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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: NOV 27 2009  
(CDJ 2004 758 771 RELATES)

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:

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.

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 and the waiver application will be approved.

The record reflects that the applicant, a native and citizen of Mexico, last entered the United States without authorization in 1995 and did not depart the United States until February 2006. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until February 2006. The applicant was thus found to be inadmissible to the United States pursuant to 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.<sup>1</sup> The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child, born in 2000.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated February 16, 2007.

In support of the appeal, the applicant submitted the following, *inter alia*: a letter from the applicant's U.S. citizen spouse, dated March 7, 2007; medical documentation pertaining to the applicant's spouse and child; financial documentation; a letter from the applicant's child's teacher, dated March 5, 2007; letters from the applicant's U.S. employer; and support letters from colleagues and family members. In addition, on September 27, 2007, the AAO received a supplemental letter and evidence in support of the appeal from the applicant's spouse. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) of the Act 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.

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<sup>1</sup> The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

(v) Waiver. – The Attorney General [now the Secretary of 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....

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

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).

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their child cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse contends that she will suffer emotional, physical and financial hardship if the applicant's waiver request is not granted. In a declaration she states that her U.S. citizen child is experiencing emotional and academic hardship based on long-term separation from his father, which in turn is causing the applicant's spouse emotional hardship. She notes that her child is now hitting and yelling and is having trouble sleeping. His school is providing him with extra help but he is so far behind that he is likely going to be held back.<sup>2</sup> In addition, she contends

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<sup>2</sup> The applicant's child's teacher states that the applicant's child "has struggled throughout the year, both academically and behaviorally. [redacted] [the applicant's child] is significantly behind in Reading, Writing, and Mathematics despite extra individualized attention he receives daily at school. Behaviorally, he has trouble following directions, classroom

that she and her son are suffering physical hardship, due to numerous medical conditions that are exacerbated by the applicant's physical absence. As she asserts:

I suffered a severe knee injury. I sprained and tore my ACL in my knee. My injury required me to do physical therapy 3 days a week because I couldn't have the surgery. If I would have had the surgery I would have had to depend on someone to take additional care of my son and me. I still need this surgery...my husband [the applicant] who is my caregiver is away. Every night I suffer with the pain from my knee.... Due to my knee injury I was unable to work for 6 months.... I have put on a significant amount of weight. This has also caused me to have other health problems. I have early diabetes mellitus, asthma and allergies.... As for our son he has also been diagnosed with early diabetes mellitus.... If I can't get [redacted] [the applicant's child's] blood sugar under control with diet and exercise then he will become an insulin dependent diabetic... My husband's presence for support in this matter of health as our caregiver would be in our best interest... [redacted] [the applicant's] absence from us if much longer could result in our medical conditions worsening....

*Letter from* [redacted] dated March 7, 2007.

In support, a letter has been provided by [redacted], who corroborates that the applicant's spouse is suffering from early diabetes mellitus, hyperlipidemia, asthma and allergies and the applicant's son suffers from obesity and severe separation anxiety. As [redacted] notes, "The stress and the extra burden of caring for herself [the applicant's spouse] and her son's problems impact her diabetes. Most of her son's problems stem from the lack of his father's presence. He will need to be held back in school next year. His immaturity is the result of severe separation anxiety caused by the absence of his father..." [redacted] concludes that the presence of the applicant would solidify and improve the family life and give a positive influence to the applicant's spouse's and child's health problems. *Letter from* [redacted] dated March 15, 2007.

Finally, the applicant's spouse contends that she is suffering financial hardship due to her spouse's inadmissibility. Prior to his departure, the applicant's spouse asserts that her husband's medical insurance through his employment with United Parcel Service covered the whole family. Since his departure, the medical and dental bills have become financially burdensome to the applicant's spouse. She has been forced to "borrow money from my family, and most of all depend on financial help from my sister [redacted] If it weren't for her paying my rent every month I wouldn't have the place where we live. I would have been evicted. [redacted] has also supplied me with laundry service,

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routines, etc. It is my opinion that [redacted] would benefit from a strong, male influence in his life. He often talks about his father [the applicant], and how much he misses him. I think it would be great for him to be able to play an active role in [redacted]'s life." *Letter from* [redacted] dated March 5, 2007

food, gas, licensing for my car, clothes and shoes for [REDACTED] [the applicant's child], money for the doctor and the dentist, and so on. I need [REDACTED] [the applicant] back so that he can be the means of support for this family not my sister.... [REDACTED] absence from us could and probably will cause us to lose our home, and not have a car to drive. The car that we own is in need of much repair.... *Supra* at 1, 3. Documentation to corroborate the financial hardship referenced by the applicant's spouse, and her dependence on her sister for financial support, has been provided. In addition, a letter has been received by the AAO, confirming that as of September 30, 2007, the applicant's spouse's sister no longer is going to assist in the rental payments and the lease on the apartment will be up. Due to this situation, the applicant's spouse and child will have to move and the applicant's child will have to change school and lose his friends, thereby causing additional hardship to the applicant's spouse and child. *Letter from* [REDACTED] dated September 5, 2007.

Due to the applicant's inadmissibility, the applicant's spouse has had to assume the role of primary caregiver and breadwinner, without the complete support of the applicant. The record reflects that the applicant's spouse needs her husband on a day to day basis, financially, emotionally and physically, to help with the care of their child and her own care. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. With respect to this criteria, the applicant's spouse asserts that she finds "this option to be impossible considering our son and I don't speak Spanish.... [H]ow would I get a job, and how would our son go to school? I know that Mexico has doctors and medicine, but how would I pay for it, and would it be the kind of care that we need? I know that the living conditions over there are nothing like what we have here.... In Mexico we would have no family to help us out...." *Supra* 4.

The record establishes that the applicant's spouse was born in the United States, and does not speak Spanish. The record further establishes that the applicant's spouse has an extensive support network of family and friends who live close to the applicant's spouse, and who confirm the applicant's spouse's strong ties to the United States. The applicant's spouse is not familiar with the country and its language, customs and culture. In addition, the applicant's spouse needs to continue to assist her child with respect to his medical, mental and academic issues by working with professionals familiar with his needs, and who speak the English language. As such, the AAO concludes that based on a totality of the circumstances, the applicant's spouse would experience extreme hardship were she to relocate to Mexico to reside with the applicant due to his inadmissibility.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Further, the AAO notes that the applicant's U.S. citizen spouse would suffer hardship as a result of continued separation from the applicant. However, the grant or denial of the waiver does not turn only on the establishment of extreme hardship. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in

terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the applicant's U.S. citizen spouse and child, the hardships that the applicant's family would face if the applicant were not present in the United States, community ties, long-term gainful employment, the apparent lack of a criminal record, support letters from friends, family and colleagues, and the passage of more than 14 years since the applicant's unlawful entry to the United States. The unfavorable factors in this matter are the applicant's unlawful entry to the United States and unlawful presence and employment while in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the hardships imposed on the applicant's spouse and child as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted

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. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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