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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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U.S. Citizenship
and Immigration
Services



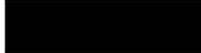
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Date: SEP 08 2011

Office: ST. PAUL

File: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, St. Paul, Minnesota, denied the instant waiver application. On appeal, the Administrative Appeals Office (AAO) withdrew the district director's decision and declared the waiver application moot. The AAO then reconsidered, withdrew its prior decision and provided the applicant with 30 days to submit a brief. The AAO will now dismiss the appeal and deny the waiver application.

The record reflects that the applicant, [REDACTED] is a native and citizen of Mexico, the husband of a naturalized U.S. citizen, and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year, and again seeking admission within three years of the date of the applicant's departure. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States with his U.S. citizen wife and four children.

In a decision dated May 8, 2006 denying the Application for Waiver of Ground of Excludability (Form I-601), the district director concluded that the applicant was inadmissible under section 212(a)(9)(B)(i)(I) of the Act and had failed to establish that the bar to admission would impose extreme hardship on the qualifying relative, his U.S. citizen spouse.

On appeal, the applicant's former counsel argued that the district director had failed to properly weigh the hardship factors presented by the applicant. He asserted that these hardships, when considered cumulatively, constitute extreme hardship to the applicant's wife and children. In a decision dated May 4, 2009, the AAO reviewed the determination of inadmissibility. The AAO found that though the applicant had been inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, he was no longer inadmissible because three years had passed since the departure from the United States that triggered inadmissibility. Accordingly, the AAO withdrew the district director's decision and declared the waiver application moot.

On July 24, 2009, the AAO reconsidered and withdrew its decision. The AAO determined that because the applicant did not remain outside the United States for three years as specified in section 212(9)(B)(i)(I) of the Act, he remains inadmissible under that section. The AAO then addressed whether the applicant warrants a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act and concluded that the applicant had failed to establish that his wife will experience extreme hardship if the waiver application is not approved. The AAO provided the applicant with 30 days to submit a brief in response.

In a brief dated August 24, 2009, counsel asserts that a clear reading of the statute dictates that the applicant is no longer inadmissible because it has now been more than three years since the departure that rendered him inadmissible under section 212(a)(9)(B)(i) of the Act. Counsel argues that the applicant did not seek admission until he signed his Application to Register Permanent Residence or Adjust Status (Form I-485) on August 15, 2005, after the three-year period of inadmissibility had run. Counsel observes that "[t]he inadmissibility period continues to run for three years even though a person re-enters the United States on advance parole." Counsel contends

that should the applicant be found inadmissible, he has established that a denial of the waiver application will result in extreme hardship to his U.S. citizen spouse.

Section 212(a)(9) 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-

(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 . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, 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.

The applicant has asserted that he entered the United States without inspection in January 1993, and was thereafter continuously present in the United States until October 5, 1998. The applicant then departed the United States and remained in Mexico until August 20, 2000, when he reentered the United States without inspection.¹

On August 1, 2005, United States Citizenship and Immigration Services (USCIS) approved the applicant's Application to Extend/Change Nonimmigrant Status (Form I-539), affording the applicant V-1 nonimmigrant status.² On October 17, 2005, the applicant filed a Form I-485 based on

¹ On his Form I-485, the applicant stated that his last entry into the United States was on August 20, 2000. In the space reserved for him to report his Form I-94 Departure Record number, he entered "N/A." On a Form G-325A signed by the applicant on October 2, 2005, the applicant stated that he lived in Michoacan, Mexico from October 1998 to August 2000. Notwithstanding the assertion of the applicant's former counsel that the applicant returned to the United States during September 2000, the AAO accepts the date previously provided by the applicant for purposes of this appeal. The record contains no indication that the applicant sought admission or other legal entry into the United States in August 2000.

² V-1 status is issued to spouses of U.S. lawful permanent residents provided that they meet certain conditions. See Section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V); 8 C.F.R. § 214.15. Aliens in the United States in V nonimmigrant status are entitled to reside in the United States as V nonimmigrants and obtain employment authorization. 8 C.F.R. § 214.15(b). However, a V nonimmigrant alien is subject to the ground of inadmissibility under section

the approved Form I-130 filed by his spouse on May 26, 1998. The applicant also filed a Supplement A to his Form I-485 for adjustment of status pursuant to section 245(i) of the Act.³

Therefore, for purposes of section 212(a)(9)(B)(i) of the Act, the applicant was unlawfully present in the United States from February 5, 1998, when he turned 18 years old, until his departure on or about October 5, 1998.

