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

H3

FILE:

[REDACTED]
CDJ 2004 845 286

Office: CIUDAD JUAREZ, MEXICO

Date: NOV 14 2008

IN RE:

Applicant: [REDACTED]

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:

SELF-REPRESENTED

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 Officer-in-Charge, Ciudad Juarez, Mexico, 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 application will be approved.

The applicant, [REDACTED], a native and citizen of Mexico, 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. He sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated December 9, 2005.*

The AAO will first address the finding of inadmissibility for unlawful presence. Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired 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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.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 departure from the United States following accrual 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), do not apply. *See DOS Cable, note 1. See also Matter of Rodarte, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).*

The record before the AAO reflects that [REDACTED] entered the United States from Mexico without inspection in December 2002 and voluntarily departed to Mexico in January 2004. He therefore accrued over one year of unlawful presence from December 2002 to January 2004, and when [REDACTED] departed from the United States he triggered the ten-year bar. The Officer-in-Charge'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), is, consequently, correct.

The AAO will now address the Officer-in-Charge's finding that a waiver of inadmissibility should not be granted.

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 *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act, which provides that:

- (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.

A waiver under section 212(a)(9)(B)(v) of the Act is dependent upon the applicant’s 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 to his or her child are not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is [REDACTED] the applicant’s U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The evidence submitted in support of the waiver application includes the following documents:

- A letter dated January 5, 2006, by [REDACTED] Manager, Gouverneur Manor Apartments, in which [REDACTED] states that she noticed a tremendous change in her employee, [REDACTED] since [REDACTED] separation from her husband. She states that [REDACTED] visits her doctor often because of her mental and physical health, and takes medication for anxiety and depression. She indicates that [REDACTED] cries often and misses work on a regular basis to see a psychologist. She states that she worries about [REDACTED] personally and about her ability to continue with her job.
- A letter dated January 5, 2006, by [REDACTED] a licensed specialist clinical social worker with [REDACTED] Family Medicine and Specialty Clinics. This letter conveys that the applicant’s is respectful of [REDACTED], whereas her prior partners were physically and emotionally abusive. [REDACTED] states that [REDACTED] feels that she has a safe environment for herself and her children with the applicant. He states that [REDACTED] struggles as a single parent without the applicant’s assistance. [REDACTED] indicates that her stress has magnified and that she functions in a minimal way as a parent and as an employee. He states that [REDACTED] son, [REDACTED] was seen several times in the emergency room and in their clinic with stomach pains seeming to have no organic basis, but which he believes are related to [REDACTED]’s emotional stress.
- A letter dated January 6, 2006, by [REDACTED] M.D., with [REDACTED] Family Medicine and Specialty Clinics in which [REDACTED] states that [REDACTED] has been his patient for multiple medical issues. He indicates that [REDACTED] has significant depression and anxiety which are affecting her work and home life. He states that he receives calls from [REDACTED] in the evenings

in which she sounds panicked. M indicates that 's depression seems to stem from the stress rooted in her isolation from her husband and the subsequent rise in the demand on her as the sole provider and caregiver of her children. He states that is having trouble earning enough money to pay her medical bills and does not have insurance for herself, while at the same time is being referred for counseling treatments and other testing. He states that she has been given a benzodiazepine (Lorazepam) for acute disruptive symptoms of anxiety and is being placed on a selective serotonin uptake inhibitor (Zoloft) for a more long-term approach to depression. He describes other physical symptoms of that he states may be related to severe stress or panic disorder.

- Letters by the applicant's step-children and wife in which they describe a close relationship with the applicant.
- A letter dated September 21, 2005, by the applicant's wife conveys that has behavioral disorders and that he visits a physician, whom he has seen over the course of two years, once a month to monitor his medication. She states that her son's behavioral problems have increased in the absence of her husband. She states that she has been employed as a housekeeper for seven years, and it would be a hardship for her and her children to uproot to Mexico as she would not be able to support her family in Mexico. She indicates that her three children attend school and it would be very hard for them to adapt to school in Mexico where they do not know the language or culture. She indicates that the schools in the United States are more advanced than those in Mexico. Ms. states that it would not be good for her children to move away from their grandparents, aunts and uncles, and cousins or to leave their church or school activities to move to Mexico. She states that her children regard the applicant as a father figure.
- A letter dated September 21, 2005, by , M.D., with Via Christi Family Medicine and Specialty Clinics, states that Samuel is a nine-year-old boy who has had extraordinary difficulties in classes. He states that has ADHD and is on a careful regimen of methylphenidate and that his weight is carefully followed and his behaviors carefully monitored to determine the effect of the medicine. He states that it is his medical opinion that his education and social development will profoundly suffer if he is without the medicine and is without continued medical guidance.

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning" and establishing it is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors the Board of Immigration Appeals (BIA) considers relevant in determining whether an applicant has established extreme hardship under 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 565-566. 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).

Applying the *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established if she remains in the United States without her husband, and alternatively, if she joins him in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the emotional hardship to [REDACTED] as described in her letters and in the letters by [REDACTED] Family Medicine and Specialty Clinics rises to the level of extreme" hardship if she were to remain in the United States without her husband.

As previously stated, in assessing [REDACTED]'s hardship if she were to join her husband to live in Mexico, the hardships to her children are not a consideration under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and will be considered only to the extent that it results in hardship to [REDACTED]. In light of [REDACTED]'s behavioral problems, the AAO finds that [REDACTED] would experience extreme hardship if she were to remove her son from an environment in the United States to which he is familiar and is receiving treatment, to one where he does not know the language or culture. The evidence, weighed collectively, establishes that the applicant's wife would endure extreme hardship in the event that she joins her husband in Mexico.

The grant or denial of the above waiver does not 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 family members, his steady employment as indicated on the Biographic Information, lack of any criminal record and the passage of over four years since the applicant's immigration violation. The unfavorable factors in this matter are his initial unlawful entry and period of unlawful presence in the United States.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the severity of the applicant's unlawful presence is at least partially diminished by the fact that four years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of his 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(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), 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. The waiver application is approved.