

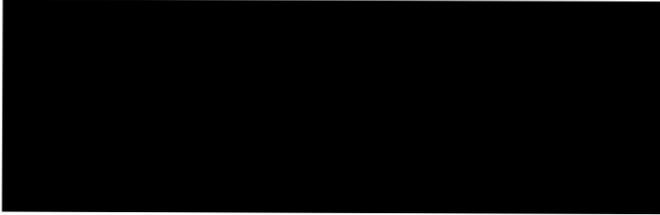
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U.S. Department of Homeland Security  
Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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H<sub>2</sub>

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ), MEXICO Date: **JAN 15 2010**  
CDJ 2004 827 047

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Ground 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:  
[REDACTED]

**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, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a 30-year-old 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. The applicant is married to a U.S. citizen, and she seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her husband and children in the United States.

The District Director found that the applicant failed to establish extreme hardship to her citizen spouse, and denied the application accordingly. *Decision of the District Director*, dated March 23, 2007. On appeal, the applicant contends through counsel that the denial of the waiver imposes extreme hardship on her husband. *See Form I-290B, Notice of Appeal*, dated April 10, 2006; *Brief on Appeal*.

The record contains, *inter alia*, a copy of the couple's marriage certificate, indicating that they were married on July 27, 2002, in Illinois; copies of the birth certificates for the couple's two U.S. citizen children; several statements and letters from the applicant's husband; a joint affidavit from the applicant and her husband; a letter from the applicant's husband's doctor; two letters regarding the applicant's daughter's medical condition; a statement from the applicant's husband's employer; and a brief in support of the appeal.

The AAO reviews these proceedings de novo. *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). The entire record was considered in rendering a decision on the appeal.

Section 212(a)(9) 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 [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.

8 U.S.C. § 1182(a)(9)(B).

The record shows that the applicant entered the United States without being inspected and admitted in or around July, 1999. *See Form I-601, Application for Waiver of Ground of Excludability*. The applicant's spouse filed a Petition for Alien Relative (Form I-130), which U.S. Citizenship and Immigration Services approved on October 29, 2004. *See Form I-130, Petition for Alien Relative*. The applicant departed the United States in December, 2005. *See Form I-601, supra*. The applicant's unlawful presence for one year or more after April 1, 1997, and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006).<sup>1</sup>

In order to obtain a section 212(a)(9)(B)(v) waiver, an applicant must show that the ten-year bar imposes an extreme hardship on the applicant's U.S. citizen or lawfully resident spouse or parent. *See* 8 U.S.C. § 1182(a)(9)(B)(v). Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-68 (BIA 1999) (en banc) (considering the hardships of family separation and relocation). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has

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<sup>1</sup> The District Director erred in characterizing the ground of inadmissibility in section 212(a)(9)(B)(i)(II) of the Act as a "permanent bar to admission." *See Decision of the District Director, supra* at 3. Rather, departure after unlawful presence of one year or more triggers a ten-year bar to admission. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

established extreme hardship to a qualifying relative. 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.”); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the INA that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

*Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *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 mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the U.S. Supreme Court affirmed that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.<sup>2</sup>

The AAO finds that the applicant has established that the denial of a waiver imposes an extreme hardship on her spouse if he remains in the United States without his wife and children, or if he relocates to Mexico to be with his family.

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<sup>2</sup> The District Director erred in citing to *Matter of Tin*, 14 I&N Dec. 371 (Reg. Commr. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Commr. 1978), because these decisions discuss the factors relevant to consent to reapply for admission after deportation from the United States, which are not applicable to this case. Because the AAO is dismissing this appeal after a de novo review, this error is harmless.

The record reflects that the applicant's spouse, [REDACTED], is a 31-year-old native and citizen of the United States. *See Birth Certificate for [REDACTED]* The applicant and her husband have been married for seven years. *See Marriage Certificate.* The couple has a 6-year-old son and a 5-year-old daughter. *See Birth Certificates for [REDACTED] and [REDACTED]* Both children have been residing in Mexico with the applicant since January 9, 2006. *See Sworn Statements of [REDACTED]* dated Mar. 20, 2009, and May 9, 2007. The applicant's spouse asserts that he is suffering extreme medical, physical, emotional, and financial hardships as a result of the denial of the waiver.

In support of the medical and physical hardship claim, the applicant has presented evidence that her husband suffers from Blount's Disease, a growth disorder that causes the lower legs to become severely bowed." *Letter from [REDACTED]* dated Mar. 13, 2009. This disease began when [REDACTED] was an adolescent, and he underwent surgery, physical therapy, and the use of braces, to slow the progression of the disease. *Id.* Despite this treatment, [REDACTED] continues to have deformities and severe pain that is difficult to treat with multiple medications. *Id.* The applicant's husband states that "[e]very day is a painful ordeal for [him] that not even pain medication can manage." *See Sworn Statement of [REDACTED]*, dated Mar. 20, 2009. [REDACTED] physician confirms that he "has difficulty with many daily activities, including walking up or down stairs, heavy lifting, standing for long period of times [sic], driving, and sleeping," and he uses a cane for assistance in walking on occasion. *Letter from [REDACTED] supra.*

[REDACTED] also has diagnosed [REDACTED] with moderate depression, originating with the physical separation from the applicant. *Id.* [REDACTED] claims "difficulty concentrating, sleeping, remembering to take his medications, having interest in activities, and with work." *Id.* Further, [REDACTED] indicates that [REDACTED] "is eating excessively and gaining weight, which is making his knee and leg arthritis and pain worse." *Id.* Additionally, [REDACTED] "has frequent crying spells and suicidal thoughts," and the "depression is not controlled while on medications." *Id.* [REDACTED] states that he did not want to admit his depression to himself or to others, and he claims that the emotional pain of separation is equal to, if not worse than, his physical pain. *Sworn Statement of [REDACTED]* dated Mar. 20, 2009. The depression has impacted his work, as he has "great difficulty getting through a productive day of work," and he feels that he "cannot endure a full day of work and then go home to [his] solitude." *Sworn Statement of [REDACTED]*, dated May 9, 2007. The applicant's husband was placed on work probation because he could "not focus on [his] job due to the stress of being separated from [his] wife and child." *Id.*; *see also Note from [REDACTED]* dated Apr. 5, 2007 (noting [REDACTED] "decline in . . . performance and attention to the floor," and placing him "on an additional 90-day probation").

