

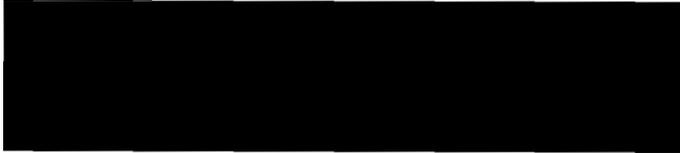
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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FILE: Office: MEXICO CITY (CIUDAD JUAREZ) Date **OCT 30 2009**
(CDJ 2003 800 176 relates)

IN RE: 

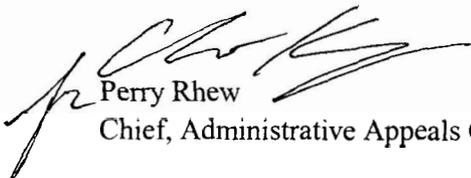
APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was 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 for more than one year and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and children.

The district director found that the applicant failed to establish extreme hardship to her U.S. citizen husband and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated November 14, 2006.

On appeal, the applicant's husband explains that he and the applicant have a son with special needs, and that the applicant is required in the United States to help care for him. *Statement from the Applicant's Husband*, dated November 29, 2006. The applicant's husband asserted that he is experiencing hardship due to the applicant's absence. *Id.* at 1; *Prior Statement from the Applicant's Husband*, dated February 8, 2006.

The record contains statements from the applicant's husband; a copy of the applicant's son's birth certificate and U.S. passport; documentation from the applicant's son's school; a letter from the applicant's son's pediatrician; a copy of the applicant's marriage certificate; a copy of the applicant's husband's birth certificate, and; information regarding the applicant's unlawful presence in the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

(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.

The record reflects that the applicant entered the United States without inspection in or about April 1990. She remained until she voluntarily departed in April 2005. Accordingly, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until she departed in April 2005, totaling approximately eight years. She now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure. The applicant does not contest her inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act 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. Hardship the applicant or her children experience upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. 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).

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

On appeal, the applicant's husband explains that he and the applicant have a son with special needs, and that the applicant is required in the United States to help care for him. *Statement from the Applicant's Husband*, dated November 29, 2006. He states that his family is going through a difficult time due to the applicant's absence. *Id.* at 1. The applicant's husband provided that the applicant was residing abroad with their older son, and their older son missed a year of school as a result despite the fact that he had been approved for an immigrant visa. *Prior Statement from the Applicant's Husband* at 1. The applicant's husband expressed that he loves and misses the applicant. *Id.* He explained that he is caring for their younger son in the United States alone. *Id.* The applicant's husband indicated that he must get up at 6:00 a.m. to place his son on a bus for school and he must pay someone to pick his son up and care for him until the applicant's husband returns

home from work at 5:30 p.m. *Id.* The applicant's husband reported that he is beginning a new job, and that he will work two jobs to meet his family's economic needs. *Id.*

The applicant provided a letter from her younger son's school nurse, Mr. [REDACTED], explained that the applicant's younger son is 13 years old and attends an alternative school due to multiple disabilities. *Letter from [REDACTED]*, dated November 22, 2006. He noted that the applicant's son exhibits evidence of Autism and Post-Traumatic Stress Disorder, and that he is globally delayed. *Id.* at 1. [REDACTED] stated that the applicant's son lacks basic life skills and will never be able to live independently. *Id.* [REDACTED] indicated that the applicant's younger son should have adult supervision at all times, but that he is often left in the care of his 16-year-old brother while the applicant's husband works. *Id.* [REDACTED] asserted that the applicant's younger son is at risk of "falling through the cracks" if the applicant is not permitted to return to the United States to care for him. *Id.*

The applicant submitted a letter from her younger son's pediatrician who noted that the applicant has brought her son to their clinic since 1994. *Letter from Pediatrician*, dated November 17, 2006. The pediatrician explained that the applicant's son was evaluated in 2002 and 2003, and he was diagnosed with Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder. *Id.* at 1. She noted that the applicant's son has a history of impulsivity, aggressive behavior, and difficulty communicating. *Id.* The pediatrician explained that "it is important that a child with this many disabilities have consistent care within the family unit. The absence of [the applicant] creates additional disruption and difficulties handling the child. Since [the applicant] has been held in Mexico, [the applicant's younger son] has exhibited symptoms of stress." *Id.*

The applicant provided a letter from a school counselor and social worker from her younger son's school that notes that the applicant's son would do better in school if he is reunited with the applicant. *Letter from Counselor/Social Worker from Atlantic County Special Services School District*, dated January 23, 2006.

Upon review, the applicant has established that her husband will suffer extreme hardship if she is prohibited from entering the United States. The record contains references to hardships experienced by the applicant's children. Direct hardship to an applicant's children is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. Thus, hardship to the applicant's sons will be examined to determine the impact it has on the applicant's husband.

The record clearly reflects that the applicant's younger son has multiple disabilities that require special schooling and that impact his development and independence, including Autism, Post-Traumatic Stress Disorder, Oppositional Defiant Disorder, and Attention Deficit Hyperactivity Disorder, as well as a history of impulsivity, aggressive behavior, and difficulty communicating. It is evident that the applicant's husband is faced with unusual parenting responsibilities in caring for two sons alone, including one with substantial disabilities. A school nurse noted that the applicant's younger son should have adult supervision at all times, yet he is often left with the applicant's 16-

year-old son. The applicant's husband noted that he must work two jobs to meet their financial needs, thus he is unable to provide full-time adult supervision to his disabled son without the applicant's assistance. The record supports that the lack of a unified family and consistent adult supervision will further impact the applicant's younger son's development. It is evident that detriment to the applicant's disabled son due to a lack of parental care and supervision will have a significant emotional impact on her husband should he continue to raise their children alone in the United States.

The applicant's son with disabilities has received pediatric care in the United States since 1994, and he has attended Atlantic County Special Services School since 2002. The record supports that he requires services that are specific to his multiple disabilities, and that to remove him from his present school and pediatric care to relocate to Mexico would be detrimental to his stability and development. The record shows by a preponderance of the evidence that the applicant's husband would experience emotional hardship should he attempt to relocate to Mexico with his sons to join the applicant.

U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). However, the AAO finds that the applicant's younger son's disabilities present unusual circumstances for her husband that go beyond the challenges commonly experienced when families are separated or relocate due to inadmissibility.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that her husband will experience extreme hardship should the present waiver application be denied, whether he relocates to Mexico or remains in the United States with his sons. As discussed above, this finding is largely based on the impact the applicant's younger son's disabilities would have on her husband, whether the applicant's husband continues to care for him alone or they relocate to Mexico.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for a lengthy duration without a legal immigration status.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen husband would experience extreme hardship if she is prohibited from residing in the United States;

the applicant's U.S. citizen son with disabilities will experience significant hardship if he resides in the United States without the applicant or relocates to Mexico, and; the applicant has cared for her U.S. citizen children and cultivated a strong family unit.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an 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. *See also Matter of Mendez-Morales*, 21 I&N Dec. at 301 (in addition to establishing extreme hardship, an applicant must show that he or she merits a favorable exercise of discretion). In this case, the applicant has met her burden and shown that she merits approval of her application.

ORDER: The appeal is sustained.