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

U.S. Citizenship and Immigration Services

H5

[redacted]

DATE: JAN 09 2012 OFFICE: LOUISVILLE, KENTUCKY FILE [redacted]

IN RE: APPLICANT [redacted]

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

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,

Ellen C. Johnson

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Louisville, Kentucky, 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)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. He was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse and step-child.

The Field Office Director concluded that there was insufficient evidence of extreme hardship to the qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated October 7, 2009.

On appeal, counsel for the applicant submits a brief in support of appeal, copies of the I-601 and I-485 denial letters, and additional medical records. In the brief, counsel explains the circumstances surrounding the applicant's misrepresentations during his application for an H-2B visa. *Brief in support of appeal,* December 3. 2009. Counsel then presents the qualifying relative's hardship in the context of the Board of Immigration Appeals' (BIA) decision in *Matter of Cervantes Gonzalez,* 22 I&N Dec. 560 (1999) and concludes there is sufficient evidence for a finding of extreme hardship. *Id.*

The record includes, but is not limited to, the documents listed above, other letters from family and friends, U.S. Federal Income Tax returns, financial documents, other applications and petitions filed on behalf of the applicant, evidence of birth, marriage, and citizenship, evidence of admission into the United States, medical records, articles on medical care, cost of living, and general country conditions in Mexico, evidence of the applicant's spouse's employment, statements from family and friends, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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-
>
> . . . .
>
> (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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant admitted in an immigration interview that he entered the United States without inspection in October 2000. The applicant returned to Mexico in January 2007. As such, the applicant has accrued more than one year of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and requires a waiver pursuant to section 212(a)(9)(B)(v) of the Act.

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

> (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The Department of State's Foreign Affairs Manual [FAM] provides, in pertinent part:

> Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa....
>
> "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:
>
> (1) The alien is excludable on the true facts; or

(2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

DOS Foreign Affairs Manual, § *40.63 N. 6.1.* Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive. In the present case, the record reflects that the applicant failed to disclose his marriage to a U.S. Citizen as well as his years of unlawful presence in the United States in his application for a non-immigrant H-2B visa. *See DS-156 forms,* May 15, 2007. The applicant was granted the visa, and was admitted to the United States on May 19, 2007. *See H-2B visa,* issued May 17, 2007, *see also I-94 Arrival / Departure record,* May 19, 2007. The years of unlawful presence makes him excludable under section 212(a)(9)(B)(i)(II) of the Act; therefore, the applicant made a material misrepresentation under section 212(a)(6)(C)(i) of the Act by failing to disclose this information. Moreover, although counsel contends the applicant actually had non-immigrant intent while applying for the H-2B visa, the applicant's disclosure of his marriage to a U.S. Citizen shut off a pertinent line of inquiry regarding potential immigrant intent which would render him ineligible for that non-immigrant visa.[1] *Brief in support of appeal,* December 3, 2009. The AAO therefore finds the applicant has made material misrepresentations as defined in section 212(a)(6)(C)(i) of the Act, and requires a waiver under section 212(i) of the Act. The applicant's qualifying relative for a waiver of the misrepresentations and unlawful presence is his U.S. Citizen spouse.

The record contains references to hardship the applicant's step-child and parents-in-law would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children or parents-in-law as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act, and hardship to the applicant's child and parents-in-law will not be separately considered, except as it may affect the applicant's spouse.

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.

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[1] Section 101(a)(15)(H)(ii)(B) permits "an alien... having a residence in a foreign country which he has no intention of abandoning and who is coming temporarily to the United States to perform other temporary service or labor" to obtain a non-immigrant H-2B visa.

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.

Counsel for the applicant asserts the applicant's spouse would experience extreme emotional hardship, in that she would be separated from her spouse, or her parents and daughter. *Brief in support of appeal,* December 3, 2009. The applicant's spouse explains her relationship with the applicant, stating she was in an abusive relationship previously, and that she has now has a healthy, fulfilling relationship with the applicant. *Letter from applicant's spouse,* undated. The applicant's spouse further indicates her daughter Amaya has come to regard the applicant as a father, who takes care of them both. *Id.* Counsel indicates the applicant's spouse provides daily care for her chronically ill U.S. Citizen parents. *Brief in support of appeal,* December 3, 2009. The spouse's

father states that he has thyroid and liver cancer, and that the applicant assists him with chores and transportation. *Letter from* [redacted] undated. The spouse's father's diagnosis is corroborated by medical records. The spouse's mother mentions she is disabled, and also attests to the applicant's work ethic and his fulfillment of responsibilities as a husband and a father. *Letters from* [redacted] undated. Some medical records are submitted with respect to the spouse's mother. Furthermore, counsel for the applicant declares that Amaya's non-custodial parent is unwilling to allow her to move to Mexico. *Brief in support of appeal.*

Counsel additionally maintains that medical care for the spouse's parents as well as spouse herself in Mexico is completely insufficient. *Brief in support of appeal,* December 3, 2009. A letter from Harrodsburg Family Medical Center is submitted in support, which indicates the applicant's spouse is being treated for severe depression, dyspepsia, anxiety, fatigue, weight gain, and a hiatal hernia with reflux. *Letter from* [redacted] undated. Some medical records were submitted in support, as well as articles on medical care in Mexico. *See medical records,* September 2008 to October 2009. Counsel also contends the applicant's spouse needs the applicant to care for her, Amaya, and the spouse's parents when the spouse is in great pain due to her illness. *Brief in support of appeal,* December 3, 2009.

