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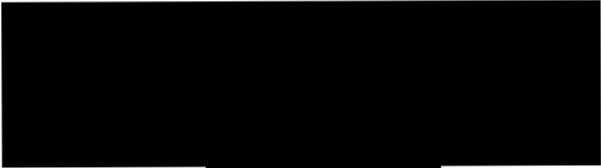
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
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FILE:



Office: MEXICO CITY (CIUDAD JUAREZ)

Date: JAN 04 2010

(CDJ 2004 774 182 relates)

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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 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 married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with his wife and children in the United States.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. *Decision of the District Director*, dated February 13, 2007.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, [REDACTED] indicating they were married on November 10, 2003; a letter from [REDACTED] copies of medical records and a school assessment; a letter from a physician; a letter from [REDACTED] employer; copies of tax and financial documents; and a copy of an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this 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 this case, the district director found, and the applicant does not contest, that he entered the United States without inspection in 1993 and remained until March 2006. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until his departure from the United States in March 2006. Therefore, the applicant accrued unlawful presence of more than eight years. He now seeks admission within ten years of his 2006 departure. Accordingly, he is 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 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. 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).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

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). In addition, the Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations

omitted); *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, the applicant’s wife, [REDACTED], states that she has a son, [REDACTED] or ‘[REDACTED]’, from a previous marriage and that the applicant has raised her son as a father. [REDACTED] states the applicant has two sons from his first marriage, and that the couple have a son together. [REDACTED] contends [REDACTED] has very serious health problems including attention deficit disorder, bipolar disease, and other mental health disorders. She states [REDACTED] needs to be with his family, particularly his father, and that [REDACTED] relates more to her husband than to herself. In addition, [REDACTED] claims her monthly income alone of \$2,098 is not enough to pay living expenses for her to raise their four children. *Letter from [REDACTED] dated March 6, 2006.*

The record contains a copy of a Multidisciplinary Team Evaluation Report for [REDACTED]. The report indicates that during the evaluation, [REDACTED] stated that he has no friends at school, knows he is different, and does not fit in. He stated he is not normal and that he does “lots of weird things, like make noises.” [REDACTED] teacher stated that [REDACTED] is unable to keep up on assignments and that he is “constantly disrupting” in the classroom. The report states [REDACTED] score on the “Atypicality Scale” suggests “a possible variety of problems such as confused thoughts and perhaps a decompensation process.” [REDACTED] score for “Hyperactivity, Aggression, and Conduct Problems” was in the 96<sup>th</sup> percentile, the clinically significant range. In addition, he scored “high” for Asperger’s Disorder, and the report states “he does appear to have a significant level of hyperactivity and/or significant attention difficulties.” The report states that [REDACTED] “likes to find out what will annoy someone and then he will do it until they can’t take it anymore . . . [and] he appears to take pleasure in doing this.” The report indicates [REDACTED] is “preoccupied by death,” has continuous thoughts of something bad happening to his family, and reported that these thoughts of death interrupt him when he is playing or reading. [REDACTED] reported that [REDACTED] has a bad temper and punches holes in the walls of his room. She also reported that both she and the applicant have observed [REDACTED] talking to himself, pointing at things that are not visible, and hitting himself when he thinks no one is watching him.” The report concludes that [REDACTED] has an “Emotional Disturbance” and other health impairments due to attention deficit hyperactivity disorder, and finds him eligible for special education services. *Multidisciplinary Team Evaluation Report*, dated April 25, 2008.

A letter from [REDACTED] physician states that [REDACTED] “was in [her] office due to suicidal ideations, and auditory hallucinations. . . . [The] child seemed distracted, with no eye contact and stating incoherent phrases. Mom stated that he also was violent.” The physician also stated she was treating [REDACTED] for attention deficit hyperactivity disorder. *Letter from [REDACTED], dated February 23, 2006.*

A letter from [REDACTED] teacher states that he is easily distracted and gets up out of his seat at inappropriate times, interfering with other students’ work. The teacher contends [REDACTED] is very disorganized and that his small motor skills are “quite immature.” The teacher expressed concern about [REDACTED] interaction

with other students who often “complain[] that [REDACTED] is bothering them, hurting them and/or interfering with their work.” When students ask him to leave them alone, he “will often push them, hit them, or destroy something of theirs.” *Letter from [REDACTED]*, dated July 30, 2002.

Upon a complete review of the record evidence, the AAO finds that the applicant has established his wife has suffered, and will continue to suffer, extreme hardship if his waiver application is denied.

The record shows that [REDACTED]’s son, [REDACTED], has serious mental health problems. The record indicates he has had suicidal ideations, auditory hallucinations, makes incoherent statements, becomes violent, talks to himself, points to things that are not there, hits himself, and is preoccupied with death. The record also indicates that [REDACTED] needs to be close to his father, considers the applicant his father, and relates more to the applicant than to his mother. In addition, the record shows that prior to the applicant’s departure, the applicant earned the majority of the family’s income. According to the tax documents in the record, in 2004, the applicant earned \$29,766 working two different jobs, and [REDACTED] earned \$11,994 working two jobs. In 2005, the applicant earned \$43,719 working two jobs, and [REDACTED] earned \$14,278. [REDACTED] indicates that her monthly expenses significantly exceed her income. *Letter from [REDACTED] supra*. The record indicates that the applicant was the primary source of income for the family, earning more than double his wife’s income. Considering [REDACTED] is raising four minor children, one of whom has significant mental health problems, the AAO finds that [REDACTED] has suffered extreme hardship since her husband’s departure from the United States. Under these unique circumstances, and considering these factors cumulatively, the AAO finds that the effect of separation from the applicant on [REDACTED] goes above and beyond the experience that is typical to individuals separated as a result of deportation and rises to the level of extreme hardship.

Moreover, moving to Mexico to avoid separation would be an extreme hardship for [REDACTED]. The record shows that [REDACTED] was born in the United States and would need to adjust to a life in Mexico after having lived in the United States her entire life, a difficult situation made even more complicated given she has four minor U.S. citizen children. In addition, even assuming [REDACTED] mental health condition would permit him to move to a foreign country, moving to Mexico would disrupt the continuity of health care and special education services he has been receiving. In sum, the hardship [REDACTED] would experience if her husband were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

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

In discretionary matters, the alien bears the burden of proving that positive factors 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 include the applicant’s unlawful entry and presence in the United States, and the applicant’s conviction in May 2002 of driving a vehicle with 0.08 percent or more, by

weight, of alcohol in his blood. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's wife if he were refused admission; significant family ties in the United States including his U.S. citizen wife and four U.S. citizen children; the fact that the applicant has paid taxes while working in the United States; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violations are 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. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.