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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  
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FILE:

(CDJ 2004 865 007 relates)

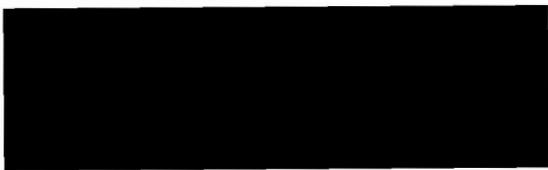
Office: MEXICO CITY (CIUDAD JUAREZ) Date: NOV 18 2009

IN RE:



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:



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 that reads "Perry Rhew".

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 and children 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 April 17, 2007.

The record contains, *inter alia*: a declaration and a letter from the applicant's wife, [REDACTED] a letter from [REDACTED] physician and copies of her medical records; a letter from [REDACTED] employer; a letter from a teacher; letters of support; 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.

....

(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 record shows, and counsel concedes, that the applicant entered the United States without inspection in April 1999 and remained until April 2006. Therefore, the applicant accrued unlawful presence for seven years. 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. In addition, the record shows that the applicant was convicted of simple battery in violation of the Reno Municipal Code in 2001. He was fined \$380.<sup>1</sup>

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

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<sup>1</sup> The AAO notes that the district director did not find the applicant inadmissible under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude. As explained below, the applicant met his burden of establishing eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). Therefore, even if he is inadmissible for having been convicted of a crime involving moral turpitude, he necessarily met his burden of establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

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 and the applicant have four young children. [REDACTED] has two seven-year old twins from a previous marriage to whom the applicant has been a father since they were four years old. According to [REDACTED], her ex-husband is not at all involved in the twins’ lives and the applicant is the only father they know. In addition, [REDACTED] states that she and her husband have a two-year old son and a six-month old son together. [REDACTED] states that she works full-time as a Care Coordinator Assistant in a medical center and that the work is very detail oriented, requiring her to be “very exact in determination and planning.” [REDACTED] contends her husband provided most of the child care when he was in the United States. She states that it would be “a huge change” and extremely expensive to put her four children in child care if her husband’s waiver application were denied. In addition, [REDACTED] states that the baby had to undergo surgery to put tubes in his ears due to frequent ear infections and that it was very difficult not having her husband in the United States for the surgery. Furthermore, [REDACTED] claims one of her sons, [REDACTED] has had numerous difficulties in school since her husband left the United States. Moreover, [REDACTED] contends that since her husband’s departure, she has had anxiety attacks, depression, and problems coping with work and day-to-day activities. She states she has been reprimanded at work and placed on “corrective action,” which may lead to her losing her job. [REDACTED] also claims she has suffered financially since the applicant’s departure, that she has had to apply for government assistance, and that she had to move in with her mother where she now shares a bedroom with her four children. [REDACTED] contends she has never been outside of the United States and has no family outside of the country. She states she does not read or write Spanish, fears she would be unable to find employment in Mexico, and states she and her children would have no place to live in Mexico. *Declaration of [REDACTED]*, dated May 10, 2007; *Letter from [REDACTED]* dated April 11, 2006.

A letter from [REDACTED] manager states that [REDACTED] is working as the “lead” in the Outpatient Operations department. According to the manager, [REDACTED] has been under a great amount of hardship and stress, juggling her home life and work, since her husband’s departure. The manager states that the company has a “strict policy on attendance and punctuality,” and that due to this policy, [REDACTED] is currently “on a corrective action [which] means that if one of her children becomes ill and she is not able to report to work, she will be suspended from work for two days without pay. Once she has been suspended her next occurrence level will result in termination.” The manager states that these occurrences are completely out of [REDACTED] control since [REDACTED] is a single parent until her husband is allowed to return to the United

States. The manager states that [REDACTED] has worked at the company for nine years and has never before been placed on a corrective action. *Letter from [REDACTED]*, dated May 4, 2007.

Another manager states that [REDACTED] has four children under the age of eight, has been forced to leave her home since her husband's departure, and now lives in a three-bedroom home with her mother where she shares a bedroom with her children. This manager contends that staff at the hospital have rallied around [REDACTED] to support her, but that in spite of their best efforts, [REDACTED] is up against a challenge. The manager explains that "[t]he hospital has strict standards of conduct. [REDACTED] is only allowed 5 sick events per year – that leaves her with one event for each of her children, and one for herself." The manager states that [REDACTED] never complains about her situation and continues to "hold her head high with hope." *Letter from [REDACTED]* dated April 23, 2007.

A letter from [REDACTED] son's teacher states that [REDACTED] son, [REDACTED], has had a "decline in his behavior and personality since his father's departure." The teacher contends that when the applicant lived in the United States, he was very active in the children's daily lives, dropping them off and picking them up from school, participating in after-school activities, and helping them with homework. According to the teacher, since the applicant's departure, [REDACTED] seems lost. He's unorganized at school, frequently misses homework, has a difficult time paying attention, and is hungry for attention." She describes the effect of the applicant's departure on [REDACTED] to be "quite evident in [the] classroom." *Letter from [REDACTED]*, dated May 4, 2007.

A letter from [REDACTED] physician states that she has been treating [REDACTED] for depression and strongly believes her depression is triggered by the applicant's departure from the United States. The physician states [REDACTED] has been left alone in the United States with their four children and is working full-time. *Letter from [REDACTED]* dated September 28, 2006. Copies of [REDACTED] medical records indicate that [REDACTED] has difficulty sleeping, has been treated for depression, and had her prescription for fluoxetine increased, but despite the increased dosage, the prescription was not working as "[s]he is more depressed now." The medical records indicate [REDACTED] is morbidly obese and has gained more weight lately. The records state [REDACTED] will be tapered off fluoxetine and prescribed Paxil and a sleep aide.

In this case, the AAO finds that [REDACTED] has suffered, and will continue to suffer, extreme hardship if the applicant's waiver application were denied. The record shows that [REDACTED] is a single parent of four children under the age of eight, one of whom is having problems in school. The record also shows [REDACTED] suffers from depression that prescription medication has not alleviated, has problems sleeping, and has gained weight, a particular concern for [REDACTED] physician given that [REDACTED] is morbidly obese. In addition, the record shows that [REDACTED] works full-time and has worked at the same hospital for over nine years, a hospital that has a very strict attendance policy. Prior to her husband's departure, for nine years, [REDACTED] had never been placed on a corrective action at work. The record indicates that she is currently on a corrective action and that, as a result, she is at risk of losing her job. Moreover, the record shows that [REDACTED] had to move in with her mother after her husband's departure and now shares a

bedroom with her four children. 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 has never traveled outside of the country. [REDACTED] has no family in Mexico and is not fluent in Spanish. [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. Furthermore, 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 factors in the present case are the applicant’s unlawful entry and presence in the United States, and the applicant’s conviction for simple battery in 2001. 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 four children; a letter of support describing the applicant as trustworthy, honest, intelligent, industrious, a devoted husband, and loving father, *Letter from [REDACTED]* dated May 1, 2007; an offer of employment upon the applicant’s return to the United States, *Letter from [REDACTED]*, dated May 7, 2007; and the fact that the applicant has not had any further arrests or convictions for over eight years.

The AAO finds that, although the applicant’s immigration violations and criminal history are 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.