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IN RE:

[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:

[REDACTED]

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Officer in Charge, Lima, Peru, 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 Chile 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 her last departure from the United States. The applicant is the spouse of a U.S. citizen, daughter of a lawful permanent resident and mother of a lawful permanent resident. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse, mother and daughter.

The acting officer in charge 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 Acting Officer in Charge*, dated November 8, 2004.

The record reflects that, in May 1992, the applicant was admitted to the United States as a visitor. The applicant overstayed her admission. On May 26, 1992, the applicant's U.S. citizen sister filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On July 7, 1992, the Form I-130 was approved but an immigrant visa number was not immediately available to the applicant. On July 26, 1998, the applicant's daughter became a lawful permanent resident. In December 2002, the applicant married her U.S. citizen husband, [REDACTED]. In August 2003, the applicant departed the United States and returned to Chile in order to attend her immigrant visa interview.

On appeal, prior counsel¹ contends that the applicant's mother and husband would suffer extreme hardship if she were to be denied a waiver. *See Applicant's Brief*, dated June 2, 2005. In support of these contentions, counsel submitted additional medical documentation in regard to the applicant's spouse and mother and additional affidavits from the applicant's spouse and daughter. The entire record was reviewed and considered in rendering a decision in this case.

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.

....

¹ The applicant has obtained new counsel, but all submissions by prior counsel have been considered.

(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 acting officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admitted unlawful presence in the United States for more than one year. Counsel does not contest the acting officer in charge's determination of inadmissibility.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(a)(9)(B)(i)(II) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. It is noted that Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Thus, hardship to the applicant's lawful permanent resident daughter will not be considered in this decision, except as it may affect the applicant's spouse and mother, the only qualifying relatives.

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 at 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).

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 Mr. [REDACTED] is a native of Chile who became a lawful permanent resident in 1993 and a U.S. citizen in 1997. The applicant's mother is a native and citizen of Chile who became a lawful permanent resident in 1991. The record reflects further that the applicant and Mr. [REDACTED] are in their 50's, the applicant's mother is in her 90's and that Mr. [REDACTED] and the applicant's mother have some health concerns.

Prior counsel contends that the applicant's spouse and mother would suffer extreme hardship if the applicant is denied a waiver. The record reflects that Mr. [REDACTED] has a history of depression that has been exacerbated by his separation from the applicant. *See Psychologist's Letter*. Documentation in the record indicates that Mr. [REDACTED] is also concerned about the applicant's daughter who is also suffering from depression due to her separation from the applicant. The medical documentation in the record indicates that Mr. [REDACTED] ability to perform daily and work functions has been affected by his depression and the separation from the applicant. Medical documentation in the record indicates that the applicant's mother is elderly and is suffering from Alzheimer's dementia. The record reflects that the applicant was her mother's primary caretaker and that due to the deterioration of her mother's condition the applicant's presence is required. The medical documentation indicates that the nature of the applicant's mother's condition requires that a family member care for the applicant's mother. Affidavits indicate that the applicant's sister is unable to continue to care for the applicant's mother due to her own financial and family commitments. The record reflects that even though home-care by family members is the preferred treatment for individuals with Alzheimer's, there are Alzheimer's care facilities. Affidavits in the record indicate that the applicant's mother would be unable to afford such care facilities and that, in such a facility she would be subjected to care by individuals whom she does not know which would exacerbate Alzheimer's symptoms. Medical documentation and affidavits indicate that it may be difficult to relocate the applicant's mother to Chile due to her age and the deterioration of her condition. There is no documentation of country conditions on the record to indicate whether the applicant's mother and spouse would be able to receive adequate medical care in Chile.

If Mr. [REDACTED] remained in the United States, he would face trying to maintain alone a household, as well as trying to combat his psychological problems. If the applicant's mother remained in the United States, she would face the inability to afford a care-facility and not receive the family care required for her condition. It would be extremely difficult for the applicant's mother to mitigate the effects of separation by visiting the applicant, due to her age and health condition. The hardship Mr. [REDACTED] and the applicant's mother faces is substantially greater than that which aliens and families upon deportation would normally face when combined with Mr. [REDACTED] history of depression and the applicant's mother's Alzheimer's. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted medical and psychological letters. A discounting of the extreme hardship Mr. [REDACTED] and the applicant's mother would face in either the United States or Chile if the applicant 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 Mr. [REDACTED] and the applicant's mother 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 factors in the present case are her overstay of her initial visa and 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 spouse and mother if she were refused admission, the applicant's lawful permanent resident daughter and U.S. citizen sister, the applicant's spouse's, mother's, daughter's and sister's significant ties to the United States and the applicant's otherwise clean background.

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.