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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]  
CDJ 2004 701 068

Office: CIUDAD JUAREZ, MEXICO Date: JUL 30 2009

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i), 8 U.S.C. § 1182(i); 212(h), 8 U.S.C. § 1182(h); and 212(a)(9)(B)(v), 8 U.S.C. § (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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom,  
Acting Chief Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved.

The applicant [REDACTED] is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation; and section 212(a)(9)(B)(i)(II) of 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 sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(i), 8 U.S.C. § 1182(a)(9)(B)(v). The district 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 Officer-in-Charge*, dated June 26, 2006. The applicant submitted a timely appeal.

On appeal, former counsel states that the totality of the circumstances show that [REDACTED] the applicant's spouse, would experience extreme hardship if the waiver application were denied. She states that [REDACTED] is under severe stress on account of her husband taking anti-depressants and being under a doctor's care for depression. Former counsel states that [REDACTED] is a student and is struggling to continue her education and without her husband's moral and financial support will be forced to quit school. [REDACTED] former counsel states, is in financial straits and her husband has a job offer in the United States that would help her pay rent, loans, and their son's expenses. He states that she would experience extreme hardship if she moved to Mexico because she would leave behind her extensive and close knit family in the United States.

The AAO will first address the finding of inadmissibility for seeking admission into the United States by fraud or willful misrepresentation.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under [Chapter 12 of Title 8] is inadmissible.

The Docket, Minute and Commitment Sheet in the record reflects that the applicant pled guilty or no contest to violation of Cal. Penal Code § 148.9 (count 5). That section reads:

- (a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.

(b) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any other peace officer defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, upon lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the arresting officer is guilty of a misdemeanor if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer.

The OIC determined that the applicant is inadmissible for misrepresentation based upon his violation of Cal. Penal Code § 148.9. The AAO finds that although the applicant was convicted under § 148.9, the material misrepresentation that the applicant made as to his identity was not made in furtherance of seeking to procure a visa, other documentation, or admission into the United States or other benefit within the meaning of the Act. Thus, the applicant is not inadmissible under section 212(a)(6)(C) of the Act.

The applicant was found to be inadmissible for unlawful presence. 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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes

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<sup>1</sup> Memorandum by [redacted] Director, Refugee, Asylum and International Operations Directorate and [redacted] Office of Policy and Strategy, Consolidation of

of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup>

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 February 1999, remaining illegally until he left in July 2003. The applicant accrued four years of unlawful presence from February 1999 to July 2003, 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 section 212(a)(9)(B)(v) 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). 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

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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.

<sup>2</sup> *Id.*

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 565-566.

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).

Extreme hardship to the applicant's spouse must be established in the event that she remains in the United States without him, and alternatively, if she joins the applicant 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.

Contained in the record are a declaration, letters, birth certificates, medical records, school transcripts, financial records, a job offer to the applicant, and other documents.

██████████ indicates that she is experiencing emotional and financial hardships ever since her husband left the United States. ██████████ states in her declaration dated July 25, 2006, that since the applicant left the country she has been stressed and worried about how to pay bills and was prescribed anti-depressants by her doctor in October 2005. The Kaiser Permanente medical record shows ██████████ was diagnosed with headaches, anxiety, stress, depression and with trouble sleeping and was prescribed trazodone. In her letter dated November 2, 2005, ██████████ states that because of her illness she missed examinations that determine whether she transfers to a university. **She states that if her husband is inadmissible she will not be able to achieve her educational goals.** In her declaration, ██████████ conveys that her son has been upset ever since the applicant returned to Mexico and she states that she and her son recently went to a therapist. Ms. ██████████ states that she lives with her mother because she cannot afford rent and that she pays her son's expenses by credit card. She indicates that she is a student at American River College and plans to transfer to Sacramento State University and hopes to work in law enforcement. The record contains her school transcripts. If her husband's waiver application were denied, she states that she will have to quit school to obtain full-time employment. ██████████ conveys that she has family members in the United States and that her mother depends upon her for emotional support, **especially since ██████████'s brother overdosed on drugs.** She states that her parents see her son often. ██████████ **mother** indicates that her daughter is desperate and needs the help of her husband to support their son who will start kindergarten. The birth certificate shows the applicant's son was born on May 2, 2001. In her declaration, the applicant's spouse conveys that her husband barely makes enough money to support himself and his mother in Mexico, and relies upon his brother in the United States for financial support. The record shows the applicant is receiving medication for depression.

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).

Given the evidence of hardship relating to [REDACTED] education, her son’s emotional issues, her close relationship with her family members, and her financial hardships, when considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that her hardship rises to the level of “extreme” if she remains in the United States without her spouse.

Furthermore, the AAO finds that the totality of the record is sufficient to establish that the applicant’s spouse would suffer extreme hardship if she were to join her husband to live in Mexico. The applicant’s spouse is providing moral support to her mother and brother during a difficult period in her brother’s life and she has been attending college and anticipates transferring to a university and eventually obtaining employment in law enforcement. [REDACTED] conveys that her husband depends upon his brother in the United States for financial support because he is unable to support himself and his mother in Mexico. The AAO therefore finds that the evidence weighed collectively establishes that the applicant’s spouse would endure extreme hardship in the event that she joins her husband 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 son, and the passage of five 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 unlawful presence and any unauthorized employment, and his criminal conviction. There do not appear to be any further convictions other than the one discussed in this decision.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant’s flagrant 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 five 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. The application will be approved.

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