It is well settled that when construing a statute, an agency must first look at the language and design of the statute as a whole in order to ascertain the manner in which Congress intended to implement it. See *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (“In expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy”); *K-Mart Corporation v. Cartier*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *FDIC v. McSweeney*, 976 F.2d 532, 537 (9th Cir.1992) (“Our goal in construing a statute is to ascertain the intent of Congress in order to give effect to its legislative will.”).

Section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, produced the grounds of inadmissibility under section 212(a)(9) of the Act for aliens previously removed and unlawfully present. Under the plain language of the statute, for inadmissibility under section 212(a)(9)(B)(i) to attach, three elements must be met: a specified period of unlawful presence, departure from the United States and a subsequent application for admission within either three or ten years. The instant matter involves inadmissibility under section 212(a)(9)(B)(i)(I) of the Act, which applies to an alien who was unlawfully present for more than 180 days but less than one year and again seeks admission within three years of the date of his or her departure. The applicant does not dispute that he was unlawfully present for more than 180 days but less than one year, or that he departed the United States following this period of unlawful presence. The issue is whether the three years of inadmissibility have “run” and the applicant is no longer inadmissible.

212(a)(9)(B) of the Act when applying for an immigrant visa or adjustment of status to that of a lawful permanent resident. 8 C.F.R. § 214.15(i)(3)(ii).

³ In general, section 245(i) of the Act allows an otherwise admissible alien who has an immediately available immigrant visa to apply for adjustment of status upon a payment of a \$1,000 surcharge, even though the alien entered the United States without inspection in violation of section 245(a) or is barred by section 245(c) of the Act. Section 245(i)(1) of the Act, 8 U.S.C. § 1225(i)(1), 8 C.F.R. § 245.10(b). To be grandfathered under section 245(i) of the Act, the alien must be the beneficiary of a qualifying immigrant visa petition or application for labor certification that was filed on or before April 30, 2001 and meets applicable statutory and regulatory requirements. Section 245(i)(1)(B) of the Act, 8 U.S.C. § 1225(i)(1)(B), 8 C.F.R. § 245.10(a)(1)(i). The alien must demonstrate that he or she is not inadmissible from the United States under any provision of section 212 of the Act, or that all grounds of inadmissibility have been waived. Section 245(i)(2) of the Act, 8 U.S.C. § 1225(i)(2), 8 C.F.R. § 245.10(b)(3).

The terms “admission” and “admitted” mean, with respect to an alien, the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A). However, regarding aliens who enter the United States without inspection, Section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1), as amended by section 302(a)(1) of IIRIRA, provides:

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) *shall be deemed for purposes of this Act an applicant for admission.* (emphasis added)

Counsel has asserted that the plain language of the statute indicates that the applicant, as a consequence of his illegal reentry in 2000, can only be considered an “applicant for admission” as of the date he filed for adjustment of status in 2005, and is not therefore inadmissible under section 212(a)(9)(B)(i) of the Act because three years had passed by the time of that application. A plain reading of section 235(a)(1) of the Act indicates that the applicant has been an applicant for admission from the date he illegally reentered the United States in 2000. Rather, counsel likely is referring to decisions by the Board of Immigration Appeals (Board) in which the Board has held that in the “Act, the term “admission” generally refers to adjustment of status from within the United States, as well as a lawful entry at the border.” *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 908 (2006) (citations omitted). Thus, counsel argues, the applicant was not inadmissible at the time he sought admission, i.e. filed for adjustment of status, in 2005, more than three years after his departure from the United States. Further, even assuming that the applicant were an applicant for admission at the moment of his unlawful entry, given that an application for admission is a “continuing” application, adjudicated on the basis of the law and facts in effect on the date of the decision, section 212(a)(9)(B)(i)(I) of the Act would not at present bar the applicant’s adjustment of status to that of lawful permanent resident. *See Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

However, counsel’s argument fails to account for the significance of departure as the trigger for inadmissibility under section 212(a)(9)(B)(i) of the Act. *See Rodarte-Roman, supra*, 23 I&N Dec. at 910. The fact that inadmissibility under this section attaches only upon departure, rather than by virtue of the offending conduct (unlawful presence), reflects that Congress intended this section to prevent aliens who are outside the United States from reentering within the specified period. It reflects that what may seem to be the third and consummating element of inadmissibility under section 212(a)(9)(B)(i), is more accurately described as the consequence Congress attached to unlawful presence: absence from the United States. Regardless of whether the term admission, as used in section 212(a)(9)(B)(i) and elsewhere in the Act, can be construed more broadly than its statutory definition, we do not believe that Congress intended to create a penalty for unlawful presence that can be circumvented by yet another violation of the law.

