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

U.S. Citizenship and Immigration Services

H6

[redacted]

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: JUL 01 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Ground 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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

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 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 ten years of his last departure from the United States. The applicant is married to a United States citizen and 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 wife.

The director found that the applicant failed to establish extreme hardship to his spouse, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated November 13, 2007. On appeal, the applicant's wife contends that the denial of the waiver imposes extreme hardship on her. *See Form I-290B, Notice of Appeal*, dated December 26, 2007.

The record includes but is not limited to, a declaration and a letter by the applicant's wife; a copy of a Grant Deed, copies of the applicant's wife's Statement of Earnings and Deductions; copies of mortgage loan account information statements; copies of various bills; and copies of the applicant's wife's Form 1040, U.S. Individual Income Tax Return(s) for the years 2004 through 2006. The entire record was reviewed and considered in rendering this decision on appeal.

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

> (B) 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 [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.

In the present case, the applicant claims that he entered the United States without being inspected and admitted or paroled in or around November 2000. On January 21, 2005, the applicant's United States citizen wife filed a Form I-130 on the applicant's behalf. On March 7, 2005, the Form I-130 was approved. In October 2004, the applicant voluntarily departed the United States. On August 28, 2006, the applicant filed a Form I-601. On November 13, 2007, the District Director denied the Form I-601, finding that the applicant failed to establish extreme hardship to his spouse. The applicant accrued unlawful presence from November 2000, until October 2004, when he voluntarily departed the United States. The applicant's unlawful presence for more than one year and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006). Thus, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from 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 applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. Section 212(a)(9)(B)(v) of the Act provides that a waiver is applicable solely where the applicant establishes extreme hardship to her 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 wife is the only qualifying relative. 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).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) ("When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."); *Matter of Lopez-Monzon*, 17 I&N Dec. 280

(Commr. 1979) (noting in the context of a waiver under section 212(i) of the Act that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

> 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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." *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 mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), the U.S. Supreme Court held 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's spouse, [redacted] is a 29-year-old native of Mexico and citizen of the United States. The applicant and her husband were married in Mexico on December 23, 2004, and do not have any children. The applicant's spouse asserts that she is suffering extreme emotional, physical and financial hardships as a result of the denial of the waiver application.

The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant's waiver request.

Regarding the emotional hardship of separation, the applicant's spouse states that she needs the applicant's moral, financial and physical support to help her accomplish her goals. She states that it has been very difficult for her to live in the United States without the applicant, that the separation has affected her job performance, forced her to put her college education on hold, and she has "been losing sleep over the matter for several months." *Declaration of* [redacted] dated December 19, 2007.

Regarding the financial hardship of separation, the applicant's spouse states that the applicant's absence has caused a very bad financial situation for her. The applicant's wife states she and the applicant incurred expenses including buying a home with the expectation that the applicant would be returning to the United States soon to help with the family's financial obligations. As a result of the waiver denial, the applicant's wife states that she alone is responsible for paying all their bills including a mortgage of about $1,300 per month. The applicant's wife states that her gross monthly income of about $2,000 is not enough to meet all their financial obligations, and that she is on "the brink of financial bankruptcy." *Id.* The applicant's wife states that her parents have been able to help her for a couple of months, but that they have expressed to her that they may not be able to help her much longer. *Id.* The applicant's wife further states "I am beginning to experience financial stress, almost panic because I fear that if I am not able to make the house payment I may lose the property." *Id.*

The applicant's wife submitted a detailed statement of the emotional and financial hardship she is undergoing as a result of the applicant's inadmissibility. Further, she submitted copies of various bills, copies of her individual income tax returns for the years 2004 through 2006, and copies of her statements of earnings and deductions to demonstrate the financial hardship she faces without the applicant's help. Based on the totality of the evidence in the record, the AAO finds that the applicant has demonstrated that his wife has endured and will continue to endure significant financial hardship if he were to remain in Mexico.

Regarding relocation, the applicant's spouse states that she does not want to move to Mexico to live with the applicant because of "the economic consequences this would have on our lives." The applicant's spouse states that she has a good and secure job with possibilities for advancement and it would be the worst decision to move to Mexico. *Declaration of Ederlen Gutierrez Alvarado,* dated December 19, 2007. Additionally, the applicant's spouse states that her parents are living in the United States, that she has been living in the United States since she was three months old and considers the United States her home.

The AAO finds that given the applicant's spouse's long residence in the United States, work history and family ties, she would experience extreme hardship if she relocates to Mexico to live with the applicant. As discussed before, the applicant's wife's family is in the United States, she has been living in the United States for more than 29 years – virtually her entire life – and lacks the familiar or cultural ties to Mexico that might ease her transition to life in that country. If forced to relocate to Mexico, the applicant's wife would have to leave her support network and her long-term gainful employment. In addition, the AAO notes that the U.S. Department of State has issued a travel warning for Mexico, documenting the escalating violence in Mexico. As noted by the U.S. Department of State:

> A number of areas along the border continue to experience a rapid growth in crime... Criminals have followed and harassed U.S. citizens traveling in their vehicles in border areas ... 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 Warning, United States Department of State, Bureau of Consular Affairs, Mexico, dated March 14, 2010.

Considered in the aggregate, the applicant's wife's finances, family ties in the United States and risks to her personal safety in Mexico, indicate that she would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of* [redacted] 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of* [redacted], the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of* [redacted], as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of* [redacted] is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of* [redacted], in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an

> 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardship the applicant's wife faces if the waiver request is denied and his lack of a criminal record. The unfavorable factors include the applicant's initial entry into the United States without admission or parole and his subsequent unlawful presence in the country.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.