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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: NOV 18 2009
(CDJ2004 656 017)

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.

Ellen C. Johnson

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 applicant is a native and citizen of Mexico who resided in the United States from 1991, when she entered without inspection, to May 2005, when she returned to Mexico. She was found to be inadmissible to the United States under 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 one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. She 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 return to the United States and reside with her husband.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the District Director* dated April 17, 2007.

On appeal, counsel for the applicant asserts that the applicant's husband is suffering extreme hardship due to his poor health, which requires the applicant to be with him to assist in his care. *See Counsel's Letter in Support of Appeal dated January 18, 2007.* Counsel further states that the applicant would be unable to care for his two young daughters on his own due to his poor health, and for this reason they are residing with the applicant in Mexico. Counsel claims that the separation has caused the applicant's daughters to suffer emotional hardship and has deprived them of educational opportunities and has caused the applicant's husband to suffer from depression and anxiety. *Counsel's Letter in Support of Appeal.* Counsel additionally asserts that the applicant's husband is suffering financial hardship due to the cost of maintaining two households and traveling to Mexico to visit his family. ***Counsel's Letter in Support of Appeal.*** **In support of the appeal counsel** submitted affidavits from the applicant's husband and other relatives, a psychological evaluation of the applicant's husband, a letter from the applicant's husband's physician and copies of medical records, a letter from the applicant's husband's employer, copies of pay stubs and income tax returns, copies of medical records for the applicant's daughter, information on special education in Mexico, and letter from friends in support of the waiver application. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (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 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.

The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

A waiver of the bar to admission resulting from violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. 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).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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 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). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien

resulting from his separation from family members may, in itself, constitute extreme hardship.") (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).

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, in *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the court held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan v. INS*, *supra,* the court further held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship, but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a forty year-old native and citizen of Mexico who resided in the United States from 1991, when she entered without inspection, to May 2005, when she returned to Mexico. The record further reflects that the applicant's husband, whom she married on February 6, 2002, is a fifty-two year-old native of Mexico and citizen of the United States. The applicant currently resides in Mexico and her husband resides in West Memphis, Arkansas.

Counsel for the applicant asserts that the applicant's husband is suffering extreme hardship due to his poor medical condition. *Id.* In support of this assertion counsel submitted a letter from the applicant's husband's doctor stating that he "has multiple medical problems, which include hypertension, hypercholesterolemia, diabetes, and coronary artery disease." *Letter from* [redacted], dated January 11, 2007. [redacted] further states,

> He has a history of having had a myocardial infarction that required two stents. He is on multiple medications and at times has trouble controlling his diabetes. I believe it to be in his best interest to have someone at home to help him with his medications and diet. *Letter from* [redacted]

Additional documentation indicates that the applicant's husband has had two stents placed in his coronary arteries and suffered from re-stenosis at the site of one of the stents in 1999. *See Discharge Summary from Methodist Healthcare dated October 28, 1999 and copies of Stent Patient Implant Cards for* [redacted] Affidavits from the applicant's husband and sister-in-law further state that the applicant reminds her husband to take his medications and eat well-balanced meals because he suffers from diabetes and heart problems and that the applicant's husband is unable to care for his daughters alone due to his poor health, which is why they now reside in Mexico. *See Affidavit from* dated January 9, 2007 *and Affidavit from* dated January 18, 2007.

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The record indicates that the applicant's husband has suffered from a myocardial infarction and continues to suffer from coronary artery disease and also takes multiple medications and has trouble controlling his diabetes. The applicant's sister-in-law states that the applicant helps her husband with his medications and diet, and the applicant's husband's physician recommends that that applicant's husband have someone at home to help him with his medications and diet.

The applicant's husband states that he has no family member living close to him and because of his poor health he cannot care for his daughter. He further states,

> I think about my family all of the time. When I talk to them on the phone, they tell me they want to come home. This brings me to tears. At times, I stay up all night thinking about my wife and kids. *Affidavit from* [redacted] dated January 9, 2007.

The applicant's husband also describes the community where the applicant and their daughters live in Mexico, stating that it is a poor community with unsatisfactory schools that are not equipped to deal with their older daughter's speech problems, which require a speech therapist unavailable to her in Mexico. *Affidavit from* [redacted] dated January 9, 2007.