In *Rodarte-Roman*, the Board sought to refute the respondent’s argument that he was not inadmissible under section 212(a)(9)(B)(i)(II) because that section applies only to aliens seeking admission at the border and not to aliens (such as himself) seeking adjustment of status after reentering unlawfully:

If the term “admission” did not include “lawful admission to permanent residence” by means of adjustment of status, then section 212(a)(9)(B)(i)(II) would preclude an alien from acquiring lawful permanent residence through admission as an immigrant at the border, but would permit the very same alien to evade this preclusion by simply entering the United States unlawfully and applying for adjustment. We do not believe that Congress intends the Immigration and Nationality Act to be interpreted in a manner that would give aliens an incentive to enter the United States illegally.

Id.

Had the Board availed itself of section 235(a)(1) of the Act, it could have found that because the respondent was deemed an applicant of admission as of his illegal reentry, he was inadmissible under section 212(a)(9)(B)(i)(II) at that moment regardless of whether or not he later filed for adjustment of status. Nevertheless, the argument made by the respondent in *Rodarte-Roman* is similar to that of the applicant in this case in that both seek to use a subsequent illegal reentry as a shield to inadmissibility under section 212(a)(9)(B)(i), which the Board found repugnant to the congressional intent.

Thus, although the applicant is considered an applicant for admission by virtue of his application for adjustment of status, this does not excuse him from the consequences imposed by the three-year bar in section 212(a)(9)(B)(i)(I) of the Act. To read the statute as providing an exception to the bar by virtue of subsequent illegal entry and unlawful presence in the United States would be to allow one to avoid the punitive effects of a law by violating the law anew, an absurd result contrary to well-established principles of statutory construction. *See Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U.S. 315, 333 (1938) (“[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where...the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intentment of the law.”); *U.S. v. McKeithen*, 822 F.2d 310, 315 (2nd Cir. 1987) (quoting *United States v. About 151.682 Acres of Land*, 99 F.2d 716, 721 (7th Cir.1938)) (“[A]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose.”). We therefore hold that the inadmissibility under section 212(a)(9)(B)(i) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for three years under section 212(a)(9)(B)(i)(I) and ten years under section 212(a)(9)(B)(i)(II).

We are mindful that a separate provision of law, section 212(a)(9)(C) of the Act, renders aliens who are unlawfully present for an aggregate period of more than one year, and who subsequently enter or reenter the United States without being admitted, but this does not preclude our interpretation of section 212(a)(9)(B)(i) as pertaining to aliens who reenter without admission. Inadmissibility under section 212(a)(9)(C)(i) of the Act is permanent, except, as provided under section 212(a)(9)(C)(ii), to an alien “seeking admission more than 10 years after the date of the alien’s last departure if, prior to the alien’s reembarkation at a place outside the United States. . . , the Secretary of Homeland Security has consented to the alien’s reapplying for admission.” The Board has held that the exception

authorized by provision is unavailable unless the alien has remained outside the United States for ten years. See *Matter of Torres-Garcia*, 23 I&N Dec. 866, 876 (BIA 2006).

We do not find that our interpretation of section 212(a)(9)(B)(i) of the Act renders superfluous section 212(a)(9)(C). In general, a “statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void, or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-186 rev. 6th ed. 2000). We note, however, that section 212(a)(9)(C) applies to aliens unlawfully present for an *aggregate* period of one year or more, while unlawful presence from multiple stays in the United States is not aggregated in determining inadmissibility under section 212(a)(9)(B). Thus, consistent with what the BIA has referred to as the congressional intent “to compound the adverse consequences of immigration violations,” section 212(a)(9)(C) imposes penalties on aliens who accrue more than one year of unlawful presence during multiples stays in the United States, even if time in unlawful presence accrued during any single stay would not render them inadmissible under section 212(a)(9)(B)(i). 23 I&N Dec. at 909.

