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Office: MEXICO CITY, MEXICO

Date: OCT 14 2008

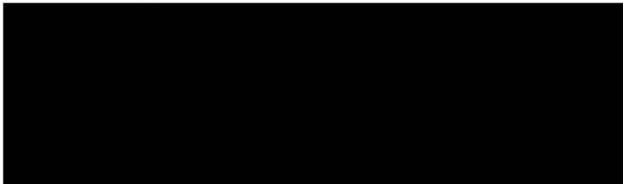
IN RE:



APPLICATION:

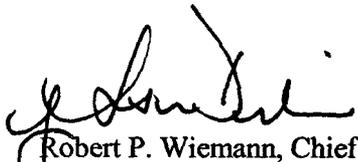
Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v) and § 1182(g)

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 waiver application was denied by the Acting District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States under section 212(a)(1)(A)(iii) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(1)(A)(iii), as an alien classified as having a mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety or welfare of the alien or others, section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for seeking admission within ten years of his removal from the United States, and 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 a period of one year or more and subsequently departing the United States. The record indicates that the applicant has a U.S. citizen spouse. The applicant seeks a waiver of inadmissibility in order to reside with his spouse in the United States.

The acting district director found that the applicant 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 Acting District Director*, at 3, dated May 2, 2008. The acting district director also denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). *Id.*

On appeal, counsel contends that there is no evidence that the applicant has posed or will pose a threat based on his mental disorder and that the acting district director failed to weigh the extensive evidence of extreme hardship. *Form I-290B*, dated June 3, 2008.

The AAO notes that the acting district director found the applicant to be inadmissible to the United States under section 212(a)(1)(A)(iii)(I) of the Act as an alien determined to have a physical or mental disorder with associated harmful behavior. It finds, however, that the acting district director erred in reaching this conclusion. Although the record contains medical evidence that indicates that the applicant has, in the past, been diagnosed with both bipolar disorder and schizophrenia, it also includes a Medical Examination for Immigrant or Refugee Applicant (DS-2053), dated August 14, 2007, that demonstrates that the applicant's mental status has been evaluated and, while it affirms the diagnosis of bipolar affective disorder, finds no evidence of associated harmful behavior, as required for a determination of inadmissibility under section 212(a)(1)(A)(iii)(I) of the Act. The DS-2053 establishes that the applicant has a Class B medical condition, which does not render him inadmissible to the United States under section 212(a)(1)(A)(iii)(I) of the Act. Therefore, the acting district director's determination of the applicant's medical inadmissibility was improper.

The AAO also notes that counsel indicates on the Form I-290B that he is also appealing the denial of the Form I-212, as well as the Form I-601 decision. However, the applicant has submitted only one filing fee on appeal and, the AAO will, therefore, not consider the Form I-212 decision in this proceeding. Citizenship and Immigration Services' Adjudicator's Field Manual, Chapter 43.2(d), states that, where a Form I-601 and Form I-212 are submitted together, the Form I-601 is to be adjudicated first. Thus, the AAO will only consider the applicant's waiver application and inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

The record includes, but is not limited to, counsel's brief, statements from the applicant and his spouse, information on country conditions in Colombia, medical and financial records for the applicant's spouse, and photographs of the applicant and his spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in May 1994 and was ordered deported *in absentia* from the United States on June 7, 1995. The applicant remained in the United States and was subsequently removed on October 5, 2006 after his September 1, 2006 Motion to Reopen was denied. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until October 5, 2006, the date of departure from the United States. Based on the record, the applicant is inadmissible under sections 212(a)(1)(A)(iii)(I), 212(a)(9)(B)(i)(II) and 212(a)(9)(A)(ii)(I) of the Act.

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.

Section 212(a)(9)(B)(v) of the Act provides that:

(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 AAO will now determine whether the applicant is eligible for a waiver of his unlawful presence pursuant to section 212(a)(9)(B)(v) of the Act.

