Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

[redacted]

H2 H6

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: MAY 27 2010

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.

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 September 1999, when he entered without inspection, to February 17, 2006, when he returned to Mexico. He 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 is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. 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 return to the United States and reside with his spouse and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director* dated September 6, 2007.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant had not established extreme hardship to his U.S. Citizen wife and denying the waiver application. *Brief in Support of Appeal* at 2. Specifically, counsel asserts that in addition to suffering emotional hardship that would be expected as a result of separation from her husband, the applicant's wife is suffering hardship that goes far beyond that. *Brief* at 4. Counsel states that the applicant's wife has the burden of financially supporting the family and caring for their two children on her own while the applicant is in Mexico, and further states that she suffers from various medical conditions including an abdominal hernia. *Brief* at 4. Counsel additionally claims that the applicant's wife could not relocate to Mexico because of the lack of jobs and adequate medical care there, and the applicant would be unable to support the whole family if they relocated there. *Brief* at 4. In support of the appeal counsel submitted declarations from the applicant and his wife, birth certificates for the applicant's two children, copies of family photographs, a copy of an apartment lease and a letter from the applicant's wife's landlord, medical records for the applicant's wife, copies of income tax returns for the applicant and his wife, letters in support of the applicant from friends and family members, a letter from the applicant's wife's church, and a letter from the applicant's former employer. The entire record was reviewed and considered in rendering this decision.

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 is 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.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These 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.

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 case, *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United

States," and that, "[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." (Citations omitted.)

The record reflects that the applicant is a thirty year-old native and citizen of Mexico who resided in the United States from September 1999, when he entered without inspection, to February 17, 2006, when he returned to Mexico. The record further reflects that the applicant's wife, whom he married on August 27, 2002, is a twenty-three year-old native and citizen of the United States. The applicant currently resides in Mexico and his wife resides in Dallas, Texas with their two children.

Counsel asserts that because the applicant's wife has a hernia, she sometimes finds it difficult to work, and it is difficult for her to pay the rent on their apartment because the applicant earns little money in Mexico. The applicant's wife states that when she was staying in Mexico with the applicant she was having pain in her stomach and was diagnosed with a hernia and told by the doctor that she needed to have an operation because the hernia would continue to grow. *Declaration of* [redacted] She further states that she felt so bad that she went back to the United States but has not had an operation because she needs the applicant's assistance and financial support to pay the bills. She further states that she has worked as a housekeeper but finds it difficult at times because of her hernia and she also has an eye condition that requires medication. *Declaration of* [redacted] In support of these assertions counsel submitted prescriptions from a doctor in Mexico that are not translated and a note from a doctor in Dallas stating that the applicant's wife has been diagnosed with an abdominal hernia and is being treated for it. Counsel did not submit any more detailed information about the nature and severity of the applicant's wife's condition or any treatment or assistance needed. The AAO takes note, however, of information provided by the website of the hernia resource center, which states that the "only way to effectively treat a hernia and provide lasting relief is to have it surgically repaired." The website further states,

> A hernia will not go away with exercise, weight loss or medicine. Some patients find that wearing a hernia belt or truss helps ease discomfort, but will not help your hernia go away. Only surgery provides a permanent solution.

The applicant's wife states that she relied on the applicant for financial assistance when he lived in the United States and finds it difficult to earn enough to support her family and at times cannot work due to her hernia. Income tax returns submitted with the appeal indicate that the applicant's wife earned $13,256 in 2006 working as a housekeeper and at a restaurant. According to the 2009 Federal Poverty Guidelines, the poverty level for a family of three is $18,310 per year. The record indicates that the applicant's wife was employed at a restaurant and as a housekeeper, but it appears that the income she is earning is not sufficient to support her two children, and the record further indicates that she suffers from a medical condition that limits her ability to work.

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that his wife would experience extreme hardship if he is denied admission to the United States. The evidence on the record indicates that the applicant was an iron worker and supported the family when he lived in the United States and his wife earns far less money and she and their children are living below the poverty level on her income. Further, the applicant's wife suffers from

a medical condition that is causing her pain and affecting her ability to work, and she has decided not to have surgery though her doctor states she needs it because the applicant is in Mexico and she needs his support. In light of her medical condition, the difficulties of working and caring for their two children on her own, and the financial hardship caused by loss of the applicant's income, the emotional and financial hardships caused by separation from the applicant rise to the level of extreme when considered in the aggregate.

The evidence further indicates that the applicant's wife is twenty-three years old and was born in the United States. Numerous letters from friends and family members and a letter from her church indicate that she has significant ties to the United States. The applicant and his wife further state that she and their children had difficulty living in Mexico, they could not feed the children adequately, and they could not afford treatment for the applicant's wife's hernia and she was afraid to have surgery there. A letter from the applicant's sister states that he has been working in the fields trying to support his family while he is in Mexico, but he does not earn enough money to support the family and sometimes he has nothing to eat. *See letter from* [redacted] *and declaration of* [redacted] In light of her age, medical condition, and her length of residence and ties to the United States, the applicant's wife would suffer extreme hardship if she relocated to Mexico due to difficulty adjusting to conditions there and having to sever her ties to the United States.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(a)(9)(B)(v) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case are the applicant's illegal entry, unauthorized presence in the United States from 1999 to 2006, and unauthorized employment. The positive factors in this case include the applicant's significant family ties to the United States, including his wife and children and his sister and cousins, hardship to the applicant's wife and children if he is denied admission to the United States, his length of residence and history of employment and filing tax returns, and his lack of a criminal record. Although the applicant's immigration violations cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that she merits approval of his application.

ORDER: The appeal is sustained.