Furthermore, we are not aware of any authority precluding an interpretation of the various grounds of inadmissibility in the INA such that these grounds overlap, as many clearly do, or holding that section 212(a)(9)(C) provides an exclusive basis of inadmissibility in cases involving reentry without admission after a period of unlawful presence. We do not believe that in creating section 212(a)(9)(C), Congress intended to limit the scope of inadmissibility under section 212(a)(9)(B)(i).

In speaking to the congressional intent of section 212(a)(9) in general, the Board stated:

The unifying theme of section 212(a)(9) is that all its subparagraphs seek to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter. We deem it evident that Congress made departure (rather than commencement of unlawful presence) the event that triggers inadmissibility or ineligibility for relief, because it is departure which marks the culmination of the alien's prior immigration violation and which makes the alien a potential *recidivist*. It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent.

23 I&N Dec. 905, 909 (BIA 2006).

An alien who reenters the United States before the specified period of time has elapsed defeats the punitive and preventive intent of the law. The alien commits another immigration violation by the act of illegal reentry; is immediately inadmissible under section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), as an alien present in the United States without being admitted or paroled; and commences another period of unlawful presence that may serve as another basis for inadmissibility under section 212(a)(9)(B) of the Act. Allowing an alien to meet the time requirement of the bar to his admission while simultaneously accruing additional unlawful presence in the United States is incongruent and rewards recidivism, which we deem contrary to the congressional intent underlying the creation of section 212(a)(9) of the Act.

In the rebuttal brief, counsel analogizes the applicant's situation to that of an alien who has returned to the United States pursuant to advance parole, noting that "[t]he inadmissibility period continues to run for three years even though an alien re-enters the United States on advance parole." In general, the departure from the United States of an applicant for adjustment of status is deemed an abandonment of the application constituting grounds for termination, unless the applicant was previously granted advance parole for such absence and was inspected upon returning to the United States. See 8 C.F.R. § 245.2(a)(4)(ii)(A); 8 C.F.R. §§ 212.5(c), (f). It should be noted, however, that by granting advance parole, USCIS is not authorizing the alien's departure from the United States so much as providing a means for the alien to return to the United States in spite of inadmissibility. USCIS has taken the position that an alien with a pending adjustment of status application, who has accrued more than 180 days unlawful presence time, triggers the bar to admission if he or she departs the United States subsequent to the issuance of an advance parole document. See Memo. from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Policy and Strategy, 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* 17 (May 6, 2009).

Counsel is correct that the AAO has interpreted section 212(a)(9)(B)(i)(I) of the Act to allow the three-year period of inadmissibility to run for aliens with pending adjustment applications who trigger inadmissibility by departing the United States and subsequently reenter pursuant to advance parole before three years have elapsed. Like an alien who enters without inspection, an alien who enters the United States pursuant to parole has not been admitted and is considered an "applicant for admission" under the Act. Section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5)(A). This reflects the longstanding principle that an alien paroled into the United States "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-89 (1958) (quoting *Kaplan v. Tod*, 267 U.S. 228 (1925)).

However, parole is a lawful entry, and an alien paroled into the United States is not considered to be unlawfully present, unless the period for which parole was authorized expires or the parole is otherwise terminated. See Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. § 212.5(e). The Act has provided the Attorney General, and now the Secretary of Homeland Security, the discretion to parole otherwise inadmissible aliens into the United States. See Section 212(a)(9)(B)(ii) of the Act; 8 C.F.R. § 212.5(a)-(d). Unlike an alien who reenters without inspection, an alien who reenters pursuant to a grant of parole has entered legally after inspection, is not inadmissible under section 212(a)(6)(A)(i) of the Act, and does not accrue time in unlawful presence. Such an alien is not a recidivist by virtue of this entry, and the purposes of the Act, one of which is to permit physical presence based on a discretionary grant of parole, are not frustrated by allowing the period of inadmissibility to run while the alien is present in the United States. An alien triggering inadmissibility under 212(a)(9)(B) by departing from the United States is not relieved of inadmissibility under that section by virtue of advance parole, and remains "inadmissible" for a period of either three or ten years after the departure. However, it is consistent with the language and purposes of the Act to deem advance parole a "constructive absence" which provides an exception to the rule that the alien must actually remain outside the United States for this entire

period. Consequently, because the applicant reentered the United States without inspection prior to the passage of three years abroad, he remains inadmissible under section 212(a)(9)(B)(i) of the Act.

