a detained prognosis that should specify, based on a reasonable degree of medical certainty, the possibility that the harmful behavior is likely to recur or that other harmful behavior associated with the disorder is likely to occur; and
- D. A recommendation concerning treatment that is reasonably available in the United States and that can reasonably be expected to significantly reduce the likelihood that the physical or mental disorder will result in harmful behavior in the future.

To qualify for a waiver of unlawful presence, the I-601 Instructions, at page 5 under the section entitled "Applicants Seeking a Waiver of Inadmissibility Based on the Three-Year or 10-Year Bar Pursuant to INS Section 212(a)(9)(B)(v)," indicate that:

[t]he waiver may be granted if your qualifying U.S. citizen or [lawful] permanent resident relative (spouse, parent), or the K visa petitioner would experience extreme hardship if you were denied admission.

The AAO now turns to a consideration of whether the record establishes that the applicant has satisfied the above requirements and is eligible for waivers of his inadmissibilities under sections 212(a)(1)(A)(iii) and 212(a)(9)(B)(i)(II) of the Act.

A review of the record does not find the applicant to have complied with the documentary requirements for K-3 beneficiaries seeking a waiver of a Physical or Mental Disorder and Associated Harmful Behavior. As the record does not contain the medical history and other documentation required by the I-601 Instructions, the applicant has not established eligibility for a waiver of his health-related inadmissibility under section 212(a)(1)(A)(iii) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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 AAO notes that while section 212(a)(9)(B)(v) of the Act waives inadmissibility based on extreme hardship to a U.S. citizen or lawfully resident spouse or parent, Form I-601 instructions also allow for a waiver of unlawful presence when an applicant is able to establish extreme hardship to the K petitioner. In the present case, the qualifying relative is both the K petitioner and the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23

I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In his brief in support of the applicant's waiver application, counsel asserts that the applicant's spouse would experience extreme hardship if she relocated with the applicant to Mexico. Counsel states that the applicant's spouse is a U.S. citizen who has lived in the United States since she was six years old, that her parents and three of her siblings reside in the United States as lawful permanent residents, that a fourth sibling is a U.S. citizen by birth and that she has nine aunts and uncles and many cousins living in the United States. The applicant's spouse, counsel contends, has no family in Mexico and she will not be able to regularly travel the long distance between Ocampo, Guanajuato, the location of the applicant's parents, and the United States to see her family. Counsel further notes the violence, crime and human rights problems in Mexico, including discrimination against women in the workplace. Counsel asserts that if she relocates to Mexico, the applicant's spouse will "essentially relegate herself to a life of misery and poverty." When she ultimately returns to the United States, he contends, she will have been exposed to such debilitating poverty that she will have to rely on public assistance.

Counsel also notes that by following the applicant to Mexico, his spouse will lose her current job as a quality control inspector at a local company, where she earns an annual salary of \$17,000, with full benefits. Counsel also states that since the applicant's spouse is a U.S. citizen she will not be authorized to work in Mexico until she obtains some type of legal status. He claims, however, that even if she is able to obtain a status that allows her to work, she will still face serious problems finding a decent job. Counsel further asserts that relocation would destroy the applicant's spouse's hope of going to college and pursuing a degree in business, as she would find it extremely hard to succeed in a foreign university system.

In an April 30, 2007 statement, the applicant's spouse states that she has been raised and educated in the United States, and that her parents and siblings all live in the United States, as well as her nine uncles and aunts, and their families. She asserts that she has no family or friends in Mexico, has visited Mexico infrequently and would be unable to afford to travel to see her U.S. family very often. The applicant's spouse also reports that the applicant lives with his parents in a small two-bedroom house in Ocampo, Guanajuato, which is in the middle of the desert.

The applicant's spouse states that she has been educated only in English, that whatever Spanish she knows has been picked up in everyday conversations and that she can hardly write in Spanish. As a result, she asserts, her job prospects in Mexico will be poor. She states that she will be limited to low-paying jobs with no opportunities for advancement and that until she gets legal status she will be

unable to work. She further states that she will be unable to find employment that is comparable to that she currently holds and that, prior to moving to Mexico, she and the applicant would have to sell nearly everything they own as they would need the money for relocation. She notes that when they return to the United States in ten years, she and the applicant will be much worse off and will have to start all over again.

The applicant's spouse also asserts that if she relocates her opportunity for a college education will disappear. She reports that, although she left high school to help care for a younger sister, she is close to completing the requirements for a high school diploma and that she plans to enter college to obtain a business administration degree. In Mexico, she contends, she will be unlikely to pass the university entrance examinations as her Spanish is so limited. She also states that she wants any children she may have to be educated in the United States and that if she relocates to Mexico, English will be their second language, which will affect their ability to attend college in the United States.