[REDACTED] also states that he worries constantly about the health of his daughter in Mexico. *Sworn Statement of [REDACTED]*, dated May 9, 2007. The applicant's daughter has asthma and has been hospitalized for acute asthmatic bronchitis. *See Letter from [REDACTED]* dated Apr. 11, 2007; *Letter from [REDACTED]*, dated May 26, 2008. [REDACTED] fears that he is endangering his daughter's life by keeping her in Mexico. *Sworn Statement of [REDACTED]*, dated May 9, 2007. [REDACTED] also worries about the applicant, who is seeing a therapist

in Mexico “because she can no longer cope with [their] separation.” *Id.* [REDACTED] employer-provided health insurance policy does not cover his family in Mexico. *Id.* Further, [REDACTED] states that “[a]s a father, [he] need[s] to be able to take care of [his] family” and his failure to “fulfill this obligation as a father and a husband makes [him] feel worthless.” *Id.*

has opined that [REDACTED] physical and emotional health conditions are worsening as a result of the separation from the applicant. *Letter from [REDACTED] supra.* When the applicant was in the United States, “she was able to assist him with daily activities, motivate him to continue with his important daily exercises and be compliant with his doctor visits,” as well as assisting him with driving and taking medications. *Id.* [REDACTED] expressed concern that “further separation will result in worsening and potentially life-threatening physical and mental health in [REDACTED]” *Id.*

[REDACTED] also claims that the separation from the applicant has caused financial hardship. *Affidavit of [REDACTED] and [REDACTED] dated Dec. 5, 2005.* [REDACTED] is employed by a mail services company and it appears that he made \$14.40 per hour in 2007. *Id.*; see also *Brief on Appeal.* [REDACTED] states that he works double shifts in order to support himself and his family in Mexico. *Sworn Statement of [REDACTED] dated Mar. 20, 2009.* He cannot afford many trips to Mexico to see his family, and only made two trips during the period from January, 2006 to May, 2007. *Sworn Statement of [REDACTED] dated May 9, 2007.* Further, [REDACTED] claims that the cost of medical treatment in Mexico for the applicant and their daughter has added to his economic burden. *Id.*

Here, the applicant’s spouse has shown that the multiple hardships caused by the separation from his wife and children, when considered in the aggregate, constitute extreme hardship. See *Matter of O-J-O-*, 21 I&N Dec. at 383. Although the separation of family members and financial difficulties alone do not establish extreme hardship, the medical and psychological impact of [REDACTED] prolonged separation from his wife and children, takes this case beyond the ordinary hardships to be expected when one family member is inadmissible. Accordingly, the applicant has shown that the cumulative impact of the medical, physical, emotional, and financial hardships is extreme. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565 (recognizing importance of family ties and the financial impact of departure); *Salcido-Salcido*, 138 F.3d at 1993 (emphasizing weight to be given to the hardship that results from family separation); *Matter of Lopez-Monzon*, 17 I&N Dec. at 281 (noting that waiver was designed to promote the unification of families and to avoid the hardship of separation).

The applicant’s spouse also has provided evidence that he would suffer extreme hardship if he were to relocate to Mexico to live with his wife and children. First, [REDACTED] was born in the United States. See *Birth Certificate.* His parents are lawful permanent residents of the United States, see *Permanent Resident Cards*, and his sister is a U.S. citizen, see *Birth Certificate for [REDACTED]* [REDACTED] has a history of employment with Superior Mailing Services, and he has medical insurance through his employment, which would be lost upon relocation. *Sworn Statement of [REDACTED] dated May 9, 2007.* Further, [REDACTED] doctor states that his medical condition would be impacted by relocation, as “his knee and leg pain are worsened with the hills, steep cobble stone streets and walkways” in Mexico. *Letter from [REDACTED] supra.* Finally, residing in

Mexico would not alleviate [REDACTED] concerns regarding his daughter's health, as her doctor believes that "a local allergen [in Mexico] is causing the asthma." *Letter from [REDACTED] supra.*

Based on [REDACTED] evidence of medical, physical, psychological, and financial hardships to himself as a result of family separation, and his long residence, family ties, and work history in the United States, coupled with family medical concerns exacerbated by conditions in Mexico, the AAO finds that the applicant has established extreme hardship to her spouse if the applicant is prohibited from entering in the United States, or if her husband leaves the United States to be with his family. Although not all of the relevant factors in this case are extreme in themselves, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

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 Coelho*, 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the applicant's entry without inspection and the unlawful presence for which she seeks a waiver. The favorable and mitigating factors in this case include: the applicant's ties to her U.S. citizen spouse in the United States; the applicant's lack of a criminal record; and the extreme hardship to the applicant and her spouse caused by the denial of a waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (setting forth relevant factors).

The AAO finds that the favorable factors in this case outweigh the adverse factors, and that a grant of relief in the exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.