Further, the rationale of the exception for parole cases does not apply to aliens, such as the applicant, who are granted V nonimmigrant status in the United States after their unlawful return. Nearly five years after he reentered the United States without admission, the applicant was granted V-1 nonimmigrant status. While in V nonimmigrant status, he filed an application to adjust status to that of a lawful permanent resident pursuant to section 245(i) of the Act.

Inadmissibility under section 212(a)(9)(B)(i) of the Act does not bar V status, and a V nonimmigrant does not accrue time in unlawful presence while maintaining this status, but nothing in the statute or implementing regulations provides that V status relieves an alien of inadmissibility under section 212(a)(9)(B) of the Act. Section 101(a)(15)(V) of the Act; 8 C.F.R. §§ 214.15(i)(3)(i), (ii). A V nonimmigrant must obtain a waiver of such inadmissibility when he or she applies for adjustment of status. 8 C.F.R. §§ 214.15(i)(3)(i), (ii). Thus, we find that a period in V nonimmigrant status, where that status has been granted to an alien present in the United States without admission or parole, cannot be counted towards fulfilling the three-year or ten-year bar to admission under section 212(a)(9)(B)(i) of the Act.

Similarly, section 245(i) of the Act does not relieve an adjustment applicant of the burden of demonstrating either that he or she is not inadmissible under section 212(a)(9)(B)(i) of the Act, or that such inadmissibility has been waived. Generally, any alien present in the United States who was not inspected and admitted or paroled is ineligible for adjustment of status to that of a lawful permanent resident under section 245 of the Act. Section 245(a) of the Act. An alien who returns unlawfully without admission or parole can nonetheless establish eligibility for adjustment of status if he or she meets the requirements of section 245(i) of the Act, which includes the requirement of demonstrating admissibility. Section 245(i)(2)(A) of the Act. While the plain terms of section 245(i) of the Act indicate that inadmissibility under section 212(a)(6)(A)(i) of the Act (Aliens Present Without Permission or Parole) does not apply, the other grounds of inadmissibility, including inadmissibility under section 212(a)(9)(B), do apply and render an applicant ineligible unless the inadmissibility is waived.

Viewing the language and design of the statute as a whole, it is clear that departure from the United States was intended to be a critical element in determining both inadmissibility and eligibility for adjustment of status to that of a lawful permanent resident for aliens who are present in the United States without being admitted or paroled. Aliens present in the United States who are inadmissible under section 212(a)(6)(A)(i) of the Act but are also eligible for adjustment of status under section 245(i) of the Act may be granted lawful permanent resident status regardless of whether they have accrued more than 180 days of unlawful presence in the United States. However, if they depart after having accrued time in unlawful presence in excess of 180 days, they voluntarily subject themselves to inadmissibility under section 212(a)(9)(B)(i) of the Act and relinquish an advantage they otherwise would have been afforded under section 245(i) of the Act.

Congress made departure the event that triggers inadmissibility under section 212(a)(9)(B)(i) of the Act and the effect of this provision and section 245(i) of the Act, when viewed together, is to grant certain aliens who are unlawfully present in the United States the benefit of becoming permanent residents without departing the United States upon payment of an additional fee, but to require them to remain absent from the United States for a specified period if they choose to depart. Having departed, the applicant subjected himself to the immigration consequences of his unlawful presence, and neither his subsequent application for adjustment of status under section 245(i) of the Act nor his V-1 nonimmigrant status provide an exception to the three-year bar to admission imposed by section 212(a)(9)(B)(i)(I) of the Act.

In this case, the applicant became subject to the three-year bar by departing the United States in 1998, failed to comply with the requirement that he remain outside the United States for three years before seeking admission, and then became a repeat offender when he returned without admission or parole and again accrued unlawful presence for a period beyond 180 days. It is not merely the fact that subsequent presence in the United States is lawful that warrants exception to the rule, but that the matter of entry is lawful. Although the situation of an alien who acquires V-1 status abroad and is admitted to the United States in that status can be analogized to that of alien who is paroled into the United States, we do not find that the situation presented here warrants such comparison. Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

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 to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A 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. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative under section 212(a)(9)(B)(v) of the Act. 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-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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

In the present case, the record reflects that the applicant wed [REDACTED] a native of Mexico and naturalized U.S. citizen, on April 8, 1998. Birth certificates in the record show that the applicant and his spouse have a nine-year-old U.S. citizen child, [REDACTED] a five-year-old U.S. citizen child, [REDACTED] a four-year-old U.S. citizen child, [REDACTED] and a two-year-old U.S. citizen child, [REDACTED]. Hardship to the applicant's children will be considered insofar as it results in hardship to the applicant's spouse.