In support of the claims of hardship upon relocation, the record contains a copy of the section on Mexico from the Department of State's Country Reports on Human Rights Practices – 2005, published on March 8, 2006. This report indicates that, in 2005, the minimum wage in Mexico did not provide a decent standard of living for a worker and his or her family, and that only a small fraction of workers in the formal workforce received the minimum wage. However, we do not find general economic or country conditions in an alien's native country to establish hardship in the absence of evidence that the conditions would specifically impact the qualifying relative. *See Kuciemba v. INS*, 92 F.3d 496 (7th Cir. 1996) (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985)). The AAO does note, however, that the applicant's ability to speak and write in Spanish is limited and agrees that her lack of literacy in Spanish would negatively affect her ability to obtain employment.

The AAO also acknowledges counsel's claims regarding the violence that is prevalent in Mexico and observes that the recent spike in drug-related violence has led the Department of State to issue a travel warning for Mexico, which remains in effect. The travel warning indicates that violence is spread across the country. We further recognize that the applicant's spouse, who is now 31 years of age, has lived in the United States since she was six years old and that all the members of her immediate family live in the United States.

Having considered the preceding claims and the evidence of record, the AAO finds that when the applicant's spouse's long-term residence in the United States; the presence of all of her close family members in the United States; the violence prevalent in Mexico, the impact of her limited Spanish-language capabilities on her employment and educational opportunities; and the disruptions and difficulties normally created by relocation are considered in the aggregate, the applicant has established that his spouse would experience extreme hardship upon relocation

Counsel also claims that the applicant's spouse will suffer extreme hardship if the applicant's waiver application is denied and she remains in the United States. In the brief he filed with the Form I-601, counsel contends that although the applicant's spouse is employed, her employment should not be used to minimize the hardship that she would suffer in the applicant's absence. Counsel asserts that the applicant's spouse will suffer hardship as a result of her ten-year separation from the applicant and her inability to achieve her educational aspirations without his support.

In her April 30, 2007 statement, the applicant's spouse states that the applicant is the main breadwinner of the family while she attends school and that she will suffer economically and emotionally if he is not allowed to return to the United States. She states that it is a 2,000 mile round-trip to visit the applicant in Guanajuato, and that she would have neither the money nor the time off from work to see him very often.

The AAO notes the applicant's spouse's assertion that she would suffer economically in the applicant's absence, but does not find the record to support this claim. Although counsel states that the applicant's spouse earns \$17,000 a year, the record contains no documentary evidence that establishes the amount of her annual income. A March 23, 2007 letter from [REDACTED] at [REDACTED] reports only that the applicant is employed as a mechanical assembler. It does not indicate her rate of pay. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. 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 record also lacks any documentation, e.g., earnings statements, W-2 forms or tax returns, to demonstrate that the applicant was the main breadwinner in his family prior to his departure for Mexico. 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 record also fails to provide evidence of the applicant's spouse's financial responsibilities in his absence. Therefore, the AAO finds the record to contain insufficient evidence to establish the financial impact of separation on the applicant's spouse.

The record further fails to offer evidence that would allow the AAO to assess the emotional hardship that the applicant's spouse would suffer as a result of her continued separation from the applicant. While we acknowledge that the applicant's spouse would experience emotional hardship as a result of the denial of the applicant's waiver application, no evidence in the record addresses the specifics of how she has been or would be affected as a result of being separated from the applicant. Therefore, without further evidence of the hardships claimed on appeal, the AAO finds that the applicant has not established that his spouse would suffer extreme hardship if his inadmissibility to the United States is not waived and she remains in the United States.

Although the applicant has demonstrated that his spouse would experience extreme hardship if she relocates to Mexico, the AAO can find extreme hardship warranting a waiver of inadmissibility only where an applicant has shown extreme hardship to a qualifying relative in the scenario of relocation *and* the scenario of separation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, when remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant in this case has not demonstrated extreme hardship as a result of

separation, we cannot find that refusal of admission would result in extreme hardship to his spouse. Accordingly, he has not established statutory eligibility for a waiver under section 212(a)(9)(B)(v) of the Act.

The record does not establish that the applicant has met the waiver requirements set forth in the I-601 Instructions and he, therefore, remains inadmissible under sections 212(a)(1)(A)(iii) and 212(a)(9)(B)(i)(II) of the Act. In that the applicant is statutorily ineligible for relief, the AAO finds no purpose would be served in considering whether he merits a waiver as a matter of discretion.

In proceedings for an application for a waiver of grounds of inadmissibility, 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.