identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

H3

[redacted]

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: JUL 0 8 2009
CDJ 2004 767 148

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Immigration and Nationality Act.

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

John F. Grissom,
Acting 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 more than one year.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Act. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated June 26, 2006. The applicant submitted a timely appeal.

On appeal, counsel submits previously submitted and additional evidence.

The AAO will first address the finding of inadmissibility.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (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.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). For purposes of section

212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[1]

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* Memo, note 1.

Citizenship and Immigration Services (CIS) records reflect that the applicant entered the United States without inspection in 1999, remaining illegally until October 2005. The applicant accrued six years of unlawful presence, from 1999 until October 2005, and triggered the ten-year-bar when he departed the United States, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). That section reads:

> (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 waiver under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child is not a consideration under sections 212(a)(9)(B)(v) and 212(i) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant

---

[1] Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

to section 212(i) of the Act. The factors relate to an applicant's qualifying relative and include 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 565-566.

The factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines "whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

In addition to other documents, the record contains birth certificates, prescriptions, photographs, a psychological evaluation, a marriage certificate, and letters from physicians, the applicant's spouse, family members, a pastor, and friends.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established in the event that she joins the applicant to live in Mexico, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant's spouse, [redacted], indicates that she will experience hardship if her husband remains in Mexico. In her letter dated October 29, 2005, she indicates that her salary is not enough to pay rent and bills and babysitting expenses so she must get financial assistance from the government such as food stamps. She states in a letter dated July 24, 2006, she and her daughter live with her parents and depend upon them financially; that she has no energy to find a job and is nervous all the time, and bites her hands until they bleed and pulls out her hair. She states that she feels out of control and is nothing without her husband and sometimes feels that she does not want to live. [redacted] states that relatives took her to a doctor and he recommended counseling, but she cannot afford to visit a therapist. The letter by [redacted] with Sana Medical Group, Inc. conveys that [redacted] was seen in his office on July 14, 2006, and was treated for anxiety and depression was referred to counseling, and that [redacted] is undergoing difficult stressful situations with her family in Mexico and social stress in the United States. He prescribed Ativan for [redacted]. In addition, [redacted], an obstetrics and gynecologist, prescribed Ambien for [redacted]. Ms. [redacted] pastor indicates that she has visited him on account of her depression. [redacted] mother states that her daughter is depressed and has changed since separation from the applicant. She indicates that her daughter cannot sleep, cries and is awake early. She conveys that [redacted] son is living with his father in Mexico. She states that her daughter needs money and is not working and that she cannot give her money because she is supporting three of her own children. [redacted] mother indicates that the applicant took care of the children while her daughter worked. The letters by family members convey that Ms.

[redacted] is very depressed and some of the letters describe her as having no money to support herself and her daughter.

The psychological evaluation dated June 30 and July 1, 2006, conveys the applicant is depressed due to separation from his wife and children, and it reflects that he is unemployed. The record contains money remittances sent to the applicant since February 2006. The letter by [redacted] dated July 6, 2006, states that the applicant's income is low and his living conditions are poor and it would be hard on his children to adapt to this. The letter by dated July 4, 2006, conveys that the applicant is depressed and unable to find work in Mexico. She conveys that her family members collect and send money to the applicant so that he can support his son and himself.

Courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to 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).

The hardship presented in this case is both financial and emotional in nature. The applicant's wife is described as having depression and as being in financial straits. In light of the evidence in the record, the AAO finds that the cumulative general emotional effect that family separation has had on the applicant's wife, combined with the increased familial burdens that she has faced since her husband's departure from the United States, render the hardship in this case beyond that which is normally experienced in most cases of removal. Accordingly, the AAO finds that the applicant has established that his wife would suffer extreme hardship if she remained in the United States without him.

Furthermore, given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the applicant's spouse, in view of her husband's poor living conditions in Mexico and his reliance upon financial support from family members in the United States to survive in Mexico, rises to the level of "extreme" hardship if she joins the applicant to live in Mexico.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and his U.S. citizen children, their close ties to their church, the letters commending the applicant's character, and the passage of approximately nine years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's entry into the United States without inspection, his periods of unauthorized presence, and unauthorized employment. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the severity of the applicant's immigration violation is at least partially diminished by the fact that nine years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

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