

Administrative Appeals Office
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U.S. Immigration and Citizenship Services
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Services

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FILE:

Office: MEXICO CITY (CIUDAD JUAREZ) Date: OCT 02 2009

CDJ 2004 799 260

IN RE: Applicant:



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:



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.

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's spouse, [REDACTED], is a naturalized 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. The 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 District Director*, dated December 13, 2006. The applicant filed a timely appeal.

On appeal, counsel states that all of [REDACTED] family members, except for her husband, live in the United States. Counsel states that [REDACTED] has been financially devastated since her husband left to Mexico and is unable to maintain her monthly mortgage. Counsel states that [REDACTED] is employed as a grade school teacher with the Chicago Board of Education, where she has worked for 11 years and as a teacher for 7 of those years. He states that [REDACTED] works overtime at the school, and works as a part-time cashier with a restaurant. With her jobs, counsel states that [REDACTED] earns \$45,000 a year. According to counsel, the applicant had earned \$75,000 annually as a union carpenter; he now earns \$100 each week as an iron caster in Mexico and [REDACTED] periodically sends money to him for basic necessities. Counsel states that [REDACTED] provides some financial support to his parents. Counsel asserts that letters by [REDACTED] in-laws demonstrate that [REDACTED] would be unable to obtain employment as a teacher in Mexico. He states that even if [REDACTED] obtained employment as a teacher in Mexico, her salary would not be sufficient to support herself and her children and Ms. [REDACTED] would not be accustomed to living there. Counsel conveys that [REDACTED] is enrolled in a master's degree program and has applied for student loans and would have to drop her educational aspirations if she relocated to Mexico, diminishing her career and financial opportunities. According to counsel, [REDACTED] supports her three children, who were at the time, one, 13, and 15 years old. Counsel states that [REDACTED] health and emotional well-being are deteriorating due to separation from her husband, and he states that she attends counseling. Counsel states that [REDACTED] has had difficulties with her children because she is unable to spend time with them and because the applicant is no longer involved in their lives and extra-curricular activities. Counsel states that the applicant's sons tested positive for tuberculosis and are receiving daily medication and taking chest x-rays every three months as a preventative measure. Counsel conveys that [REDACTED] has severe depression and is in need of a surgery for an ulcer, but cannot afford an operation, although his wife's insurance would cover an operation in the United States.

The AAO will first address the finding of inadmissibility

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.

....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in August 1994 and remained until December 2005. The applicant accrued eight years of unlawful presence from April 1, 1997, until December 2005, and triggered the ten-year-bar when he left the country, 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.

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. Thus, hardship to the applicant and his child and step-children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (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). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant’s qualifying relative and 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 factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines “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).

The evidence in the record consists of: [REDACTED] letter, birth certificates, a marriage certificate, letters from family members and friends, medical records of [REDACTED] and his step-sons, financial records, school records of [REDACTED], money transfers, letters from psychiatrists, and other documentation.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s spouse must be established in the event that she remains in the United States without the applicant, 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.

With regard to remaining in the United States without her husband, in her affidavit dated January 4, 2007, [REDACTED] conveys that she works and pays for childcare and all of the household expenses including the mortgage, and is not able to maintain everything. She states that her husband had helped with childcare. She states that her health is deteriorating, that she does not eat or sleep well, and cries often. [REDACTED] parents convey in their undated letter that they are concerned about their daughter. They state that [REDACTED] takes over-the-counter sleeping pills to relax and is deeply depressed, but refuses to seek psychological help on account of her job. They state that their daughter has become socially isolated and impatient with her children since separation from her husband. They indicate that their daughter can no longer afford to have her children in after-school activities and is afraid to drive on the expressway since her brother died in a car accident. **The applicant**, her parents state, had driven the children to activities. Collectively, the letters from [REDACTED] friends and colleagues convey that [REDACTED] is depressed and stressed and is having problems raising her children. Letter from colleagues convey that [REDACTED] is receiving complaints from parents that she is not returning graded homework or tests on time, and has missed college activities due to babysitting

