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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

H2

FILE:

[REDACTED]

Office: MEXICO CITY (CIUDAD JUAREZ) Date: AUG 07 2009

CDJ 2004 744 992

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:

SELF-REPRESENTED

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.

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Officer, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], 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 is the spouse of a citizen of the United States. 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 so as to immigrate to the United States and live with his wife. The district officer 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 District Director*, dated August 17, 2006.

In a letter submitted on appeal, the applicant's wife, [REDACTED] states that she was diagnosed with Lupus and rheumatoid arthritis and was in acute pain and hospitalized for nearly a week. She states that she was off work for quite some time and received disability benefits. [REDACTED] indicates that she takes pain medication, but her health has worsened. She states that on many occasions she was unable to pay for basic living needs and had been in jeopardy of being evicted. Her situation, she conveys, makes her depressed. She states that she needs her husband to be with her so that he may work and provide for her so that she can focus on her health. She states that she can't work much longer and is always in pain and has no one other than her husband to rely upon. *Letter by [REDACTED]*, dated September 19, 2006.

Also submitted on appeal is a letter substantiating that [REDACTED] was diagnosed with probable systemic lupus erythematosus, anemia, and osteopenia. *Letter by [REDACTED] dated May 30, 2006.* The letter by [REDACTED] dated May 22, 2006, states that [REDACTED] has been a patient for three years and that [REDACTED] has a history of hyperthyroidism and that in the past four months her health has been deteriorating. [REDACTED] states that [REDACTED] has progressively worsening fatigue, arthritis, joint stiffness, and pain. She states that [REDACTED] had been recently hospitalized for hepatosplenomegaly, leucopenia, and anemia requiring blood transfusion. [REDACTED] indicates that [REDACTED] has been placed on disability for joint pain and is unable to work and that [REDACTED] requires intensive medical treatment and frequent clinic visits with herself and three specialists and that [REDACTED] would benefit from her husband's help.

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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in August 1990, and remained until October 2005. The applicant therefore accrued eight years of unlawful presence, from April 1, 1997 to October 2005, and triggered the ten-year-bar when he left 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 provides that:

- (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.

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.

The AAO will now address the OIC's conclusion that a waiver of inadmissibility is not warranted in the present case.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 the applicant is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative here. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine 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).

U. S. 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). Separation from one's family will therefore be given appropriate weight in evaluating the hardship factors in the present case.

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

As described in the letters by medical doctors, the applicant has serious health problems for which she receives regular medical care. In view that [REDACTED] health problems have affected her ability to maintain steady employment, and in light of [REDACTED] claim that her husband would provide her with financial security, enabling her to concentrate on her health, the AAO finds that [REDACTED] would endure extreme hardship if she remained in the United States without her husband.

[REDACTED] describes being in constant pain for which pain medication has not proven useful. Ms. [REDACTED] indicates that [REDACTED] requires intensive medical treatment and frequent clinic visits with herself and three specialists. In that [REDACTED] is undergoing intensive medical treatment in the United States, the AAO finds that she would experience extreme hardship if she were to cease the treatment she is receiving in the United States to join her husband to live in Mexico.

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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 family ties to the United States including two U.S. Citizen children. The unfavorable factors in this matter are the applicant's entry into the United States without inspection, his unlawful presence, and any unauthorized employment. There does not appear to be 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 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. The application will be approved.

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