In an affidavit from the applicant's spouse dated April 19, 2006, she states that she loves her husband and that he has been her emotional support and stability, especially now that they have

young children. She asserts that she and her husband have established roots in the United States over a period of thirteen years, and that her children have never been outside the country. These roots include ties to a Catholic church that she and her husband had been attending for over a year. She claims that the applicant will have no place to live in Mexico. She also asserts that there will be little to no opportunity for employment in the construction industry there, as residents in the part of Mexico where the applicant's family lives perform their own building work. She contends that wages are considerably less in Mexico than in the United States, and the applicant will not be able to earn sufficient income in Mexico to continue supporting himself, her and their children, and his family members in Mexico. She asserts that if her husband were to leave the United States for any extended period, he would lose his current employment as a carpenter. She states that her immediate family, including parents, brothers, and sisters, reside legally in the United States, while the applicant's family, including his parents, a brother, and a sister, reside in Mexico. She asserts that the applicant is the sole source of financial support for her and her children, and that he also sends money to support his parents and siblings in Mexico. She further claims that she does not work outside the home because she cares for her children, and child care services are very expensive. She states that her children are at "a most vulnerable age" to be separated from their father, and that they will not have the same educational opportunities in Mexico that they have in the United States, particularly beyond the eighth grade.

The record contains an Affidavit of Support Under Section 213A of the Act (Form I-864) filed on October 17, 2005 by the applicant's spouse. The financial documentation attached to the Form I-864 consists of bank statements, federal tax returns, W-2 forms, and an employment verification letter. These documents show that the applicant earned gross income of \$28,158.33 in 2004, and his spouse earned \$3,314.98. In 2005 the applicant earned gross income of \$27,982.73, and his spouse earned \$14,872.68. The applicant also reported a net profit of \$3,683 from a business he owned, a store called "██████████". The employment verification letter from the applicant's employer, ██████████ reflects that in 2005 the applicant was earning an hourly wage of \$12.61.⁴ On the Form I-864, the applicant's spouse indicated that she had been unemployed since May 2005.

In a brief dated July 3, 2006, the applicant's former counsel indicated that the applicant was then earning an hourly wage of \$14, but no further documentation related to the applicant's finances has been submitted. In that brief, applicant's former counsel reiterated many of the assertions made by the applicant's spouse, adding that health care is very poor in Mexico. In the most recent submission, counsel states that the applicant's spouse has "provided information for consideration regarding the future employability of her husband and the decline in their standard of living" and testified that "she fears her husband will not be able to support her and her children."

We acknowledge that the applicant's spouse may suffer economic and emotional hardship if the applicant returns to Mexico and she remains in the United States. However, the applicant has presented insufficient evidence to support a determination that this hardship rises to the level of

⁴ We note that further documentation related to the applicant's finances was not furnished with the June 6, 2006 appeal or subsequently.

extreme hardship. It is noted that the applicant will not have to remain outside the United States indefinitely⁵, and that the applicant and his spouse chose to be separated for approximately two years from 1998 to 2000. In her affidavit, the applicant's spouse indicated that she "was able to go back and forth" to visit him in Mexico, and she has not claimed that she experienced hardship as a consequence of that separation.

We observe, however, that circumstances have changed since 2000. Most notably, the applicant's spouse is now the mother and primary caretaker of four young children. We find that if the applicant's spouse is separated now from the applicant, even for the limited period, she will experience significant emotional hardship, as she will be faced with the difficulties inherent in raising a large number of children herself. It must be noted, however, that the applicant's spouse has not provided detailed testimony concerning the severity of this emotional hardship, nor are there any evaluations from mental health professionals in the record that would allow this office to determine the emotional or psychological impact more precisely.

