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FILE: [REDACTED]  
(CDJ 2004 792 459 relates)

Office: MEXICO CITY (CIUDAD JUAREZ)

Date: NOV 03 2009

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:

[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.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved.

The record establishes that the applicant, a native and citizen of Mexico, entered the United States without authorization in April 1998 and did not depart the United States until January 2006. The applicant was thus 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. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child, born in 2003.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated November 13, 2006.

In support of the appeal, the applicant's U.S. citizen spouse submitted the following: a letter, dated December 6, 2006; financial and employment documentation; and medical documentation pertaining to the applicant's child. In addition, on July 14, 2008, counsel for the applicant submitted a brief and supplemental documentation in support of the instant appeal. The entire record was reviewed and considered in rendering this decision.

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

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...

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant, their child, and/or extended relatives cannot be considered, except as it may affect the applicant's spouse.

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 held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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.

The applicant's U.S. citizen spouse asserts that she will suffer extreme hardship were she to reside in the United States while the applicant remains abroad due to his inadmissibility. In a declaration she states that she is dependent on her spouse for support and encouragement and his absence is causing her emotional hardship. She also references the hardship her child is suffering due to his father's inadmissibility, which is causing hardship to her, the only qualifying relative in this case. She notes that her son went to Mexico to reside with the applicant for six months, but during that time, he suffered emotional hardship due to separation from his mother, and physical hardship, as he was diagnosed with respiratory problems. Finally, she asserts that due to her spouse's absence, she is not able to make enough money to support the household; her home was foreclosed in December 2007 and she was forced to move to an apartment with her mother. *Declaration and Translation of* [REDACTED] [REDACTED] dated June 11, 2008.

In support of the emotional hardship referenced by the applicant's spouse, a letter has been provided by [REDACTED], confirming that the applicant's spouse is a regular patient at the Salud Family Health Center, and is being seen for depression, fatigue and sleep disturbances. [REDACTED] further confirms that the applicant's spouse is receiving medications regularly and is seeing a Family Medicine

doctor as well as a psychotherapist. *See Letter from [REDACTED] Salud Family Health Centers*, dated March 26, 2008. Documentation establishing that the applicant's spouse is taking medications for depression has been submitted by counsel.

In addition, a letter has been provided by the applicant's child's psychotherapist, [REDACTED]. [REDACTED] notes that the applicant's child is being seen by him due to behavioral and emotional problems the child is experiencing due to long-term separation from his father. He further notes that the applicant's child has presented with enuresis (bed-wetting) and non-compliant behaviors that may be associated with the stress. [REDACTED] concludes by asserting that reunification of the family is highly recommended. *See Letter from [REDACTED] dated July 31, 2007.*

Finally, medical documentation has been provided establishing that the applicant's child suffered from numerous medical conditions while he resided in Mexico with the applicant including nasal problems and allergies, and mental health problems, including aggression and episodes of depression. *See Letter and Translation from [REDACTED] University Automna of Zacatecas*, dated November 24, 2006, and *Letter and Translation from [REDACTED] University Autonoma of Zacatecas*, dated November 21, 2006.

As for the financial hardship referenced, documentation has been provided establishing the financial contributions made by the applicant prior to his departure from the United States<sup>1</sup> and confirming that his absence, and the lack of his financial contributions, has played a critical role in the foreclosure of the family home due to his spouse's inability to keep up with the mortgage payments. *See Notice of Hearing*, dated November 13, 2007.

Since the applicant's relocation to Mexico in 2006, the applicant's U.S. citizen spouse has been experiencing emotional and financial hardship. She is under the care of a psychotherapist and is taking medication for depression and emotional distress. In addition, due to the loss of her spouse's financial assistance and despite her employment<sup>2</sup>, the applicant's spouse's home has been foreclosed and she has been forced to rent an apartment with her mother since February 2008. Moreover, her child is suffering emotionally due to long-term separation from his father, creating the need for psychotherapy. Thus, based on a thorough review of the record, the AAO concludes that were the applicant unable to

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<sup>1</sup> The record establishes that prior to the applicant's departure from the United States, he was employed full-time, earning \$17.00 an hour. *See Letter from [REDACTED]*, dated November 14, 2005.

<sup>2</sup> As the applicant's spouse notes,

My mother and I work, but I only have 35 hours per week. I need to work overtime in order to make all the payments. My mother works and takes care of my son when I work the night shift. She earns \$9/hour at Denver Mattress. My mother has bills for her medical treatment, which we have to pay, and she still needs further treatment, they recommend surgery, but we cannot afford that now....

reside in the United States, the applicant's spouse would suffer extreme hardship. The applicant's spouse needs the emotional and financial support that the applicant provides on a day to day basis. A prolonged separation at this time would cause hardship beyond that normally expected of one facing the removal of a spouse.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. The applicant's U.S. citizen spouse states as follows:

I do not want to return to Mexico because there life is very difficult. My son would get sick again.... The wages are very low; hardly enough to sustain yourself and pay everything that has to be paid.... I want my son to study here in his country and to have access to all the opportunities available here....

