



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

A3

APR 10 2007

FILE:

Office: PHOENIX, AZ

Date:

IN RE:

APPLICATION:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant, [REDACTED] 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. [REDACTED] a lawful permanent resident, is the husband of the applicant. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The district director found the applicant failed to establish eligibility for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and denied the application, accordingly.

On appeal, counsel states that the district director applied a higher standard than “extreme hardship” in evaluating the case because the facts and evidence establish “extreme hardship” as contemplated by Congress. Counsel asserts that the district director did not consider the totality of the circumstances. According to counsel, the district director ignored the hardships to non-qualifying relatives and how their hardships would indirectly cause extreme hardship to qualifying relatives. Counsel cites to *Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596; and *Matter of Riccio*, 15 I&N Dec. 548 (BIA 1976) and states that these cases indicate that it is an abuse of discretion to not consider all factors that may establish a qualifying relative will suffer extreme hardship, including hardship to non-qualifying relatives.

The AAO will first address the director’s finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra*. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had

¹ Memo, Virtue, Acting Assoc. Comm. INS, *Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043)*; and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² DOS Cable, *supra*.; and *IIRIRA Wire #26, HQIRT 50/5.12*.

180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The district director correctly found that the applicant was unlawfully present in the United States for more than one year. She entered the United States without inspection on June 20, 1992, and filed an Application to Register Permanent Residence or Adjust Status, Form I-485, on August 25, 2000. She had been in unlawful status from April 1, 1997 to August 25, 2000. She departed from the United States on November 3, 2000, using advance parole authorization. It is clear that the applicant accrued more than one year of unlawful presence in the United States from April 1, 1997 to August 25, 2000, and when she departed from the country on November 3, 2000 she triggered the ten-year bar. Thus, the district director correctly found her to be inadmissible to the United States pursuant to 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. *Decision of the District Director*, dated August 2, 2005.

The AAO will now address the director's finding of failure to establish eligibility for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and denied the application, accordingly.

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

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
 - (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

...

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

...

The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v). A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse, [REDACTED] is the only qualifying relative here. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 564 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors that it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 564. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I & N Dec. 880, 882 (BIA 1994).

The AAO will now apply the *Cervantes-Gonzalez* factors to the present case to the extent they are pertinent in determining extreme hardship to [REDACTED]. It is noted that extreme hardship to [REDACTED] must be established in the event that he joins the applicant to live in Mexico; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The evidence in the record indicates that [REDACTED] attends the Family Literacy program at the Phoenix Indian Center, which entails the parent attending classroom instruction while his/her preschool age children attends school. The expectation is that the parent will then reinforce the instruction the child has received. *Letter from Phoenix Indian Center, Inc.*, dated September 11, 2003. The record contains birth certificates of the applicant’s four U.S. citizen children, [REDACTED] (born on March 14, 1993), [REDACTED] (born on May 31, 2001), [REDACTED] (born on February 25, 2003), and [REDACTED] (born on May 6, 1999). The letter from The Phoenix Children’s Center, Ltd., dated November 11, 2003, indicates that [REDACTED] was hospitalized for 10 days in March 2003 because of a respiratory infection. The letter conveys that he has a congenital malformation of the chest that may aggravate respiratory infections, and that he would be at less risk in a city with a sophisticated medical community. The Phoenix Children’s Hospital Discharge Summary concerning the hospitalization of [REDACTED] states that he was discharged in good condition and is to follow-up with a private pediatrician within 72 hours of discharge or as needed for recurrence of respiratory distress. *Discharge Summary, admitted March 12, 2003, discharged March 21, 2003*. The Diagnostic Procedure Report from Phoenix Children’s Hospital indicates that [REDACTED]’s chest was improving and had some residual basilar disease. The degree of over-ventilation had improved considerably, and the regional skeleton is satisfactory. *Diagnostic Procedure Report, transcribed March 17, 2003*. The record contains a letter regarding [REDACTED] and her need to be with her mother, who is supportive and dedicated to her daughter. *Letter from [REDACTED]*, dated September 11, 2003. The letter from [REDACTED]

