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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
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date:

JAN 04 2010

(CDJ 2004 786 165)

IN RE:

[Redacted]

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:

[Redacted]

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. 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 under section 212(a)(9)(B)(i)(II) of 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 and seeking readmission within ten years of his last departure from the United States. The applicant is married to a naturalized United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their U.S. citizen child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated September 14, 2006.

On appeal, counsel contends that the applicant's qualifying relative would suffer extreme hardship and United States Citizenship and Immigration Services (USCIS) erred in denying the waiver application. *Form I-290B, Notice of Appeals to the Administrative Appeals Office (AAO) and attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, medical letters and records for the applicant's child; statements from the applicant's spouse; a psychological evaluation for the applicant's spouse; statements from friends; a statement of expenses from the applicant's spouse; earnings statements for the applicant's spouse; a statement from the assistant pastor at Saint Anthony Church; published country conditions reports; an employment letter for the applicant's spouse; medical records for the applicant's spouse; a homeowner's insurance bill; telephone bills; utility bills; and a utility payments history report. The record also contains several documents in the Spanish language. However, as these documents are not accompanied by English-language translations, they will not be considered in this proceeding. *See* 8 C.F.R. § 103.2(b)(3). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) 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.

In the present case, the record indicates that the applicant entered the United States without inspection in February 1995 and departed in October 2005, voluntarily returning to Mexico. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated October 27, 2005. The applicant, therefore, accrued unlawful presence from March 14, 1998, the date of his 18th birthday, until he departed the United States in October 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of his October 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or his child would experience as a result of his inadmissibility is not directly relevant to the determination as to whether he is eligible for a waiver. The only directly relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. Hardship to a non-qualifying relative will be considered to the extent that it affects the applicant's spouse. If 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 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in Mexico. *Naturalization certificate*. All of the immediate family of the applicant's spouse lives in the United States. *Statement from the applicant's spouse*, dated October 17, 2006. The applicant's child has health issues. He suffers from a speech developmental delay and at the age of 33 months, functions like a 9-12 month old child with his speech and language skills. *Statement from* [REDACTED] [REDACTED] dated July 3, 2008. He receives weekly therapy at the Penfield Children's Center in Milwaukee, Wisconsin. *Id.* The applicant's son has also suffered from seizures since he was nine months old and is currently taking depakote and rivatril to prevent them. *Statement from* [REDACTED] [REDACTED] dated July 8, 2008; *Medical records for the applicant's child*. He also has had breathing difficulties and ear infections. *Statement from* [REDACTED] [REDACTED], dated July 31, 2006. While the applicant's child is not a qualifying family member for the purposes of this case, the AAO acknowledges the effect upon his mother in having to care for a child with multiple health issues. The AAO notes that the applicant's child is currently receiving medical treatment in the United States and that moving to Mexico would disrupt these established treatment programs. Having considered the record before it, the AAO finds that when added to the normal disruptions and hardships associated with relocation, the problems of caring for and obtaining treatment for a chronically-ill, developmentally-delayed child would result in extreme hardship for the applicant's spouse.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in Mexico. *Naturalization certificate*. The applicant's child is frequently ill. *Statement from* [REDACTED] [REDACTED] undated. His licensed healthcare provider states it is very important that the applicant assist his spouse in the physical and emotional care of their child. *Id.* The Penfield Children's Center in Milwaukee also indicates that it is critical for the applicant and his spouse to be involved in the treatment of their child's speech problems. *Statement from* [REDACTED] [REDACTED]. Although the applicant's spouse has been able to provide for her son's medical, emotional and physical needs despite the stress and the absence of the applicant, she appears to be dealing with depression related to the uncertainty of her family situation. *Statement from* [REDACTED] [REDACTED] dated November 14, 2006. The friends of the applicant's spouse also observe that she has had a very difficult time dealing with the applicant's absence, as she is under a lot of stress and pressure. *Statements from friends*, dated October 2006. The applicant's spouse notes that she is using what little she and her family have to continue to pay for their monthly expenses. *Statement from the applicant's spouse*, dated October 17, 2006. She lists her total monthly expenses as being \$2,334.90 while her net monthly income is \$1,917.04. *Statement of expenses from the applicant's spouse*, dated October 17, 2006. While the AAO notes that the record does not demonstrate through documentary evidence that the applicant would be unable to contribute to his family's financial well-

being from a location other than the United States, the AAO acknowledges the documented expenses of the applicant's spouse and the additional financial costs in caring for a child with health issues. The AAO finds that when combined with the problems of being a single parent with a child who has both medical and developmental problems, the common financial and emotional hardships created by separation would result in extreme hardship if the applicant's spouse were to reside in the United States without him.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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).

The adverse factors in the present case are the applicant's prior unlawful presence for which he now seeks a waiver, as well as his unauthorized employment while in the United States. The favorable and mitigating factors are the extreme hardship to his spouse if he were refused admission and his supportive relationship with his spouse, their child, and their friends, as documented by letters of support submitted into the record.

The AAO finds that, although the immigration violations committed by the applicant were 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.