In regard to the applicant's unlawful presence, he requires a waiver under section 212(a)(9)(B)(v) which is dependent first upon a showing that the bar imposes an extreme hardship to the applicant's U.S. citizen spouse. 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).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors are relevant in section 212(a)(9)(B)(v) waivers as well since the same standard of extreme hardship is applied. These factors include the presence of lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Colombia or in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Colombia. Counsel states that the applicant's spouse is a native of Peru, she would lose her 20 plus year career as a patient health technician in the United States, she would be unable to find meaningful employment in Colombia, and the political and economic conditions in Colombia are not good. *Brief in Support of Appeal*, at 8, May 27, 2008. The applicant's spouse states that she would have no prospect of meaningful employment in Colombia, she and her husband will suffer poverty together, she does not know if she would have work permission in Colombia and she would lose her career as a skilled patient care technician. *Applicant's Spouse's Statement*, at 5, dated May 20, 2008. The applicant's spouse states that the applicant has been diagnosed with bipolar disorder and schizophrenia, he was able to obtain medication based on her health insurance, Colombia does not carry the medication, it would be expensive to obtain the medication if it were available in Colombia, he is currently making do with samples of the medication and she does not know how long they will last. *Applicant's Spouse's Initial Statement*, at 2-3, dated August 13, 2007.

As previously discussed, the record reflects that the applicant has been diagnosed with bipolar disorder and schizophrenia, has been hospitalized five times in the past and is currently taking medication. *Letter from [REDACTED]*. The applicant's psychiatrist states that the applicant may suffer serious deterioration of his mental health if deprived of his medications and treatment. *Second Letter from [REDACTED]*, dated November 30, 2005. The applicant is taking medication to control his bipolar disorder and will require permanent treatment. *Form DS-2053*, at 1, dated August 14, 2007. The AAO notes the inherent difficulties that the applicant's spouse would encounter while residing in a foreign country with a spouse who has a history of serious mental illness. In addition, the AAO notes the Department of State travel warning for Colombia which advises U.S. citizens against travel to Colombia as the potential for violence by terrorists and other criminal elements exists in all parts of the country. *Department of State Travel Warning, Colombia*, at 1, dated August 7, 2008. Based on the totality of the record, the AAO finds that the applicant has demonstrated extreme hardship to his spouse in the event that she resides in Colombia.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse resides in the United States. Counsel states that the applicant's spouse has had to work 95 hours a week at two jobs in order not to lose her home, she has been married to the applicant for seven years, she is 39 years old and childless, she will be too old to have children when the applicant becomes admissible, she and the applicant desire children, she cannot afford to travel to South America, and she will experience anxiety and concern for the applicant coping with his mental health problem alone. *Brief in Support of Appeal*, at 6-7, 10. The record includes a notice of defaulted mortgage for the applicant's spouse due to her failure to make the required monthly payments. *Notice of Defaulted Mortgage*, dated April 7, 2008. The applicant's spouse states that she is working 95 hours a week to make house payments, send money to the applicant due to the poor economic situation in Colombia and pay her other bills. *Applicant's Spouse's Statement*, at 2.

The applicant states that because she is working so much, she is always tired and has had a number of accidents. *Id.* The applicant's spouse states that she had an accident at work where she suffered inflammation of both the discs and spine and she had seven weeks of therapy. *Id.* The record includes medical records evidencing the applicant's spouse's claims of back problems and physical therapy. The applicant's spouse states that she lost part of her finger in a lawn mowing accident, her car was totaled in another accident and she cannot afford to replace her car. *Id.* at 3. The applicant's spouse states that she lived with the applicant for six years, she is very lonely, she will be beyond her child-bearing years and will never enjoy motherhood, and the applicant has been unable to send her money in order to avoid foreclosure of their house. *Id.* at 3,5. The applicant's spouse states that the applicant's earnings made up 60 percent of their household income, she is losing weight, experiencing irregular sleep, and having headaches and migraines. *Applicant's Spouse's Initial Statement*, at 2. Lastly, the applicant's spouse is scheduled to undergo an abdominal myomectomy, she will need four to six weeks of recovery time and she will need assistance with activities of daily living for at least two weeks. *Letter from [REDACTED]* dated September 5, 2008. Although it is the applicant whose mental health is precarious, the AAO acknowledges the emotional impact of his illness on his spouse and the additional anxiety created by separation. When considered with the financial hardship experienced by the applicant's spouse and her current medical condition, the AAO finds that separation will result in extreme hardship to the applicant's spouse.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the

existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The unfavorable factors include the applicant’s entry without inspection, unlawful presence, deportation and a 1996 misdemeanor assault conviction as referenced by counsel.

The favorable factors for the applicant include his U.S. citizen spouse, extreme hardship to his spouse, lack of a criminal record since 1996 and an approved Form I-130.

The AAO finds that the applicant’s violation is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained and the Form I-601.

**ORDER:** The appeal is sustained.