A psychological evaluation of the applicant's husband indicates that he was assessed for depression and anxiety and scored in the moderate range for both conditions. *Letter from* [redacted] dated January 11, 2007. [redacted] further states that the applicant reports being treated with an antidepressant one year before the assessment and recommends that he "continue to comply with his Physician's prescription of a psychotropic medication and that he actively pursue reunification with his wife." *Id.* A letter from the applicant's husband's supervisor further states that he has noticed "a significant change in [his] mental and social behavior," and further states,

> I am not a doctor so I cannot diagnose depression but, I can see a dramatic down swing in his work ethic. [redacted] is a good man and hard worker and one that is well respected by his coworkers as well as myself. *Letter from* [redacted]

Letters from the applicant's husband's sister and adult daughter state that his daughter [redacted] suffers from a speech impediment and needs a speech therapist, but was unable to see one because she went to Mexico. The applicant's sister-in-law states,

> I spoke with her while in Mexico and she doesn't speak any better that when she left in May 2005. [redacted] needs to return to be with her husband and seek help for [redacted] speech impediment. This separation is an extreme emotional hardship to the entire family both physically and emotionally. *Affidavit from* [redacted] dated January 18, 2007.

Medical records for the applicant's daughter states that she needed to be referred to a speech therapist because in April 2005 at the age of two and a half she had only a few understandable words. Articles submitted by counsel further indicate that despite efforts to improve special education in Mexico by integrating special needs children into the regular classroom, teachers were unprepared for these changes and were often forced to work with children whom they were not trained to assist -- for example, specialists in visual impairment having to work with children with hearing impairments and teachers accustomed to working with children with mental retardation "suddenly faced [with] the need to give speech therapy." *See The Changing Paradigm of Special Education in Mexico: Voices from the Field,* Bilingual Research Journal, 27:3 Fall 2003.

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that her husband is experiencing extreme hardship due to their separation, including physical, emotional, and financial hardship. The record indicates that he is suffering from various medical conditions that require him to take numerous medications and follow a prescribed diet, and the applicant played a significant role in assisting him with his medication and diet. The record also indicates that the applicant's medical conditions, including coronary artery disease and diabetes, prevent him from caring from his two small children on his own and that they therefore have to reside in Mexico with the applicant. This is detrimental to the applicant's older daughter in particular because she needs speech therapy to address a speech impediment and is not receiving this therapy in Mexico. The physical hardship resulting from separation from the applicant as well as the emotional hardship, which has manifested itself in symptoms of anxiety and depression, combined with the emotional effects of the lack of adequate speech therapy and special educational opportunities for his daughter, all contribute to the hardship experienced by the applicant's husband. These hardships, when combined with the financial hardship of having to support two households and travel to Mexico to visit his family, rise to the level of extreme hardship for the applicant's husband.

The record further establishes that the applicant's husband would suffer extreme hardship if he relocated to Mexico to reside with the applicant. The applicant's husband has resided in the United States since 1982 and has two adult daughters and a sister who reside in Texas and with whom he maintains a close relationship. The record further indicates that the applicant's husband owns a home in Arkansas and has been employed with the same company as a machine operator since 2003. When considered in aggregate, the factors of hardship to the applicant's husband also constitute extreme hardship if he were to relocate to Mexico. This finding in largely based on evidence of a significant medical condition for which he is receiving treatment in the United States. Further, the applicant's husband is fifty-two years old, has resided in the United States for over twenty-five years, and has two adult children and a sister who reside in the United States. As noted above, separation from close family members is a primary concern is assessing extreme hardship. *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998). Separation from his family in the United States combined with any difficulty the applicant's husband would have finding employment and adjusting to economic and social conditions in Mexico and seeking medical care for his conditions would rise to the level of extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996), the BIA held that

establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(a)(9)(B)(v) 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). *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 adverse factor in the present case is the applicant's entry into the United States without inspection and unlawful presence until her 2005 departure. The favorable factors in the present case are the extreme hardship to the applicant's husband and daughters; the applicant's lack of a criminal record or other immigration violations; the applicant's family ties to the United States, including her husband and stepdaughters; and her length of residence and property ties. Letters submitted by various friends also state that the applicant is a good mother, wife, and friend and a valuable member of her community who would do anything for her friends and family.

The AAO finds that immigration violations committed by the applicant 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.