

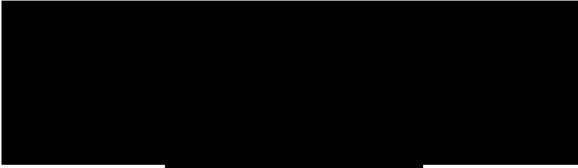
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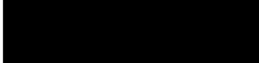
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: KANSAS CITY, MO

Date:

JUL 31 2007

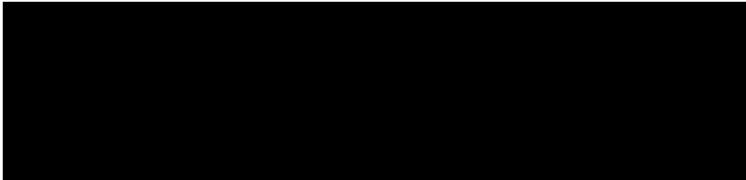
IN RE:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Kansas City, Missouri, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who is 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. The applicant is the spouse of a lawful permanent resident and the father of three U.S. citizen children and one lawful permanent resident son. He 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), in order to reside in the United States with his spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated May 24, 2004.

The record reflects that, on February 11, 1991, the applicant married his spouse, [REDACTED]. On December 2, 1993, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on January 5, 1994. On August 25, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On September 10, 1999, the applicant left the United States and returned to Mexico when his spouse suffered a fall that severely injured her back during vacation. On April 27, 2000, the applicant appeared at the Dallas, Texas Port of Entry, seeking admission on the basis that he had a pending Form I-485. The applicant was referred to deferred inspections in St. Louis, Missouri. On May 22, 2000, the applicant was paroled into the United States on humanitarian grounds. On August 27, 2001, the applicant's Form I-485 was terminated because the applicant had departed the United States without Advanced Parole. On July 24, 2002, the applicant filed a second Form I-485 based on the approved Form I-130. On December 18, 2002, the applicant appeared at Citizenship and Immigration Services' (CIS) Kansas City, Missouri District Office. The record reflects that the applicant originally entered the United States without inspection on April 10, 1984 and remained in the United States until he traveled to Mexico in September 1999. The applicant does not appear to have departed the United States since he was paroled on May 22, 2000. The applicant, thereafter, filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his spouse.

On appeal, counsel contends that the applicant's spouse and children would suffer extreme hardship. *See Counsel's Brief*. In support of her contentions, counsel submits the referenced brief, medical documentation, psychological documentation, financial documentation, a letter of recommendation, a photograph of the family and copies of documentation previously provided. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

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

The district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the record reflecting and the applicant's admission to being unlawfully present in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted under the Act, until August 25, 1999, the date on which the applicant filed an affirmative application to adjust status. Counsel does not contest the district director's determination of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon removal is not considered in section 212(a)(9)(B)(v) waiver proceedings.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier

of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Since the applicant's spouse is a lawful permanent resident and is not required to reside outside the United States as a result of the denial of the applicant's waiver request, extreme hardship must be established whether she resides in the United States or Mexico.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that [REDACTED] is a native and citizen of Mexico who became a lawful permanent resident in 1990. The applicant and [REDACTED] have a 20-year old son who is a native and citizen of Mexico who became a lawful permanent resident in 2002. The applicant and [REDACTED] have an 18-year old son, a thirteen-year old son and an eleven-year old daughter who are U.S. citizens by birth. The applicant and [REDACTED] are in their 40's. [REDACTED] has suffered from a slipped disk since 1999 and has suffered from major depression with psychosis since 1997. The applicant's youngest son suffers from migraines and frequently visits the emergency room in regard to these migraines.

On appeal, counsel contends that the applicant's children will suffer emotional, physical and financial difficulties if the applicant's waiver is denied. Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in 212(a)(9)(B)(v) cases. Thus, hardship to the applicant's U.S. citizen children and lawful permanent resident son will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

Counsel contends that [REDACTED] would suffer financial and emotional hardship without the applicant. [REDACTED] does not speak English, has no marketable job skills and has been unemployed due to her depression since 1997. [REDACTED] has a history of major depression, recurrent, with psychotic features, including multiple hospitalizations in 1997 and 1998. *See Psychological Documentation*, dated October 22, 1998. [REDACTED] also suffers back pain from a slipped disk in her spine and has received social security payments because of her depression. *See Psychological Documentation and Social Security Letters*. Counsel submitted medical and psychological documentation for the applicant's spouse indicating that, in 1997, [REDACTED] began to be hospitalized for severe depression with psychotic features and is currently taking trazodone and effexor-xr, both antidepressant drugs. *See Psychological Documentation*, dated 1998 through 2004. The psychological documentation indicates that, though her symptoms respond well to medication, [REDACTED] remains disabled by her depression. The documentation reflects that [REDACTED] has a history of increased symptoms during her brief separation from the applicant in 1999-2000, when she had returned to the United States and while he was seeking readmission. The affects of this brief separation from the applicant left Ms. [REDACTED] incapable of caring for the children or completing the simple household chores that she had previously been able to handle with the assistance of medication and the presence of the applicant. *See Psychological Documentation*, dated April 2000. The documentation reflects that the applicant's presence in the household is of foremost importance to [REDACTED] mental and physical wellbeing. The documentation states that the applicant's monitoring of [REDACTED] daily medication and her travel to and attendance at her doctor's

appointments has been essential to the treatment of [REDACTED]' illness. The psychological documentation reflects that [REDACTED] has virtually no competence for travel to appointments or taking care of treatment-related tasks, let alone caring for her children, by virtue of her language deficiencies and psychiatric symptoms. See *Psychological and Medical Documentation*, dated 1998-2004. Financial documentation indicates that [REDACTED] has not been employed since 1997 and receives very little assistance from social security. *Tax Records, Social Security Letters*. The social security payments that [REDACTED] does receive would leave her unable to meet the poverty guidelines for her family. *Federal Poverty Guidelines*, <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>. Based on the preceding evidence, the AAO concludes that if [REDACTED] remained in the United States, she would face trying to maintain alone a household with minimal social security assistance, raise three children, as well as trying to combat her own psychological problems, which would be exacerbated by the applicant's absence. Additionally, the normal hardships that [REDACTED] would suffer should she accompany the applicant to Mexico would be compounded by [REDACTED]' mental health problems. The hardship [REDACTED] faces is substantially greater than that which aliens and families upon removal would normally face when combined with her history of major depression with psychosis. [REDACTED] no longer has ties to Mexico. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted medical and psychological documentation. A discounting of the extreme hardship [REDACTED] would face in either the United States or Mexico if her husband were refused admission is, therefore, not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the unlawful presence for which the applicant seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's wife if he were refused admission, the hardship to the applicant's children if he were refused admission and the applicant's family members' significant ties to the United States.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.