problems. [REDACTED] aunt conveys in an undated letter that [REDACTED] is seeing a therapist to help her deal with her life. The letter dated January 3, 2007, by [REDACTED] professor, states that [REDACTED] has “spoken of giving up her studies, due to her home difficulties.” [REDACTED] [REDACTED] who works at the same school as [REDACTED] and is enrolled in a master’s program, states in her January 5, 2007 letter that [REDACTED] “relied on [the applicant] to take care of the children at home, while she stayed after school to grade and compete lesson plans.” She states that [REDACTED] has considered dropping out the master’s program due to hardships and that some of [REDACTED] dilemmas are her inability to keep up with the coursework or have a babysitter available on nights when class meets at the campus. The letter by [REDACTED] conveys that [REDACTED] asked for a weekend job in his restaurant until things got better, and he states that he sees her struggle and breakdown physically because she is tired of her busy schedule. The record conveys that [REDACTED] is enrolled in a master’s degree program and has student loans of \$9,250. Her credit card debit is approximately \$9,000. [REDACTED] gross income is \$1,964 every two weeks with Chicago Public Schools.

[REDACTED], a licensed clinical professional counsel, states that [REDACTED] has extreme anxiety. She states that her children have been depressed and confused since the applicant’s departure to Mexico and [REDACTED] has her daughter with a babysitter most of the time, which costs a lot of money. She indicates that [REDACTED] was a companion to his step-sons and had a close relationship with his daughter. She states that [REDACTED] daughter, who is 22-months-old, has reacted to the separation of her father with clinging behaviors, sudden explosions of anger, and with regression to previous, younger behaviors.

Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“the most important single hardship factor may be the separation of the alien from family living in the United States”).

However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent’s bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

In view of [REDACTED] hardships, as described in the letters by her family members, friends, colleagues, and professor, and in light of [REDACTED] financial obligations, the AAO finds that the hardship that [REDACTED] has experienced, and will continue to experience as a result of separation from her husband, is unusual or beyond that which would normally be expected from the applicant’s bar to admission.

With regard to joining her husband to live in Mexico, [REDACTED] states that [REDACTED] thought of moving to Mexico, but sees that they will not be able to find jobs to maintain their family. The letter

dated January 5, 2007, by [REDACTED]'s sister-in-law states that she has been a certified teacher since 2003 and that she has not found a job in any public school and that it is very difficult to find a job with the Secretary of Education in her country. Counsel conveys that [REDACTED] would have to drop her educational aspirations if she relocated to Mexico. [REDACTED] states that [REDACTED] never lived in Mexico and adjustment would be a nightmare. She states that [REDACTED] children are used to having their grandparents around and have their friends here, and would miss the opportunity to have a good education, and better health care. Counsel indicates that [REDACTED] earns \$100 each week in Mexico and that he helps support his parents. The letter dated January 5, 2007 by [REDACTED], the applicant's oldest sister, conveys that her parents have a low income, have medical problems, and depend upon the applicant's income.

As previously stated, hardship to the applicant's child and step-children will be considered only to the extent that it results in hardship to [REDACTED]

Based on the factors presented here, which are that [REDACTED] would be unable to complete her graduate studies in Mexico; that she may not be able to obtain employment in her profession; that her husband's income would not be sufficient to maintain their family; that she and her children have never lived in Mexico and their adjustment would be difficult; and that all of [REDACTED]'s family members, with whom she has a close relationship, live in the United States, the AAO finds that the applicant has established that the cumulative emotional and financial effect that living in Mexico would have on his wife establishes that she would experience extreme hardship if she joined him to live in Mexico.

The grant or denial of the above waiver does not 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. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The favorable factors in this matter are the extreme hardship to the applicant's spouse and children, and the letters commending his character. The unfavorable factors in this matter are the applicant's unlawful presence and any unauthorized employment. The AAO finds that the hardship imposed on the applicant's family 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), 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.

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