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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: MEXICO CITY (CUIDAD JUAREZ) Date: OCT 0 3 2008

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, 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 was found to be inadmissible to the United States under 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 one year or more. The applicant entered the United States without inspection in January 2001 and remained in the United States until April 10, 2005, when he traveled to Mexico and applied for an immigrant visa. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and U.S. Citizen children.

The 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 Excludability (Form I-601) accordingly. *Decision of the District Director*, dated March 22, 2006.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (CIS) erred in applying an incorrect standard for weighing favorable and adverse factors and states that the only possible unfavorable factor against the applicant is his entry without inspection in January 2001. *Counsel's Brief in Support of Appeal* at 5. Counsel further contends that CIS erred in relying on cases involving hardship to an alien applying for suspension of deportation in determining that the financial difficulties, loss of employment, and cultural readjustment in the present case did not rise to the level of extreme hardship. *Brief* at 12. Counsel asserts that the economic hardship and cultural readjustment to the applicant's U.S. Citizen spouse in the present case rises to the level of extreme hardship. *Id.* at 12-13. Counsel additionally asserts that CIS erred in finding that that separation does not constitute extreme hardship, and relies on *Salcido-Salcido*, 138 F.3d 1292 (9th Cir. 1998), which states that separation from family may be the "most important single factor." *Brief* at 15-17. Counsel further asserts that the denial of the waiver application has "enormous constitutional implications" and violates the fundamental right to marriage and to live together as a family. *Brief* at 17. To support these assertions, counsel relies on *Loving v. Virginia*, 388 U.S. 1 (1967), which held that the right to marry is a fundamental right, and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which held that the right to live together as a family is a fundamental right. *Brief* at 17-24.

In support of the appeal counsel submitted the following documentation: Copies of the applicant's marriage certificate and birth certificates of his children; letters from the applicant and his wife; a sales contracts, amortization schedule, and letter from the seller documenting the purchase and later sale of the applicant's home; letters from the applicant's mother-in-law and other relatives and friends; copies of income tax returns filed by the applicant and his wife for 2003 to 2005; copies of family photographs. The applicant's wife submitted additional documentation after the appeal was filed, including letters, a pay stub for the applicant, and bills and receipt for purchases made in Mexico. 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.

Counsel also requests oral argument before the AAO. The AAO notes that under 8 C.F.R. § 103.3(b), counsel must explain in writing why oral argument is necessary. CIS has sole authority to grant or deny a request for oral argument, and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In the present matter, the AAO finds that no cause for oral argument has been stated or shown. The request for oral argument before the AAO will therefore be denied.

Counsel contends that denial of the waiver violates the fundamental right to marriage and to live together as a family and states, "[redacted] exclusion from the United States, in this instance, is an immediate impingement upon [redacted] fundamental rights under the U.S. Constitution." *Brief* at 18. The AAO finds this assertion to be contrary to U.S. court decisions holding that a U.S. citizen spouse has no constitutional or statutory right to have her alien spouse remain in the United States. *See Bangura v. Hansen, 434 F.3d 487, 496 (6th Cir.2006)*; *Anetekhai v. Immigration and Naturalization Service,* 876 F.2d 1218, 1222 (5th Cir.1989); *Almario v. Attorney Gen.,* 872 F.2d 147, 151 (6th Cir.1989); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), *cert. denied,* 402 U.S. 983 (1971) (stating, "(e)ven assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States"). Courts have further held that Congress "has plenary power to determine the conditions under which an alien may enter and remain in the country." *See, e.g., Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953); *Harisiades v. Shaughnessy,* 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952); *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950).

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. Hardship the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's 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).

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. The BIA has further stated:

> 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 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).

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 twenty-nine year-old native and citizen of Mexico. He entered the United States without inspection in about January 2001 and remained until April 2005, when he traveled to Mexico to apply for an immigrant visa. The record further reflects that the applicant married his wife, a twenty-six year-old native and citizen of the United States, on September 22, 2001 and they resided together in Amarillo, Texas until the applicant departed the United States in 2005. They have two U.S. Citizen daughters together who currently reside in Texas with the applicant's wife.

