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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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FILE:



Office: CIUDAD JUAREZ

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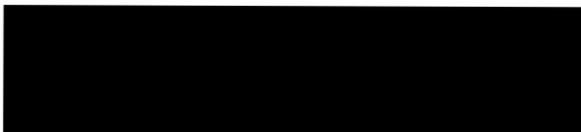
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)
of the Immigration and Nationality Act (INA), 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.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Ciudad Juarez, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico, the husband of a U.S. citizen, stepfather of three U.S. citizen children, and the beneficiary of an approved Form I-130 petition. The field office director found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant seeks a waiver of inadmissibility in order to reside in the United States with his wife and stepchildren. The field office director also found that the applicant had not established that failure to approve the waiver application would cause extreme hardship to his U.S. citizen wife, and denied the application.

On appeal, counsel submitted additional evidence. Although counsel did not appear to contest the field office director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

A G-325A Biographic Information form, which the applicant signed on November 30, 2007, indicates that he lived in Denver, Colorado from October 2002 through October 2007, and had lived in Mexico since October 2007.

The Form I-130 Petition for Alien Relative, which the applicant's wife signed on June 15, 2005, indicates that the applicant entered the United States without inspection, that they married on April 9, 2004 in Denver, Colorado, and that they then both lived in Denver, Colorado.

A Form OF-194 Refusal Worksheet indicates that the applicant stated under oath that he entered the United States without inspection during 1994 and remained in the United States until October 2007

without leaving. The record does not demonstrate that the applicant ever achieved any legal status in the United States.

Although a discrepancy exists as to whether the applicant entered the United States during 1994 or 2002, that discrepancy has no effect on the issue of inadmissibility. Even assuming that the latter date is correct, then the applicant was in the United States unlawfully from October 2002 through October 2007, a period of more than one year, and has since left the United States. The applicant is therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. The remainder of this decision will address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] 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 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 waiver of inadmissibility 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 the applicant or his stepchildren is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, 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).

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 contains letters from friends of the applicant. Most of those letters are essentially character references and do not contain any other indication that the applicant's absence from the United States would cause hardship to his wife. Because those letters are not directly relevant to whether denial of the waiver application would cause hardship to the applicant's wife, they will not be further addressed.

The record contains a letter, dated September 19, 2007, from the applicant's mother-in-law. That letter states that the applicant is considerate of his wife's feelings and makes sure that she sees her doctor. It does not otherwise address any hardship that the applicant's absence would cause to his wife.

A letter dated October 5, 2007 from the applicant's wife states that the applicant is nice, dependable, and caring; that he is a wonderful husband and stepfather and she loves him very much; that she depends on him for transportation and odd jobs, including mowing the lawn and cleaning houses; and that she was homeless when she met him,¹ but that he helped her with her alcohol addiction and she is no longer homeless.

In a letter dated February 1, 2009 the applicant's wife noted that she and the applicant had then been together almost five years, reiterated many of the claims from her previous letter and stated that since the applicant went to Mexico she and her family have had a difficult time. She stated that she has asthma, high blood pressure, and seizures, and that she has been very sick and needs the applicant to be present when she has her asthma attacks and seizures. She stated that the applicant knows how to care for her when she becomes acutely ill. In the final paragraph of that letter the applicant's wife stated,

Since [the applicant] has been gone I been really bad sick. I been having a lot of asthma attacks and some of my seizures. The ambulance has to take me to the hospital and costs about \$2,500 just take me in the ambulance not for the costs the [emergency room] or my medicines. I am afraid to go the hospital by myself because I don't have any family member instead [the applicant] and without him I don't have anything.

[Errors in the original.]

¹ Other evidence in the record confirms that the applicant's wife was previously homeless and living in a shelter.

She stated that one of her sons has attention deficit disorder, that he “twitches and lashes out at school and at home,” and that he does not pay attention in class. She stated that when the applicant is in the United States, he cares for her and her children. She stated that she is unable to go to Mexico because of the bad weather and pollution.

Form W-2 Wage and Tax Statements in the record show that the applicant earned \$19,927.10 during 2006 and \$8,021.09 during 2007. The record contains printouts of web content pertinent to asthma, heartburn and gastroesophageal reflux disease, type 2 diabetes, iron deficiency anemia, and epilepsy.

Medical records provided show that the applicant’s wife has presented, on various dates during various years with various complaints, including a bee sting, ovarian and abdominal pain, nausea, constipation, and dizziness, and has been diagnosed, on various dates, with irregular menstruation, pulmonary diseases including asthma, urinary tract infections, colitis, acute hyperventilation with possible panic attack, acute anxiety attacks with hyperventilation syndrome, anxiety, depression, substance abuse, diabetes, and seizures. The medical records also state that the applicant’s wife has a past history of hallucinations. All of the medical records provided, to the extent that they are legible, have been considered.

Letters dated December 15, 2008 and January 27, 2009 from [REDACTED] of Mexico City, Mexico state that the applicant’s wife then suffered from anxiety, depression, hypertension, asthma, type 2 diabetes, and anemia. A letter dated January 30, 2009, from [REDACTED] of Denver, Colorado, states that the applicant’s wife’s medical problems include somatization disorder (a condition in which a patient has long-term physical symptoms with no physical cause), asthma, gastroesophageal reflux disease, a history of menometorrhagia (excessive uterine bleeding), and a history of alcohol abuse with five years of abstention.