principal of Solano School, states that [REDACTED] has been an active parent at the school for the past year. She has volunteered numerous hours in her child's kindergarten classroom and has assisted once a month during the 2002/2003 school year with the gleaning program; and has assisted with the Clothe-A-Child program. *Letter from [REDACTED] principal of Solano School, dated September 15, 2003.* The record contains other letters attesting to the good moral character of [REDACTED] such as the letter from [REDACTED] preschool teacher of the applicant's daughter. [REDACTED] language acquisition teacher at Encanto School, states that [REDACTED] has been an involved parent in her daughter's education, attending weekly parent meetings; and coming to open houses, conferences, and curriculum nights. The record contains a Certificate of Achievement for [REDACTED] it also contains a U.S. Department of State report, dated 2002, about Mexico; the [REDACTED] wage statements and tax records; and [REDACTED]'s social security statement.

The letter from [REDACTED] expresses his concern about his children's well-being if his wife is deported. He states that it will mean the split-up of his family: he will be left with the children and his wife will live in Mexico. [REDACTED] states that he will not be able to care for his four children and work at the same time to pay for a babysitter, and will not be able to pay a babysitter to care for his children and also support his wife in Mexico. [REDACTED] states that his wife has no where to go in Mexico and that she cannot return to her family home in Mexico because she had been physically abused there. He states that his family will be emotionally, economically, and physically affected if his wife is deported. According to [REDACTED] his wife cares for the children and his eight-month-old child has fragile health and constantly needs his mother's love and attention. [REDACTED] states that they do not own anything in Mexico and his children will have no place to live there and no future. He states that in the United States he is buying a home and working, and his wife can work if they take turns caring for the children. *Letter from [REDACTED] dated October 21, 2003.*

The record contains an evaluation by [REDACTED]. In the evaluation [REDACTED] states that the dominant language of [REDACTED] is Spanish. She states that [REDACTED] has low-level Spanish and English language skills. [REDACTED] states that "one of the records from Phoenix Children's Hospital reads: daughter with DD., possible development disabilities." [REDACTED] indicates that Mexico does not have any consistent program in the schools for special education. [REDACTED] is advanced for her age in Spanish language skills, according to [REDACTED]. [REDACTED] states that Eric needs careful monitoring at Phoenix Children's Hospital and that he would be at risk if he is in Mexico without appropriate medical care. [REDACTED] states that [REDACTED] does not have any family or support system back in Mexico and that he has rarely left the United States since his entry in 1992. She states that he has two half-brothers who are residents, and three U.S. citizen cousins in the United States. [REDACTED] states that [REDACTED] parents are deceased, he has family in Phoenix, and he married the applicant in 1994, when their first daughter, Nancy, was about 1 1/2 years old. *Evaluation by [REDACTED], licensed psychologist, dated December 5, 2003.*

The entire record has been reviewed in rendering this decision.

[REDACTED] who is 53-years-old, is concerned about the well-being of his children if his wife, who he has been married to for 13 years, is deported. He states that she cares for his three daughters and his son who has fragile health. The AAO notes that [REDACTED] is an active parent, as demonstrated in the letter by the principal of Solano School, the Phoenix Indian Center, Inc., and [REDACTED] with the Encanto School. The evidence reveals that [REDACTED], now aged 4, had health problems requiring hospitalization the month after his birth, and that he has a congenital malformation of the chest that may aggravate respiratory infections. It is

noted that no medical records have been submitted since November 2003 indicating that his health has worsened or that he requires constant medical attention.

In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) the Ninth Circuit stated that "The most important single [hardship] factor may be the separation of the alien from family living in the United States." (internal quotations and citation omitted). Although the circuit court indicated that "while an alien "cannot gain a favored status by the birth of a citizen child," *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir.1986), "[t]he hardship to a citizen or permanent resident child may be sufficient to warrant suspension of the parent's deportation." (citation omitted). It further stated that "[w]hen the BIA fails to give considerable, if not predominant, weight," to the hardship that will result from family separation, it has abused its discretion." (citation omitted). See, e.g., *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9th Cir. 1981) (the most important single factor may be the separation of the alien from family living in the United States; separation from family alone may establish extreme hardship).

