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



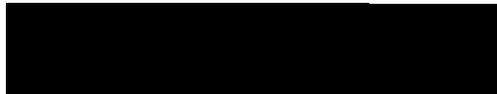
U.S. Citizenship
and Immigration
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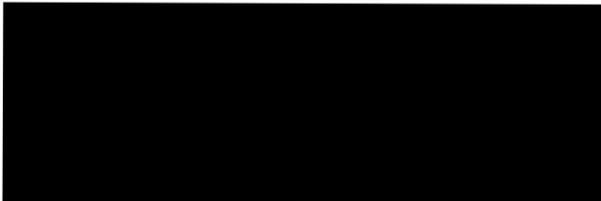
FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: JAN 04 2010
(CDJ 2004 808 192 relates)

IN RE: Applicant:



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

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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 and the waiver application will be approved.

The record reflects that the applicant, a native and citizen of Mexico, initially entered the United States without authorization in 1995 and did not depart the United States until November 2005. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until November 2005. The applicant was thus 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 in the United States for more than one year.¹ The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children, born in 2003 and 2004.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated October 20, 2006.

In support of the appeal, counsel for the applicant submits the following, *inter alia*: a brief, dated December 18, 2006; an affidavit from the applicant's spouse, dated November 15, 2006; academic documentation pertaining to the applicant's children; a psychosocial assessment for the applicant's child, [REDACTED], dated November 9, 2006; a letter from an early intervention specialist, on behalf of the applicant's children, dated November 8, 2006; a letter from [REDACTED] physician, dated November 13, 2006; a letter from [REDACTED] teacher, dated November 8, 2006; a letter from the applicant's child's, [REDACTED] teacher, dated November 7, 2006; an employment confirmation letter for the applicant's spouse, dated November 9, 2006; financial documentation; and evidence of the applicant's spouse's past enrollment in college. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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

¹ The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

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

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).

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their children cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse contends that she will suffer emotional and financial hardship if the applicant's waiver request is not granted. In a declaration she states that she is suffering emotionally due to the separation from her husband. She notes that she has had to confront being both a mother and father to her children. She contends that she has had to withdraw from school, where she was studying to get her associate degree in education, as she is unable to work, care for her children, and pursue her studies, all at the same time, without the applicant's daily support.

She further notes that her children are experiencing hardship based on long-term separation from their father, which in turn is causing the applicant's spouse emotional hardship. She contends that her son, [REDACTED] is speech delayed and receives developmental services and speech therapy but since the applicant's relocation abroad, he has regressed in his development. In addition, [REDACTED] is showing signs of anxiety disorders, trust issues and behavioral problems. Moreover, the applicant's spouse asserts that her daughter, [REDACTED] also suffers from speech developmental problems that require ongoing therapy. She has also regressed since the applicant's relocation abroad and is now wetting her pants. *Declaration of [REDACTED]*, dated November 15, 2006.

As the applicant's spouse states, before the applicant's relocation abroad, he was the one that "always took [REDACTED] [the applicant's child] to [REDACTED] [an organization for disabled children]. He was also the one who dealt with the teachers and therapists.... I was able to attend college because my husband [the applicant] helped me taking care of our children. I attended school at night.... My husband would go home around 4 pm from work. He would go to pick up my son from [REDACTED] and would take him home with him. While I was at school, he fed our children and did chores at home. I had to withdraw from school during my second semester because he is not here to help me anymore.... My son [sic] therapist suggested that I should attend therapy myself.... Unfortunately, I cannot afford to attend therapy. I do not either have the time to do it because I do not have my husband here to help...." *Id.* At 2, 4.

Finally, the applicant's spouse contends that she is suffering financial hardship due to her spouse's inadmissibility. She notes that she earns about \$527 every two weeks, which is not enough to survive and raise two children alone. After paying bills, she contends that she is left with only \$160 for food and other necessities. Prior to his departure, the applicant helped financially [as a mover, and then as a welder]. *Id.* at 1, 4. Documentation to corroborate the applicant's children's mental, physical and academic hardships has been provided. Such documentation includes letters from a licensed master social worker who has assessed [REDACTED] an early childhood intervention specialist who has worked with both [REDACTED] and [REDACTED] a family practice doctor who treats [REDACTED] [REDACTED] lead teacher, and [REDACTED] teacher. All conclude that the applicant's children's hardships are related to their father's residence abroad and reunification of the family is critical to their improvement. In addition, documentation to corroborate the applicant's spouse's financial hardship has been submitted.

Due to the applicant's inadmissibility, the applicant's spouse has had to assume the role of primary caregiver and breadwinner to two young children, both suffering from documented hardships, without the complete support of the applicant. She has had to cease the pursuit of her studies due to financial hardship and the need to care for her children as a single parent. The record reflects that the applicant's spouse needs her husband on a day to day basis, to help with the care of their children and to provide critical financial support. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. With respect to this criteria, the applicant's spouse asserts that she is unable to relocate to Mexico because "there is no therapy available in Mexico. My son cannot speak Spanish. His therapy is in English and a therapy in Spanish will be like starting all over again.... I have been told by doctors and nurses not to take my son to Mexico because it would be dangerous. They mentioned that an asthma attack could be of serious consequence in Mexico because the lack of medical care.... I cannot go join my husband in Mexico because I have never lived there. My children have never been there. Both have developmental problems and they will not have assistance in Mexico...." *Supra* at 3-4.

The record establishes that the applicant's children are suffering mental, physical and academic hardships. The applicant's spouse needs to continue to assist her children with respect to these hardships by working with professionals familiar with their needs, and who speak the English language. Moreover, as noted by [REDACTED] of San Antonio, in his letter dated November 9, 2006, relocating abroad would further exasperate the family's situation, due to unfamiliarity with the country and culture and long-term separation from their extended family support network. As such, the AAO concludes that based on a totality of the circumstances, the applicant's spouse would experience extreme hardship were she to relocate to Mexico to reside with the applicant due to his inadmissibility.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Further, the AAO notes that the applicant's U.S. citizen spouse would suffer hardship as a result of continued separation from the applicant. However, the grant or denial of the waiver does not turn only on the establishment of extreme hardship. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the

community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the applicant’s U.S. citizen spouse and children, the hardships that the applicant’s family would face if the applicant were not present in the United States, community ties, long-term employment, the apparent lack of a criminal record, and the passage of more than 14 years since the applicant’s unlawful entry to the United States. The unfavorable factors in this matter are the applicant’s unlawful entry to the United States and unlawful presence and employment while in the United States.

While the AAO does not condone the applicant’s actions, the AAO finds that the hardships imposed on the applicant’s spouse and children as a result of the applicant’s inadmissibility outweigh the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary’s discretion is warranted

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. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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