U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CLEVELAND, OHIO Date: FEB 11 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico who was 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 and seeking readmission within 10 years of his last departure from the United States. The record reflects that the applicant is the spouse of a United States citizen and that he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 United States citizen spouse, and United States citizen daughter and stepdaughter.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on his spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated June 6, 2007.

On appeal, the applicant, through counsel, asserts that the "Service erred in denying the I-601...The Service's denial of the case is directly against the weight of the evidence which shows that [redacted] will suffer 'extreme hardship' if her husband is not allowed to enter the United States for ten years." *Form I-290B*, filed August 13, 2007. Additionally, counsel contends that "[t]he Service's dismissal of [redacted]'s serious psychological and physical ailments and conditions as not constituting a particularly serious problem is also illogical and against the overwhelming weight of the evidence presented. [redacted] remains a seriously ill woman who desperately needs her husband by her side to survive." *Id.*

The record includes, but is not limited to, counsel's brief, an affidavit and statement from the applicant's wife, numerous medical documents pertaining to the applicant's wife's medical conditions, a letter from [redacted] LSW, Pathways Inc., regarding the applicant's wife's mental and psychological health, and letters from the applicant's family and friends. 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:

> (B) Aliens Unlawfully Present.-
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> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
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> ...
>
> (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 AAO notes that the record contains several references to the hardship that the applicant's United States citizen daughters would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(i)(II) of the Act provides that a waiver, under section 212(a)(9)(B)(v) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's daughters will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that the applicant initially entered the United States without inspection in August 1999. On December 3, 2001, the applicant's daughter, [redacted] was born in Ohio. On February 14, 2005, the applicant married [redacted], a United States citizen. In February 2006, the applicant departed the United States. On March 31, 2006, the applicant entered the United States on an H2B nonimmigrant visa, with authorization to remain in the United States until December 11, 2006. On October 30, 2006, the applicant's wife filed a Form I-130 on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On February 15, 2007, the applicant's Form I-130 was approved. On March 23, 2007, the applicant filed a Form I-601. On June 6, 2007, the District Director denied the applicant's Form I-485 and Form I-601, finding the applicant accrued more than 365 days of unlawful presence and failed to establish extreme hardship would be imposed on the applicant's spouse. The District Director stated the applicant accrued unlawful presence from 1999 until February 2006. The applicant is attempting to seek admission into the United States within 10 years of his departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(I) 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 applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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, 565-66 (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 to a qualifying relative. The factors 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.

Counsel asserts that the applicant's spouse would face extreme hardship if she relocated to Mexico in order to remain with the applicant or remains in the United States without the applicant. The applicant's wife "is being treated for bipolar I disorder most recent episode mixed moderate and has been prescribed geodon and depakote ER [extended release]." *Letter from* [redacted] *LSW, Pathways Inc.*, dated August 30, 2007. The AAO notes that submitted documentation establishes that Geodon is an antipsychotic medication for the treatment of schizophrenia and Depakote treats bipolar disorder. Counsel contends that "[n]one of these medications can be obtained without a doctor's prescription and it has become very clear that [redacted] cannot function without them. [redacted] .will not have access to the same quality of care in Mexico that she receives here. [redacted] suffers from diseases and disorders which simply will not go away with time nor are they the type of conditions which could adequately be dealt with by the Mexican health care community." *Counsel's Brief*, page 4, filed September 4, 2007. The applicant's wife states that she is "afraid that the type of medical and psychological care and assistance [she] would need would not be available for [her] based on the little money [they] would earn. [She] know[s] that [she] could not make it in Mexico. [She] would not be able to afford [her] medication there and [she does not] speak Spanish enough to be able to put into words what [she is] feeling in order to facilitate effective psychological care and treatment." *Statement from* [redacted], undated. **The AAO finds that based on documentation submitted by** counsel, the applicant's wife will not receive the necessary and proper mental health care in Mexico that she requires.

The applicant's wife states that during the six weeks that the applicant returned to Mexico, she "needed to seek medical help for [her] depression and Bi-Polar through Pathways Psychological Clinic." *Affidavit of* [redacted] dated March 20, 2007. However, "[w]hen [the applicant] came back, [her] condition improved dramatically." *Statement from* [redacted] *supra*. The AAO notes that the applicant has established that his wife's psychological and mental health deteriorated when she was separated from the applicant. Additionally, the AAO notes that in addition to the applicant's wife's history of depression and psychological problems, the applicant's wife attempted suicide at 16 years old and with her bipolar disorder, she could "become suicidal", again. *See Lake Hospital System ER Report*, dated August 5, 1999; *see also Pathways, Inc., Initial Psychiatric Evaluation*, dated July 8, 2004; *see also Bipolar Disorder, National Institute of Mental Health*, dated January 2007. The AAO notes that the applicant's wife's doctor noted that the applicant's wife is morbidly obese, and she has been diagnosed with numerous medical conditions, including acute gastritis, scoliosis, and asthma. *See Lake Hospital System History and Physical*, dated October 21, 2006; *see also Lake Hospital System Radiology Report*, dated December 23, 2002; and various other medical documents. Counsel states the applicant's wife "has had extensive medical problems which have resulted in numerous surgeries. [redacted] frequently suffers from chest pain, abdominal pain, back pain, and sleep disorders which often limit her ability to care for herself or her two daughters." *Brief in Support of I-601*, filed March 23, 2007. The applicant's wife states he "need[s] [the applicant] for [her]self and [their] children...He is always there to take the girls back and forth to school and to make sure their homework is

finished before [she] get[s] home from work...He usually cooks dinner..." *Affidavit of* [redacted] *supra*. The AAO notes that all of the applicant's wife's family resides in the same area as the applicant and his wife, and the applicant works as a painter in his father-in-law's company. *See letter from* [redacted], *Fineline Interior Painting*, undated. The applicant has established that his wife is dependent upon him and would experience extreme hardship if she were to remain in the United States without him.

The AAO finds that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, in that the applicant's spouse would suffer extreme emotional and psychological hardship as a result of her separation from the applicant. The record establishes that the applicant's spouse's mental and emotional problems would be exacerbated whether the applicant is removed from the United States without her or whether she joins him in Mexico, separated from her family and mental health resources. Combined with the increased financial and familial burdens that the applicant's spouse will face if the applicant is removed from the United States, the cumulative hardship in this case is beyond that which is normally experienced in cases of removal. Accordingly, the AAO finds that the applicant has established that his United States citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The favorable factors are the extreme hardship to his United States citizen wife, who depends on him for emotional and financial support, the applicant's contributions in helping to raise the children and having no criminal record in the United States. The unfavorable factors in this matter are the applicant's initial illegal entry and periods of unauthorized presence and employment in the United States.

While the AAO does not condone his actions, the AAO finds that the favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.