The record demonstrates that the applicant's spouse is financially dependant on the applicant's employment, but it also demonstrates that she has been employed in the past. The record reflects that the applicant's spouse earned \$14,872.68 from January to May 2005. Had such employment continued, she may have earned more than the \$27,982.73 her husband earned that year. The applicant's spouse has not indicated what arrangements were made for the care of her children during her past periods of employment. She also has not presented evidence showing her current earning potential and expenses, including the cost of child care services available to her. There is no independent evidence to support the assertion that employment is unavailable to the applicant in Mexico, or that any employment he can acquire would provide him with insufficient income to support himself and his wife and children in the United States. For example, the applicant has submitted no articles or reports concerning employment opportunities in the construction or building trades (or other jobs that the applicant is qualified to perform) throughout Mexico or in the areas of Mexico where he is likely to reside, or affidavits from his family members in Mexico detailing the economic circumstances the applicant is likely to experience there. The applicant resided in Mexico from 1998 to 2000, and he has not indicated how he and his wife supported themselves at that time. The applicant's spouse has not addressed the possibility of additional emotional and financial support from her family members, who, according to the applicant's spouse, reside in the United States. We acknowledge that the applicant's spouse may experience, as counsel contends, a decline in her standard of living, and possibly even poverty. However, based on the available evidence in the record, we are unable to ascertain whether and to what extent the applicant's departure from the United States will result in financial hardship to his spouse.

The assertions of the applicant's spouse are relevant evidence and have been considered. However, absent supporting documentation, these assertions cannot be given great weight. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply

⁵ The record reflects that the applicant accrued unlawful presence from August 20, 2000 until August 1, 2005. Pursuant to section 212(a)(9)(B)(i)(II) of the Act, the applicant will be barred from admission for ten years upon departing the United States.

because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it.”). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. 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)). Similarly, without documentary evidence, the assertions of counsel will not satisfy the applicant’s burden of proof. The unsupported assertions of counsel do not constitute evidence. See *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 AAO acknowledges that the applicant’s wife will experience hardship if she remains in the United States without the applicant, and nothing in this decision should be interpreted as suggesting otherwise. However, the evidence in the record is insufficient to demonstrate that the hardship of separation, when considered in the aggregate, will go beyond the hardship ordinarily associated with inadmissibility or removal.

The applicant has also not submitted sufficient evidence to demonstrate that his spouse will suffer extreme hardship if she joins him in Mexico. As discussed, the applicant has not substantiated the claims concerning employment opportunities or economic conditions in Mexico, and it is thus unclear if and to what extent relocation will result in financial hardship to the applicant’s spouse. No evidence has been submitted to substantiate the claim that the applicant’s spouse will experience reduced medical care there, and no evidence shows that she has a significant health condition requiring medical attention. The applicant’s spouse has not asserted that she will experience hardship readjusting to life in her native Mexico.

We note that relocation will likely result in the severing of family and community ties. However, the applicant’s spouse did not assert in her affidavit that she will experience hardship if she is separated from her parents and siblings in the United States, whom she could visit from Mexico. Moreover, she has not provided supporting affidavits from her family members, and there is no evidence of their residence in the United States (or the location thereof) beyond her assertions. She stated that she and her husband attend a Catholic church, but she provided no additional details concerning the nature and significance of her ties to that particular congregation or church community. She has not identified the name of the church or provided supporting affidavits from friends or others at the church.

The applicant’s spouse has asserted that relocation will result in hardship in the form of cultural adjustment and of reduced educational opportunities for her children, particularly beyond the eighth grade. As with the other claims concerning conditions in Mexico, this claim lacks detail and corroboration, and we are unable to ascertain whether the applicant’s children will face hardship in Mexico, the nature and severity of any such hardship, and the resulting hardship, if any, to the applicant’s spouse.

Although relocation to Mexico may result in some hardship to the applicant’s spouse, the applicant has not submitted sufficient evidence to substantiate assertions of hardship, and the applicant’s spouse failed to assert certain hardship factors in her affidavit. The burden of proof in this proceeding lies with the applicant, and “while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed

negative impacts.” *Ngai*, 19 I&N Dec. at 247. We are unable to conclude that the applicant’s spouse will suffer extreme hardship if she joins the applicant in Mexico.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant’s spouse, when considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The applicant has not established eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(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. Because the applicant has not met that burden, the appeal must be dismissed.

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