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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ)
(CDJ 2004 634 366 relates)

Date: NOV 05 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)
of the Immigration and Nationality Act (the 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. 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 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 married to a U.S. citizen and 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 with his wife in the United States.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. *Decision of the District Director*, dated October 30, 2006.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, [REDACTED], indicating they were married on July 6, 2002; two letters from [REDACTED], a psychosocial assessment of [REDACTED] copies of [REDACTED] bills; and a copy of an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), 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.

(ii) Construction of unlawful presence. – For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now the Secretary of Homeland Security (Secretary)] or is present in the United States without being admitted or paroled.

....

(v) Waiver. – The Attorney General [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.

In this case, the district director found, and counsel concedes, that the applicant entered the United States without inspection in 1995 and remained until February 2006. However, counsel contends that, as a matter of law, the applicant is not inadmissible for unlawful presence because he entered without inspection. Specifically, counsel contends that section 212(a)(9)(B)(i)(II) bars admission for any alien who “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,” and that because the applicant entered without ever seeking admission, he is not *again* seeking admission. *Petitioner, [REDACTED] for Reconsideration and Brief on Appeal* at 24-28.

Counsel’s contention is unpersuasive as the statute itself construes unlawful presence as including aliens who have entered 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) (“an alien is deemed to be unlawfully present in the United States if the alien is present in the United States . . . without being admitted or paroled”). Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure from the United States in February 2006. He now seeks admission within ten years of his 2006 departure. Accordingly, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), 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 is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. **See section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(a)(9)(B)(v).** 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 whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying

relative pursuant to section 212(i) of the Act. 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 566. The BIA has held:

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 Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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.” *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, the applicant’s wife, [REDACTED] states that she will suffer extreme emotional and economic hardship if her husband’s waiver application were denied. [REDACTED] states that she is thirty-four years old and that she and her husband want to start a family. She contends she does not want to move to Mexico to be with her husband because Mexico has lower health care standards, medical insurance is very expensive, and salaries are low. She states she is currently gainfully employed and has medical insurance. In addition, [REDACTED] states that since her husband departed the United States, she has been isolating herself from friends and family, has daily crying spells, and suffers from chronic headaches, fatigue, anxiety, and insomnia. She contends she has been battling depression, that she has a family history of depression, and that her mother has been on anti-depressants for over fifteen years. Furthermore, [REDACTED] states that her score on the “Social Readjustment Rating Scale” is 584, a score “indicat[ing] major life crisis [that] is highly predictive (80%) of serious physical illness within the next 2 years.” Moreover, [REDACTED] states she is the youngest of ten siblings and that she is very close with her parents and siblings. She contends she and her husband bought their home with her parents and that her parents depend on her a lot. [REDACTED] claims she takes her parents to doctor’s appointments, buys their groceries, oversees their prescription medications and bills, and that her other siblings are unavailable to assist her parents. [REDACTED] contends her mother suffers from depression, diabetes, thyroid problems, arthritis, and high blood pressure. She contends her father suffers from high blood pressure.

Additionally, [REDACTED] states she cannot move to Mexico because she is a Child Protection Worker for the Illinois Department of Children and Family Services, a job she would be “totally devastated” to leave. She contends her job is her “passion . . . in life” and that she hopes to retire from the job, which offers an excellent pension and retirement benefits. [REDACTED] states that she has an outstanding mortgage of \$117,000, credit card debt of \$18,000, two car payments, car insurance, and property tax bills. She contends it would be impossible for her to cover her debt if she moved to Mexico given the employment situation in Mexico and the currency exchange rates. [REDACTED] states she will suffer extreme financial hardship if her husband’s waiver application were denied because even though she makes good money, it is still not enough to pay off all of the couple’s current debt. Moreover, [REDACTED] states she would worry about her safety in Mexico and that the U.S. Department of State has acknowledged that Mexico is not entirely safe for U.S. citizens. She also states that Mexico City has the worst air pollution in the country and ranks among the most polluted cities in the world. *Letter from [REDACTED], dated October 13, 2006; Letter from [REDACTED] dated February 2, 2006.*

A psychosocial assessment of [REDACTED] by a social worker states that [REDACTED] is having trouble focusing and is having problems with her memory because of stress. According to the assessment, [REDACTED] states she is less productive at work and fears her lack of focus could affect her driving. The assessment states that [REDACTED] reports feeling a “stinging pain in her stomach,” gets headaches two or three times a week, and “feel[s] like throwing up.” She also reports that her hair is falling out and that she has a “habit of pulling on [her] skin.” In addition, the assessment states that “[o]ther complaints include jaw pain; grinding her teeth; a craving for cigarettes . . .; her heart beating fast; profuse sweating; red, irritated eyes; blurry vision and trouble seeing; seeing spots in front of her eyes; her head feeling hot; numbness in her legs; a habit of moving her feet when she feels nervous; and decreased appetite.” Furthermore, the assessment states that [REDACTED] is having trouble getting used to living alone and that before she married the applicant, she slept in the same bed with her sister until she was twenty-two years old. According to the assessment, [REDACTED] “feels doomed,” worries that she will be killed in an accident or that she will “get diabetes or cancer and die,” and “is consumed with thoughts of loved ones dying.” The assessment discusses a family history of suicide, stating that [REDACTED] mother attempted suicide when [REDACTED] was ten or eleven years old, and that her father’s mother and sister both committed suicide before she was born. Additionally, the assessment states that [REDACTED] brother died in 1991 from a drug overdose and that her family believes it is possible her brother’s death was actually a murder, but they never took legal action against anybody. The assessment states that [REDACTED] “has seen death or violence for much of her life.” It states that two months after her brother died, her cousin was stabbed to death. In addition, her sister’s best friend was killed by a stray bullet while crossing the street and [REDACTED] herself was the victim of a robbery when she was sixteen years old. Furthermore, the assessment states [REDACTED], who is allergic to dust and cat dander, feels like she can’t breathe when she’s in Mexico because of the dust. She states that when she was twelve or thirteen years old and on vacation in Mexico, she had trouble breathing and got bronchitis. [REDACTED] told the social worker that she had to sleep while sitting up in order to breathe and that she feared suffocating. The assessment also states that [REDACTED] and her husband want to start a family and that given that [REDACTED] is already