Counsel then claims the applicant's spouse would experience severe financial hardship without the applicant's income in the United States as well as his ability to provide after school care for [redacted] *Id.* Counsel further asserts the spouse would not be able to earn money in Mexico, due to her lack of education, lack of Spanish language skills, and the high unemployment rate in Mexico. *Id.* Additionally, counsel states the applicant's spouse fears living in Mexico because of the political unrest and crime. *Id.*

The undated letter from [redacted] is supporting evidence that the applicant's spouse has some medical and psychological issues. However, this letter lacks details about the severity of the spouse's complete medical condition and how it affects her quality of life to allow an assessment of the spouse's medical needs and whether the applicant can assist with those needs. Absent an explanation in plain language from the treating physician of the exact nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed, or the nature and extent of any hardship the applicant's spouse would suffer as a result of the applicant's inadmissibility.

Counsel makes several assertions regarding the significance of these medical and psychological issues and the effects on the applicant's spouse; however, these assertions are unsupported by the applicant's spouse's own statement as well as the rest of the record. For instance, counsel maintains that the spouse's severe acid reflux leaves her in immense pain after every meal, and that the spouse relies on the applicant to keep the household running in the face of such pain. *Brief in support of appeal, December 3, 2009.* The spouse makes no mention of either of these assertions in her own undated letter, and only vaguely states she has a few health problems which make her physically weaker than she was previously. *See letter from* [redacted] undated. Moreover, evidence of record shows the applicant's spouse is able to maintain steady employment, despite her conditions.

See letter from Venus Mackall, Aramark Correctional Services, April 22, 2009. Without supporting 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 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also makes assertions on the hardship to the applicant's spouse due to her parents' medical issues without sufficient evidence in support. The AAO acknowledges the spouse's father has thyroid and liver cancer and that her mother also has medical issues; however, there is no indication in the spouse's letter that she experiences significant hardship due to assistance necessitated by her parents' medical issues. In fact, the applicant's spouse fails to even mention her parents in her letter. *See letter from applicant's spouse,* undated. Although the spouse's father states that the applicant assists with some chores, there is no indication or evidence to show what hardship the spouse would experience if the applicant were unable to do so. Similarly, in her letters the spouse's mother confirms her medical conditions and that she is disabled without describing the assistance the applicant provides to ameliorate hardship to his spouse. *Letter from* [redacted] April 22, 2009. Without a detailed explanation from the applicant's spouse and supporting evidence, the AAO is unable to evaluate the nature of the hardship the spouse experiences due to her parents' medical problems.

Assertions of financial hardship due to separation from the applicant are also unsupported by evidence. The applicant submits some bills and evidence of income; however, there is no evidence that the household expenses exceed household income, or that the applicant's spouse would be unable to meet her financial obligations without the applicant. Without further details of the family's expenses and income, the AAO is unable to assess the nature and extent of financial hardship, if any, the applicant's spouse will face.

The applicant's spouse states that she has a loving relationship with the applicant, and that she and her daughter have come to depend on him. *Letter from applicant's spouse,* undated. While the AAO acknowledges that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, we do not find evidence of record to demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, medical, emotional or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO cannot conclude that she would suffer extreme hardship if the waiver application is denied and the applicant remains in Mexico without his spouse.

There is, however, significant evidence of hardship the applicant's spouse would experience upon relocation to Mexico. Counsel claims that the applicant's spouse fears returning to Mexico, that she would be unable to find employment there, and that she would also be unable to obtain care for her serious medical and psychological conditions. *Id.* In support of these assertions, several articles were submitted regarding medical care, the economy, and general country conditions in Mexico, including a U.S. Department of State travel warning. Moreover, it is important to note the qualifying relative was born in the United States, not Mexico, that she does not know Spanish, that she has

family members only in the United States, and has no ties to Mexico. It is also acknowledged that the qualifying relative's young U.S. Citizen daughter would also have to live in the United States without her mother or relocate to a country which she also has no ties to, and no relevant language skills.[2] Thus, the AAO finds when the medical, financial, emotional, and other hardship factors are considered in the aggregate, the applicant has shown his qualifying relative would experience extreme hardship upon relocation to Mexico.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. 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, where remaining 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 has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. Citizen spouse as required under section 212(a)(9)(B)(v) and 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for a waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.

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[2] Counsel's assertion that Amaya's non-custodial parent would be unwilling to allow Amaya to relocate to Mexico is not supported by evidence of record, and cannot constitute evidence as explained *supra*. *Brief in support of appeal,* December 3, 2009.