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U.S. Citizenship
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FILE:

CDJ 2003 864 315

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Officer, 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 is the spouse of [REDACTED], who is a U.S. citizen. 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 and live with her husband. The district officer concluded that the applicant had failed to establish that her 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 August 31, 2006. The applicant submitted a timely appeal.

On appeal, counsel states that [REDACTED] has experienced extreme psychological and emotional harm as a result of separation from his spouse.

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.

Unlawful presence accrues when an alien remains in the United States after period of stay

authorized by the Attorney General has expired or is present in 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). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.¹

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. See Memo, note 1.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in June 1998 and remained in the country until October 22, 2005. The applicant therefore accrued seven years of unlawful presence, and triggered the ten-year-bar when she left the United States, rendering her 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. Hardship to an applicant and to his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act. Thus, hardship to the applicant and her U.S. citizen 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 U.S 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-Moralez*, 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-*

¹ Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's husband must be established in the event that he remains in the United States without the applicant, and alternatively, if he 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.

psychological evaluation of dated September 25, 2006, states that reported the following. He had a traumatic family background, having both his father and mother addicted to methamphetamines. He had behavioral and attendance problems at school and began consuming alcohol, using LSD frequently, and smoking marijuana daily when he was 14 years old. He had been arrested on four occasions, with three related to alcoholism. He married the applicant in March 2001 and quit using drugs after he met her, and quit consuming alcohol after two years of marriage. His wife provides emotional stability in his life, and he relapsed into abusing alcohol after their forced separation. He has depression, frustration, sleep disturbances, and concern about his daughter living in Mexico. diagnosed with Axis I: 309.81 Posttraumatic stress disorder, chronic; 303.90 Alcohol dependence, with recent past remission; 304.80 Polysubstance dependence, in full remission; Axis II: V71.09 No diagnosis; Axis III: Physical injuries resulting from alcohol abuse and inherent anger; Axis IV: Emotional devastation caused by separation from his wife and daughter; and Axis V: GAF = 45 (present).

A letter from younger brother, dated October 10, 2005 confirms the positive effect the applicant had on her spouse.

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. *See, e.g., Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (separation of the applicant

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).

In view of the submitted evaluation that conveys that [REDACTED] has had alcohol and polysubstance abuse since he was 14 years old and has overcome such abuses as a result of his relationship with his wife, and in consideration of [REDACTED] relapse of abusing alcohol as a result of losing the emotional stability that his wife brought to his life, the AAO finds that if [REDACTED] were to remain in the United States without his wife, the emotional hardship that [REDACTED] will experience is not typical to individuals separated as a result of removal and does rise to the level of extreme hardship as required by the Act. The record before the AAO is sufficient to show that the emotional hardship that will be endured by [REDACTED] is unusual or beyond that which is normally to be expected upon removal. *See Hassan and Patel, supra*.

With regard to joining his wife to live in Mexico, in his psychological evaluation [REDACTED] indicated frustration about his inability to move to Mexico. He conveyed that he does not speak Spanish and would not be able to compete for a job with someone who is Mexican and is from Mexico. He states that he can barely make it in the United States, and without Spanish would not make it in Mexico. [REDACTED] expressed concern about the possibility of his daughter being kidnapped in Mexico. The psychological evaluation conveys that [REDACTED] is the second of four siblings and that he has worked at a fast food franchise for two years, at a grocery store stocking and unloading trucks for two years, at another grocery store as a manager for two years, loading plants at a nursery for three months in March 2005, and for the past year worked in production.

In view of the fact that [REDACTED] is unable to speak and write in Spanish and is unfamiliar with the culture in Mexico, and as a consequence of those factors will be significantly limited in his ability to obtain employment; and in light of the fact that [REDACTED] has no ties to Mexico other than his wife and daughter, the AAO finds that [REDACTED] would experience extreme hardship if he joined his wife to live in Mexico.

The factors presented do in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The grant or denial of the above waiver does 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.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and her U.S. citizen child and the applicant's good character as described by his spouse in his psychological evaluation and confirmed in a letter from her spouse's brother. The unfavorable factors in this matter are the applicant's entry into the United States without inspection, her unlawful presence, and periods of unauthorized employment. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse as a result of her 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) of the Act 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.