Counsel contends that the applicant's wife is suffering extreme hardship as a result of separation from the applicant because she "has been forced into the role of a single mother on an extremely low income." *Brief* at 3. Counsel further asserts that since the applicant's exclusion from the United States, his wife lost the home they had purchased together and is now dependent on her mother, with whom she and her daughters now reside. *Id.* Counsel further asserts that the applicant's wife has earned an annual income over the past three years that falls below the federal poverty guidelines. *Id.* In support of these assertions counsel submitted documentation indicating that the applicant and his wife purchased a home through a seller-financed contract in 2003 and that the applicant's wife sold the home in 2005 because she could no longer make the payments. *See letter from J[redacted] (seller),* dated April 5, 2006; *Sales Contract on Real Estate* dated October 15, 2003. Counsel submitted income tax returns filed by the applicant's wife indicating that she earned $13,049 in 2005, $14,637 in 2004 and $9,895 in 2003. Counsel also submitted Form I-864P, Poverty Guidelines for 2006, which indicates that for a family of three the poverty line was $16,600.

The applicant's wife submitted several letters describing her financial situation and the emotional effects of being separated from the applicant. In a letter dated December 11, 2007, she states that she has been traveling with her daughters to Mexico to see the applicant, but to do this she must leave her job and take her older daughter out of school. She further states,

> My husband being in Mexico can't support us much with the little he gets paid. . . only $720 pesos like about $70 in American money. My husband can't make it with this pay in Mexico if me and my daughters are there with him. It is not enough for all of us. . . Sure, I can come to the US and work but I would have the same expenses to pay including babysitting.

The applicant's wife submitted documentation to support these assertions including the following:

> - A pay stub from Mexico indicating that the applicant earned 720 pesos for one week's work in November 2007;
> - A water and sewer bill from Mexico for September 2007 for the amount of 111.65 pesos;
> - An electricity bill from Mexico for a two month period (March to May 2007) for 160.96 pesos;
> - Grocery and pharmacy bills from Mexico documenting the cost of groceries and medications totaling over 500 pesos in a one-week period.

The applicant's wife further states that they must pay additional expenses, including rent of 250 pesos, a bill for cooking gas, and transportation costs with her husband's salary. *See letter from* [redacted] **dated** December 11, 2007. The applicant further states that he earns the equivalent of about $50 to $60 per week working as a laborer in Mexico, and this is not enough to support the family. *See undated letter from* [redacted] *(transcribed by* [redacted]. Evidence on the record further establishes that the applicant was earning about $7 per hour working 40 hours per week in the United States, or about $14,500 per year. *See letter from* [redacted] ***Construction Masonry*** **dated November 17, 2005.**

The evidence on the record establishes that the applicant's wife is suffering extreme hardship as a result of being separated from the applicant, and that she would suffer extreme hardship if she and her daughters relocated to Mexico. The situation presented in this application rises to the level of extreme hardship because

the record demonstrates that the applicant's wife's income is below the poverty line for her family and that as a result she has lost her home and is living with her mother. This financial hardship, combined with the emotional hardship caused by separation from the applicant and witnessing the effects of this separation on her children, rises to the level of extreme hardship. Further, the applicant's wife has provided documentation of the applicant's income and the family's expenses in Mexico, which establish that the applicant does not earn enough to support the family if they were to move there. This financial hardship combined with the emotional effects of being separated from her parents and other family members, all of whom reside in the United States, and having to adjust to life in Mexico after living her entire life in the United States, rises to the level of extreme hardship. This finding is based largely on evidence of financial hardship submitted in support of the appeal. Further, as noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998).

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 a waiver 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). *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 adverse factor in the present case is the applicant's entry into the United States without inspection in 2001 and unlawful presence until 2005. The favorable factors in the present case are the applicant's significant family ties to the United States, including his wife, daughters, and other relatives; the extreme hardship to the applicant's wife if he is compelled to remain outside the United States; hardship to the applicant's daughters if they are separated from their father or if they relocate to Mexico; letters from friends and the applicant's former employer in the United States stating that he is a person of good moral character and works hard to support his family; and his lack of a criminal record.

The AAO finds that the applicant's violations of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.