

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

tt2

FILE:

Office: MEXICO CITY (CIUDAD JUAREZ), MEXICO

Date:

JAN 04 2010

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:

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 (Ciudad Juarez), 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 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 and seeking readmission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In his decision, dated December 11, 2006, the district director found that the applicant failed to establish that his qualifying relative would experience extreme hardship as a result of his continued inadmissibility. The application was denied accordingly.

In a brief, dated January 30, 2007, counsel states that the applicant's spouse will suffer emotional and financial loss as a result of the applicant's inadmissibility and that these factors should be taken in the aggregate when analyzing extreme hardship. Counsel submits documentation to support the applicant's claims of extreme hardship.

The record indicates that the applicant entered the United States without inspection in July 2001. The applicant remained in the United States until February 3, 2006. Therefore, the applicant accrued unlawful presence from July 2001, when he entered the United States until February 3, 2006, when he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his February 3, 2006 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

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 and/or parent of the applicant. Hardship the applicant or his child experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's U.S. citizen or lawfully permanent resident spouse and/or parent.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted). Thus, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly 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). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir.

1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. 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 record indicates that the applicant was diagnosed with non-Hodgkin’s Lymphoma in 2004. In an undated statement, the applicant’s spouse states that she is concerned that the applicant’s cancer will return as he has not finished his treatment, and until ten years have passed his cancer could return at any time. She states that if the applicant stays in Mexico, she does not have the money to send him to an oncologist every three to six months. In a letter from a [REDACTED] dated January 18, 2007, [REDACTED] states that he is concerned that the applicant’s lymphoma could reoccur. He states that the applicant did not receive the completion of his maintenance therapy and until he is ten years with no recurrence the applicant’s remission is not considered stable. The doctor recommends that the applicant return to the United States so he can be monitored for recurrent symptoms and have adequate lab and scan testing. In a letter from a [REDACTED] dated May 26, 2004, [REDACTED] states that the applicant did not complete a standard chemotherapy treatment, but has nevertheless been in remission. He recommends the applicant continued to be followed with observation, which would include laboratory tests every three months and a CT scan in three months and again in six months.

In her statement the applicant’s spouse also asserts that she is having financial problems. She states that she has been falling behind in her bills because she was pregnant and not able to work for four months. She states that she was on welfare, but only received \$384 per month. She states that after the birth of her daughter she found out that she needed surgery to have a fibroid removed. She states that if she has the surgery she will have to be unemployed again and will not be able to support herself and her baby. She asks that the applicant be allowed to reside in the United States where he can help her financially and in raising their daughter. The record also includes a letter from the applicant’s spouse’s doctor, dated January 2, 2007. The applicant’s spouse’s doctor states that the applicant’s spouse is scheduled to have major abdominal surgery to remove uterine fibroids on January 26, 2007, that she will be disabled for approximately two months, and she has a four month old infant she will need help caring for during her recuperation.

The AAO finds that the applicant’s spouse’s situation, when considered in the aggregate, constitutes extreme hardship as a result of the applicant’s inadmissibility. The AAO notes that the applicant’s spouse requires follow-up care for a potentially life-threatening condition. Giving predominant weight to the hardship associated with family separation, the AAO finds that being separated from her spouse during a period of unstable remission from cancer, given that the applicant’s spouse is not able to obtain and/or afford the proper treatment, would cause the applicant’s spouse emotional hardship. In addition, the applicant’s spouse requires major surgery and will need to be out of work while attempting to care for their infant child. Furthermore, the applicant’s spouse would suffer

extreme hardship as a result of relocating to the Mexico where she would be faced with finding and paying for her surgery and the care the applicant requires, while also caring and providing for her infant child. Thus, the AAO finds that the combination of hardships in the applicant's case takes his waiver application beyond those hardships ordinarily associated with a family member's inadmissibility and as such the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 section 212(h)(1)(B) 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-Moralez, 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 adverse factors in the present case are the applicant's unlawful presence in the United States and his unlawful entry in 2001. The favorable factors in the present case are the applicant's family ties to the United States, extreme hardship to his U.S. citizen wife if he were to be denied a waiver of inadmissibility, and the lack of any criminal record.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.