██████████ indicates that he will suffer economic hardship if his wife must leave the country. He indicates that he will not be able to work, pay for a babysitter, and financially support his wife in Mexico. In 2002, ██████████ worked for Dependable Staffing, Ambre Enterprises, Inc., and Bon Appetit Management Co. ██████████ indicates that ██████████ has worked in restaurants as a dishwasher, and he has benefits including health insurance through Mayo Hospital. The Form I-864 reflects that the ██████████ combined income of \$23,105 does not meet the minimum income requirement of \$26,475 from the Poverty Guidelines chart for the year 2002 for their household size. It is noted that the submitted tax records and W-2 Forms for 2002 reflect that ██████████ contributes about 50 percent towards the household income. Thus, ██████████ has shown that his wife's leaving the country would render his financial difficulties more severe. In light of the age and employment history of ██████████, the AAO is not persuaded that he will be able to find suitable employment in the United States that would provide a sustainable wage to meet the household expenses for himself and his four young children, aged approximately 14, 7, 5, and 4 years old. Although hardship to the applicant's children is not a consideration under section 212(i), the hardship endured by the applicant's husband, as a result of his concern about the well-being of his children, is a relevant consideration.

In *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9th Cir. 1981), the Ninth Circuit stated that economic loss alone does not establish extreme hardship, but it is still a fact to consider in determining eligibility for suspension of deportation. (citation omitted). The circuit court further stated that the BIA must consider personal and emotional hardships which result from deportation. (citation omitted). Included among these are the personal hardships which flow naturally from an economic loss decreased health care, educational opportunities, and general material welfare. Cf. *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995) (the loss of financially comparable employment would create not only an economic hardship for ██████████ but would severely frustrate what she regards as the overriding mission in her life-to provide for her parents and siblings).

Based on the evidence in the record, the stress that the applicant's husband would endure in attempting to keep his family unit intact would, the AAO finds, rise to the level of extreme emotional and financial hardship.

██████████ states that he would endure extreme hardship if he joined the applicant in Mexico. ██████████ has lived in the United States since 1992 and has no family ties in Mexico; his close family members reside in the United States. ██████████ states that he does not own anything in Mexico, and his children will have no place to live and no future there. He states that here he is buying a home, working, and his wife can work if they take turns caring for the children. The U.S. Department of State report, dated 2002, about Mexico conveys that Mexico's population is an estimated 98.8 million persons. It states that an estimated 25 percent of the population resides in rural areas where subsistence agriculture is common and that income distribution is skewed: in 2000, the top 10 percent of the population received 37.8 percent of total income while the bottom 20 percent earned 3.6 percent. Given ██████████'s skill level and employment history as a dishwasher, the AAO finds that he would most likely be encompassed within the 20 percent of the population earning 3.6 percent of the country's income. Thus, he and his family would have personal hardships which flow naturally from an economic loss such as decreased health care, his children would lose educational opportunities, and their general material welfare would decline significantly. ██████████ loss of comparable earnings to which he has in the United States would create not only an economic hardship for him but would severely frustrate what he regards as the overriding mission in his life-to provide for his wife and children. It is noted that in Mexico the mortality rate for children under 5 years of age was 33 percent per 1,000 live births; 3 million children under the age of 5 suffered some form of malnutrition; the same number suffer anemia, and another 2 million children are chronically malnourished. *U.S. Department of State Report*, dated 2002, page 23.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the ██████████ particularly in view of his 15 years of residence in the United States, his family ties in the United States, the adverse effect of moving to Mexico on his U.S. citizen children, and his limited employability in light of his skill level, rises to the level of "extreme" hardship if he joins the applicant in Mexico.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and the passage of approximately six years since the applicant's immigration violation. Other favorable factors are the applicant's family ties, her community involvement as a volunteer at her child's school, her lack of criminal record, and her letters of recommendation. The unfavorable factor in this matter is her initial entry without inspection, and unlawful presence in the United States for more than one year. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's flagrant breach of the immigration laws of the United States, the severity of the applicant's unlawful presence in the United States is at least partially diminished by the fact that six years have elapsed since the immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.



In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.