[W]e would have a very bad financial situation. We don't even have a place to live. In Mexico, if I were to find a job, they would pay me 300 pesos a week (\$30). The possibilities of a good job in Mexico would be nil. The financial situation in Mexico is not good for the people who always live there; even worse for me, who has lived in the United States most of my life.... Furthermore, I cannot leave my mother....

My son here had medical insurance. In Mexico my son would get sick again and we would not be able to afford the medical bills or the medicine. Here I have a discount for medical treatment and it is a great help. With this discount program I am able to take the medication Celexa for the depression I am suffering. I am worried that if I go to Mexico to be with [REDACTED] the applicant] I would even be more depressed because I cannot leave my mother and I cannot imagine losing all the opportunities of having a future for my family and myself....

*Supra* at 8-9.

In addition to the concerns outlined above, counsel notes and documents that an alert has been issued for U.S. citizen and lawful permanent residents intending to travel to Mexico. As noted by the U.S. Department of State, in pertinent part:

The Department of State has issued this Travel Alert to update security information for U.S. citizens traveling to and living in Mexico. It supersedes the Travel Alert for Mexico dated February 20, 2009, and expires on February 20, 2010.

Mexican drug cartels are engaged in violent conflict - both among themselves and with Mexican security services - for control of narcotics trafficking routes along the U.S.-Mexico border. In order to combat violence, the government of Mexico has deployed military troops in various parts of the country. U.S. citizens should cooperate fully with official checkpoints when traveling on Mexican highways.

Some recent Mexican army and police confrontations with drug cartels have resembled small-unit combat, with cartels employing automatic weapons and grenades. Large firefights have taken place in towns and cities across Mexico, but occur mostly in northern Mexico, including Tijuana, Chihuahua City, Monterrey and Ciudad Juarez. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area. The U.S. Mission in Mexico currently restricts non-essential travel within the state of Durango, the northwest quadrant of Chihuahua and an area southeast of Ciudad Juarez, and all parts of the state of Coahuila south of Mexican Highways 25 and 22 and the Alamos River for US Government employees assigned to Mexico. This restriction was implemented in light of the recent increase in assaults, murders, and kidnappings in those three states. The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted.

A number of areas along the border are experiencing rapid growth in the rates of many types of crime. Robberies, homicides, petty thefts, and carjackings have all increased over the last year across Mexico generally, with notable spikes in Tijuana and northern Baja California. Ciudad Juarez, Tijuana and Nogales are among the cities which have experienced public shootouts during daylight hours in shopping centers and other public venues. Criminals have followed and harassed U.S. citizens traveling in their vehicles in border areas including Nuevo Laredo, Matamoros, and Tijuana.

U.S. citizens are urged to be alert to safety and security concerns when visiting the border region. Criminals are armed with a wide array of sophisticated weapons. In some cases, assailants have worn full or partial police or military uniforms and have used vehicles that resemble police vehicles. While most crime victims are Mexican citizens, the uncertain security situation poses serious risks for U.S. citizens as well. U.S. citizen victims of crime in Mexico are urged to contact the consular section of the nearest U.S. consulate or Embassy for advice and assistance. Contact information is provided at the end of this message.

Although the greatest increase in violence has occurred on the Mexican side of the U.S. border, U.S. citizens traveling throughout Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

*Travel Alert-Mexico, U.S. Department of State, dated August 20, 2009.*

Based on the concerns outlined above by the applicant's spouse with respect to her and her child's care, the applicant's spouse's close relationship with her mother and her need to assist her mother financially and emotionally, in light of her brother's diagnosis of schizophrenia and his threatening behavior towards his family due to his mental health disorder, as established by mental health documentation and restraining orders issued against the applicant's brother in March-April 2008, concerns about safety in Mexico and financial hardship<sup>3</sup>, the AAO concludes that the applicant's U.S. citizen spouse would face hardship beyond that normally expected of one facing relocation abroad based on the removal of a spouse if she were to live with the applicant in Mexico.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Mexico to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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

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<sup>3</sup> The applicant notes that "before coming to Mexico, I was employed as a plumber at a company in which I was earning 17 dollars per hour.... Here in Loreto, Zacatecas, I do not even have a proper house, that's why I live in my sister's house. The house is small of three bedrooms. My sister [REDACTED] is a widow and she has two sons. One of them is of special education. From what it is more difficult to be able to settle the expenses. Simply to be able to eat well is necessary to make 1500 to 1800 per week to not live so limited of the most basic things. To survive my wife [REDACTED] sends me money from the United States.... Meanwhile I am in Mexico battling to be able to find work. To every work that I was going they were pushing me back saying to me that the work of plumber in the United States is different to here in Mexico.... [C]onstruction is too scarce and there are not many opportunities of employment and the work that exists does not pay enough to support a family.... " *Declaration and Translation of [REDACTED]*, dated June 10, 2008.

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-Moralez*, 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 favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse and child and lawful permanent resident mother-in-law would face if the applicant were to remain in Mexico due to his inadmissibility, community ties, numerous support letters from the family and from the community, gainful employment in the United States, payment of taxes, the apparent lack of a criminal record and the passage of more than eleven years since the applicant's entry to the United States without inspection. The unfavorable factors in this matter are the applicant's initial entry without inspection, his unlawful presence and unauthorized employment in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained. The waiver application is approved.