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U.S. Citizenship  
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FILE:



Office: PHOENIX, AZ

Date:

AUG 30 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:

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 Acting District Director, Phoenix, Arizona, 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 U.S. citizen and the father of three U.S. citizen children. 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 acting 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 Acting District Director*, dated October 26, 2005.

The record reflects that, on March 24, 1981, the applicant voluntarily returned to Mexico after immigration officers apprehended him as being unlawfully present in the United States. On September 12, 1984, the applicant was convicted of driving under the influence, third offense, in New Mexico. The applicant was sentenced to 90 days in jail, 80 days of which were suspended, and 3 years of probation. On July 6, 1998, the applicant married his spouse, [REDACTED]. On April 25, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by [REDACTED]. On March 13, 2002, the applicant was convicted of being a contractor acting without a license and was fined. On September 2, 2004, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advanced parole authorization to depart and return to the United States on October 12, 2004. The record does not indicate that the applicant has departed the United States since that date.

On July 11, 2005, the applicant 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, the applicant contends that he should not be punished for detrimentally relying on the issuance of an advanced parole and that his family would suffer extreme hardship if he were denied a waiver. *See Applicant's Brief*, dated November 22, 2005. In support of his contentions, the applicant submits only the referenced brief and copies of documentation previously provided. The entire record was reviewed 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.

....

(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 district director based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted under the Act, until April 25, 2001, the date on which he filed an affirmative application for adjustment of status. The applicant does not contest the acting 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. Congress 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 will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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 U.S. citizen 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 applicant asserts on appeal, that he should be granted a waiver because he was never asked to prove that he was eligible for advanced parole prior to issuance and that he was never given any warning of the potential consequences of departing the United States. A Memorandum, "Advance Parole for Aliens Unlawfully Present in the United States for More than 180 Days," issued by Paul Virtue, Acting Executive Associate Commissioner (Memorandum), made clear, on November 26, 1997, that a Service grant of advance parole did not confer any waiver of inadmissibility benefits upon the alien. The memorandum further clarified that an alien who became inadmissible due to his or her departure from the United States had to file the Form I-601, and upon adjudication of that waiver application, had to establish extreme hardship to a qualifying relative, in accordance with applicable legal standards. Moreover, while the applicant claims that he did not receive a warning that he could face potential consequences for his departure, the second page of the advance parole issued to the applicant clearly states that if, after April 1, 1997, the applicant was unlawfully present in the United States for more than 180 days before applying for adjustment of status, the applicant may be found inadmissible under section 212(a)(9)(B)(i) of the Act and may need to qualify for a waiver of inadmissibility.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] have a 19-year old daughter, a 17-year old son and a 15-year old son who are all U.S. citizens by birth. The record reflects that the applicant is in his 50's and [REDACTED] is in her 30's.

The applicant asserts that, while [REDACTED] sporadically works outside the home, her income is secondary to his income and she has attempted to attend school to improve her earning ability. He states that his daughter has a choroid plexus brain tumor and has had several operations to relieve fluid buildup and had a shunt placed in her brain. He states that his daughter has excruciating headaches which require complete bed-rest and his wife needs to be at home to care for her or to rush her to the emergency room or doctor's appointments. He states that the only cure for his daughter's condition is to have the tumor removed and that the doctors have not yet attempted this procedure. He asserts that his eldest son has a serious digestive system condition which causes acid reflux and it is [REDACTED] who cares for him on a daily basis. He states that he and [REDACTED] take him to the emergency room when his pain and discomfort become too great. A medical letter indicates that the applicant's daughter has a choroid plexus brain tumor, which results in chronic headaches. The medical letter states that the applicant's eldest son has chronic abdominal pain for which work up is continuing. The medical letter states that the doctor believes it would be detrimental to the physical and emotional health of the children to not have the applicant around and that he is needed for financial, emotional and physical care. *See Medical Letter*, dated June 16, 2005. The applicant asserts that [REDACTED] has no benefits from her employment, including medical, which is required for the treatment of the children's serious medical problems. He states that, despite the insurance that he has through his employment, treatment of the children's illnesses are very expensive and the family needs his income to cover the medical bills not covered by insurance. However, the AAO notes that the record does not establish that the applicant has been hired on a fulltime basis or received health insurance through his employment. *See Employment Letter*, dated April 26, 2005. The applicant asserts that [REDACTED] would suffer if she were unable to provide adequate medical care for the children and she would have the burden of caring for the children while trying to find medical care for

them on her relatively small salary. He asserts that [REDACTED] would bear the burden of financially supporting the children and that she currently earns \$10 per hour, which is insufficient to meet the needs of the children. He asserts that [REDACTED] and the children do not speak Spanish and have no ties to Mexico. He asserts that his family would be very poor and his spouse would suffer because they would be unable to provide the children with excellent medical care. He asserts that the constant medical supervision his daughter requires for her brain tumor is not available in Mexico because they could not afford it.

Courts in the Ninth Circuit Court of Appeals have recognized that, in certain cases, economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme. "Included among these are the personal hardships which flow naturally from an economic loss decreased health care, educational opportunities, and general material welfare." *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th cir. 1981) (citations omitted); *see also Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th cir. 1981) ("Economic loss often accompanies deportation. Even a significant reduction in standard of living is not, by itself, a basis for relief . . . . But deportation may also result in the loss of all that makes life possible. When an alien would be deprived of the means to survive, or condemned to exist in life-threatening squalor, the "economic" character of the hardship makes it no less severe.")

The economic hardship [REDACTED] faces is not uncommon to alien and families upon removal. However, this hardship, when combined with the emotional hardship associated with her children's health and medical needs, is substantially greater than that which aliens and families would normally face upon removal. [REDACTED] does not have ties to Mexico and she has significant family ties in the United States, including her mother and children. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted medical and financial evidence. 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 factors in the present case are the unlawful presence for which the applicant seeks a waiver and his convictions for driving under the influence and being a contractor without a license. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse if the applicant were refused admission, his otherwise clean background, and the applicant's spouse's and children's significant ties to the United States.

The AAO finds that, although the immigration violation committed by the applicant was 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.