

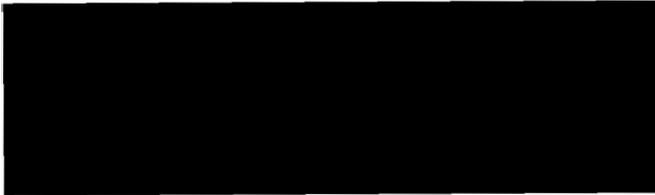
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 (PANAMA CITY)

Date:

JAN 07 2010

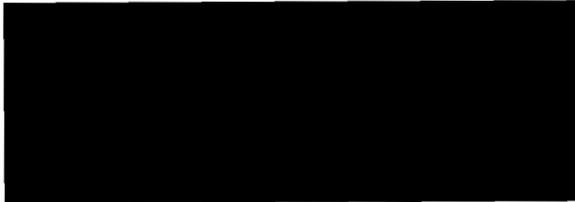
IN RE: Applicant:



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 that reads "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 Ecuador, entered the United States without authorization in October 1999 and did not depart the United States until February 2006. 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 2004 and 2005.

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 Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated April 26, 2007.

In support of the appeal, counsel for the applicant submits a brief, dated June 29, 2007, and referenced exhibits. 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 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....

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

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 must first establish that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant resides abroad due to his inadmissibility. With respect to this criteria, the applicant's spouse contends that she will suffer emotional and financial hardship. In a declaration she states that she is suffering emotional hardship due to the hardships associated with raising two young children by herself, without her husband's guidance and support. She further notes that her children are suffering emotional hardship due to long-term separation from their father, which in turn is causing her hardship. She contends that prior to the applicant's departure to Ecuador, he was an active participant in their daily lives, bathing them, changing their diapers, feeding them, playing with them and caring for them. *Declaration of* [REDACTED] dated June 22, 2007.

In addition to the emotional hardship, the applicant's spouse asserts that she is experiencing financial hardship due to the applicant's inadmissibility. She contends that prior to his departure, he was able to make \$450-\$500 per week from his work painting houses. He also worked as a busboy at a local restaurant where he earned \$6 per house. In Ecuador, she asserts that the most he has been able to make is \$6 per day working at odd construction jobs, and with that kind of income, it is impossible for him to continue supporting his spouse and children in the United States. She notes that she and the children previously relocated to Ecuador to reside with the applicant for over a year, but were forced to return to the United States as both she and the children became seriously ill from the

conditions in Ecuador. Due to the medical treatment the family has had to undergo since returning from Ecuador, their financial situation has worsened. The applicant's spouse has been unable to work due to undergoing multiple operations on her stomach, due to the digestive problems she contracted while in Ecuador and as such, the family has lost two incomes; she currently relies on her father's financial support but his assistance cannot continue indefinitely, as he has his own family to support. *Supra* at 2-3, 5-6 and *Declaration of [REDACTED]* dated June 22, 2007.

To support the applicant's spouse's assertions, medical documentation has been provided with respect to her own health and the health of the children. The documentation establishes the medical issues the family encountered while in Ecuador, including respiratory and digestive infections, due to the substandard sanitary conditions, and further establishes the need for continued medical treatment while in the United States. In addition, documentation has been provided establishing the negative ramifications of separating young children from their father long-term. Finally, financial evidence, in the form of tax documentation, has been submitted, establishing the financial contributions made by the applicant prior to his departure from the United States, to support the applicant's spouse's contention that without her spouse's income, she is experiencing financial hardship.

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 without the complete support of the applicant. She is unable to work due to the medical conditions suffered since her return from Ecuador, and is dependent on her father for financial support. 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.

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 contends that when she moved to Ecuador with the children after the applicant relocated due to his inadmissibility, she and her children experienced numerous hardships while there and as such, a relocation to Ecuador would cause her and her children extreme hardship. To begin, she asserts that there are poor job opportunities in Ecuador. The applicant has been able to work in odd construction jobs, earning about \$6 a day, which is not enough to support his spouse and children. The applicant's spouse and children would be unable to maintain a decent standard of living.² Moreover, she notes that the living conditions are unsanitary; the water is full of bacteria and other contaminants, making it unsafe for drinking, cooking and/or washing. Water is obtained from the community well and bathing in the water causes skin rashes. The children and the applicant's spouse were sick while in Ecuador and had to be treated by doctors. Furthermore, the school system in Ecuador is poor and undeveloped; the highest grade level at the local school is six. *Supra* at 3-4.

² The U.S. Department of State reports that the poverty rate in Ecuador in 2006 was 38% and the per capita income in 2008 was less than \$4000. *Background Note-Ecuador, U.S. Department of State*, dated October 2009.

Were the applicant's spouse to relocate to Ecuador to reside with the applicant due to his inadmissibility, the record reflects that she and the children would likely encounter numerous medical hardships, as they did when they resided in Ecuador in 2006-2007. In addition, the applicant's spouse would encounter financial hardship due to the problematic economic situation in Ecuador, as corroborated by the U.S. Department of State. Finally, the applicant's spouse would suffer hardship due to the struggles her children would encounter in Ecuador, including substandard academics, unfamiliarity with the language and culture, and long-term separation from their extended family. 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 Ecuador to reside with the applicant due to her 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, support letters from family and friends, the apparent lack of a criminal record, gainful employment, and the passage of more than ten 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.