thirty-four years old, they worry the child will not be healthy because sister, who gave birth to a child when she was in her thirties, had a child with mental retardation and leukemia. Moreover, the assessment states fears for her safety in Mexico as her brother-in-law's wife and child were threatened with kidnapping in Mexico during the summer. The kidnapper purportedly demanded \$25,000 from brother-in-law, the applicant's brother. The assessment states that grew up being whipped with a belt by her father who often got drunk and got out his gun, and that a man exposed himself to her when she was a child.

The social worker diagnosed with "Dysthymia (a degree of depression)." The social worker concluded that "will blame herself and her depressive symptoms will worsen if her husband is barred from re-entering the United States." The social worker further concluded that made statements about wanting to escape and that she is at greater risk for depression and suicide because of the history of depression and suicides in her family including a suicide attempt by her mother, suicides by her grandmother and aunt, and her brother's "self-destructive . . . behavior was a type of slow suicide." In addition, the social worker found that's desire to have a child is of great personal significant because she wants to "make up for her own unhappy childhood," having experienced and witnessed physical abuse and other problems. Likewise, the social worker found that was particularly invested in her job working with abused children for the same reason and that she will suffer psychologically if she moves to Mexico and is unable to continue working in her profession. Furthermore, the social worker concluded that has "extreme separation and abandonment issues," as shown by her sleeping in the same bed with her sister until age twenty-two, calling her husband in Mexico multiple times a day, and having a fear of death or being harmed. The social worker stated that if husband is denied re-entry, the effect on "will be layered onto the reported pre-existing traumas[, and that u]nder such circumstances, [anxiety and depression will increase, gravely affecting her daily functioning." *Psychosocial Assessment of:* b) dated December 7, 2006.

The record also contains copies of seven prescription medications for mother and one prescription medication for father. In addition, the record contains copies of bills, including: the couple's mortgage statement indicating a monthly mortgage of \$922; a credit card bill indicating owes \$12,714, over \$12,000 of which was due the previous month; car payments totaling \$764 per month for two cars; car insurance totaling \$780 for six months; homeowners insurance of \$593; and property tax of \$3,199 per year.

Upon a complete review of the record evidence, the AAO finds that the applicant has established his wife has suffered, and will continue to suffer, extreme hardship if his waiver application is denied.

The record shows that is suffering from anxiety and depression and has extreme separation and abandonment issues. The record shows has a family history of depression and suicide attempts. Her mother attempted suicide, her grandmother committed suicide, and her aunt committed suicide. The record indicates is "consumed" with thoughts about death and dying, and that she has experienced several traumatic events in her life, including:

her brother's death, which her family believes was a murder; her cousin's fatal stabbing; her brother-in-law's family's kidnapping attempt; a childhood with an abusive father who often got drunk; and the fact that a man exposed himself to her when she was a child. As the social worker concluded, denying [REDACTED] husband's waiver application would exacerbate [REDACTED] significant and numerous pre-existing traumas. Considering these unique factors cumulatively, the AAO finds that the effect of separation from the applicant on [REDACTED] goes above and beyond the experience that is typical to individuals separated as a result of deportation and rises to the level of extreme hardship.

Moreover, moving to Mexico to avoid separation would be an extreme hardship for [REDACTED]. The record shows that [REDACTED] was born in the United States and that most of her family lives in the United States. [REDACTED] lives in the same house as her parents, both of whom suffer from a variety of medical problems. [REDACTED] would need to adjust to a life in Mexico after having lived in the United States her entire life, a difficult situation made even more complicated given her physical and mental health, considering her allergies that make it difficult for her to breathe in Mexico and the traumas she has experienced in the past. Furthermore, the record includes documentation on country conditions in Mexico and the AAO notes that the most recent U.S. Department of State Travel Alert for Mexico states that "violence in the country has increased" and "urge[s] U.S. citizens to delay unnecessary travel" to certain areas in Mexico. *U.S. Department of State Security Travel Alert for Mexico*, dated August 20, 2009. In sum, the hardship [REDACTED] would experience if her husband were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's unlawful entry and presence in the United States. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's wife if he were refused admission; significant family ties in the United States including his U.S. citizen wife and siblings; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.