Counsel submitted a letter, received February 21, 2009, in which he reiterated the applicant’s wife’s claims of medical problems, inability to care for herself, and having no family members other than the applicant to care for her.

In an additional submission after the appeal was filed, counsel provided a letter from [REDACTED] a general surgeon in Nashville, Arkansas. [REDACTED] stated that the applicant’s wife choked on some food in her esophagus and that he performed an esophagastroscope endoscopy on her on June 30, 2009, removing a very large foreign body. He further stated that the applicant’s wife has had other incidents of dysphagia, and that the applicant’s wife may have achalasia. The final two paragraphs of that letter read,

It is recommended that this patient be sent to the University of Little Rock to see a gastroenterologist that specializes in this kind of problem of the esophagus because she may need a pneumatic dilation or subsequently surgery to correct this problem.

This letter is written on [the applicant’s wife’s] behalf as she needs this information in order to bring her husband here to the United States because he is across the border in Mexico.

Counsel provided printouts of web content pertinent to achalasia and dysphagia. In his own letter, dated September 22, 2009, counsel stated,

Since the submission of the I-290B appeal, [the applicant's wife] has undergone some medical procedures related to her esophagus. Surgery is recommended. [The applicant's wife] really needs [the applicant] to be allowed to return from Mexico to be of physical, emotional, and financial support. With her recent condition she is unable to travel because she need [sic] prompt medical attention from her physicians, when she has trouble swallowing.

Initially, the AAO notes that the letter from [REDACTED] did not recommend surgery, as counsel appears to imply. Rather, it suggests that the applicant's wife be referred to a specialist for evaluation of whether or not pneumatic dilatation, an endoscopic procedure to enlarge the lumen of the esophagus, is necessary, and, if so, whether, depending on the result, it should be followed by surgery. Further, although [REDACTED] provided his letter specifically for use in this proceeding, he provided no indication that the applicant's presence in the United States is necessary.

Counsel asserted that the applicant's wife needs his income. Although the record contains evidence that the applicant had income from employment in the United States during 2006 and 2007 counsel has offered no evidence to demonstrate that the applicant's wife is dependent on that income. The AAO notes, however, that the loss of any amount of income causes some degree of hardship.

If the applicant and his wife are obliged to live separately, this will cause some degree of emotional hardship to the applicant's wife. Although that hardship would be insufficient, in itself, to constitute extreme hardship, the AAO will consider it in the aggregated hardship that the applicant's wife would suffer if the applicant remains in Mexico and his wife remains in the United States.

The applicant's wife stated that one of her children has attention deficit disorder that manifesting itself at home and at school, and implied that the applicant's presence is necessary to remedy or control this condition. The AAO will consider hardship to the applicant's stepchildren to the extent that it causes hardship to the applicant's wife. Although counsel provided no evidence to support the assertion that the applicant's stepson has attention deficit disorder, the AAO will take the applicant's wife's assertion into consideration. The presence of an additional parent would help to assuage the hardship of caring for a child with that condition.

Counsel argued, and the evidence supports, that the applicant's wife has been treated for various maladies since 1992. Although the record is silent as to the severity of those complaints, they appear to be severe in the aggregate.

The evidence pertinent to the necessity of the applicant's presence to help his wife cope with those conditions consists almost entirely of assertions by his wife. She stated that the applicant ensures that she attends her doctors' appointments, but did not explain why his assistance in that regard is necessary. She stated that, without his assistance, she is obliged to rely on the ambulance to take her

to the hospital, and asserted, without corroborating evidence, that this service costs \$2,500 per incident. She implied that she has incurred that cost numerous times, but did not explain why no less expensive transportation could be arranged.

The applicant's wife claims she has no other relatives able to assist her. The record contains a letter from the applicant's wife's mother, as was noted above. Why she or some other relative is unable to assist the applicant's wife, even if rendering assistance required one or the other to change residences, is unclear. The AAO observes, though, that the applicant's wife has recently been homeless, which suggests that she has limited family support.

On the balance, the AAO finds that, if the applicant remains in Mexico and his wife remains in the United States, the applicant's wife will suffer extreme hardship. The AAO notes, however, that the applicant is also obliged to show that denial of the waiver application would cause his wife extreme hardship if she moved to Mexico to live with him.

The applicant's wife asserted that her asthma is seriously aggravated by the weather and pollution in Mexico. However, she provided no corroborating evidence to support that assertion, and no evidence that those conditions are universal throughout Mexico. Further, the only other evidence counsel provided that living in Mexico would cause the applicant's wife extreme hardship is the evidence pertinent to her recent dysphagia and possible achalasia, and his argument that this precludes travel because a recurrence would require immediate attention from her physicians.

However, counsel provided no evidence that the condition has been found likely to recur, and no evidence that the problem, if it recurs, could not be adequately addressed in Mexico. The evidence in the record is insufficient to show that, if the waiver application is denied and the applicant's wife joins the applicant in Mexico, she will suffer extreme hardship as a result.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if the applicant's waiver application is not granted. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising when a spouse is removed from the United States.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.