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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

H-3

FILE:

[REDACTED]

Office: MEXICO CITY (JUAREZ)

Date: **APR 15**

(CDJ 2004 782 156)

IN RE:

[REDACTED]

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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter is 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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to enter the United States and reside with his U.S. citizen wife and other family members.

The district director found that, based on the evidence in the record, the applicant failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated January 12, 2007.

On appeal, counsel for the applicant asserts that the applicant's prior counsel provided ineffective assistance, thus the applicant did not make a complete waiver application. *Statement from Counsel on Form I-290B*, dated February 1, 2007. Counsel further asserts that the district director cited cases in support of the denial that do not relate to the facts of the present matter. *Id.* Counsel contends that the applicant has shown that his wife will experience extreme hardship should the waiver application be denied. *Id.*

The record contains correspondence and a brief from counsel; statements from the applicant's wife, the applicant's father-in-law, the applicant's sister-in-law, the applicant's neighbor, and the applicant's pastor; a copy of the applicant's marriage certificate; a copy of the applicant's wife's certificate of citizenship; documents on conditions in Mexico; a medical document for the applicant's father-in-law; copies of photographs of the applicant's stepchildren; copies of birth certificates for the applicant's stepchildren; a copy of a deed for real property owned by the applicant and his wife; copies of tax documents; documentation on a serious car accident and associated injuries suffered by the applicant's stepson. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

The record reflects that the applicant entered the United States without inspection in approximately January 1995, and he remained until approximately July 2003. Accordingly, he accrued unlawful presence from the date of the enactment of the unlawful presence provisions, April 1, 1997, until July 2003, approximately six years. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant does not contest his inadmissibility on appeal.

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 or parent of the applicant. Hardship the alien himself experiences upon being found inadmissible is not a direct concern in section 212(a)(9)(B)(v) waiver proceedings. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(a)(9)(B)(v) of the Act. These 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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), 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.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's wife would likely remain in the United States if the applicant departs.

Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The applicant's wife explained that she has resided in the United States since early childhood. *Statement from Applicant's Wife*, dated February 1, 2007. She has completed substantial academic study leading to a degree in Education and her position as a teacher. *Id.* at 1. The applicant's wife has three U.S. citizen children and other family members in the United States, including eight U.S. citizen siblings and her U.S. citizen father. *Id.* She stated that her extended family meets every Sunday after church at her father's house for a meal and to visit, thus they share a close bond. *Id.* at 2.

The applicant's wife explained that she and the applicant share a close relationship, and they have been married for approximately five years. *Id.* She indicated that she and the applicant are active with their church and her religion is important to her. *Id.* She provided that the applicant is a very good companion to her, and he assists her emotionally and with routine tasks. *Id.* The applicant's wife explained that the applicant serves as a father figure to her three children, and that he actively participates in their care. *Id.*

The applicant's wife explained that she owns a home in the United States, and she does not wish to relocate to Mexico. *Id.* at 3. She expressed her serious concern for the quality of life in Mexico and her lack of connections there. *Id.* She stated that her children enjoy their life in the United States, and that relocating to Mexico would present significant hardship for them. *Id.*

On February 5, 2008, the applicant submitted additional evidence to show that his 19-year-old stepson was involved in a serious car accident on November 28, 2007. The applicant's stepson suffered "a severe brain injury and is currently in a near vegetative state requiring 24-hour care." *Document from The Permanente Medical Group, Inc.*, dated January 9, 2008. Further documentation reflects that the applicant's stepson "is on a ventilator, and will require 24 hour care for the rest of his life." *Letter from [REDACTED] and Dr. [REDACTED]* dated December 21, 2007. The applicant submitted news articles to further describe the conditions of his stepson's accident.

The applicant's wife states that since the accident she has spent all of her days and a significant portion of her nights in the intensive care unit with her son. *Supplemental Statement from Applicant's Wife*, dated January 11, 2008. She explains that she has been emotionally devastated and she needs the applicant to provide emotional support. *Id.* at 2. The applicant's wife stated that she has exhausted all of her leave from work, yet she is unable to return due to her need to be with her injured son and her emotional difficulty. *Id.* She provided that she needs the applicant to help her meet her financial obligations, care for her other two young children, and assist her in daily needs. *Id.* The applicant's wife stated that she has had to move in with her father and rent her home to help meet her financial obligations, which has placed further strain on her and her children. *Id.* at 3.

Upon review, the applicant has shown that his wife would experience extreme hardship if the present waiver application is denied. The accident suffered by the applicant's wife's eldest son constitutes a circumstance that places her hardship above that which would commonly be expected of the spouse of an individual prohibited from entering the United States.

The applicant has shown that relocating to Mexico would create extreme hardship for his wife. Specifically, the applicant's wife's son is in a near vegetative state, requiring extensive medical care. The record supports it would not be reasonable to assume the applicant's wife's son could be relocated to Mexico in his current condition. Thus, should the applicant's wife relocate to Mexico, she would be separated from her injured son which would constitute extreme emotional hardship. It is further noted that the applicant's wife has extensive ties to the United States, including the support of her extended family and church community. Separating the applicant's wife from this support would create further emotional hardship during a very difficult period in her life.

The record further supports that the applicant's wife will experience extreme hardship should she remain in the United States without the applicant. As discussed above, the applicant's wife is enduring significant emotional and financial difficulty due to her son's accident and health condition. The AAO finds that remaining separated from the applicant during this difficult time represents extreme hardship. *See Salcido-Salcido* at 1293. The applicant and his wife share a close relationship, and his presence would offer his wife emotional and moral support. Further, the applicant would be positioned to assist his wife in caring for her children and helping meet the household's economic requirements.

Based on the forgoing, the AAO finds that the applicant's wife will face extreme hardship if the applicant's waiver application is denied. Thus, the applicant has shown that a qualifying relative would suffer extreme hardship if he is prohibited from entering the United States.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant knowingly entered the United States without inspection and resided in the country without a legal immigration status for a lengthy period.

The positive factors in this case include:

The applicant has significant family ties to the United States, including his wife and stepchildren; the applicant's wife would suffer extreme hardship if he is prohibited from entering the United States; the applicant's presence in the United States will greatly help his U.S. citizen wife and stepchildren, both emotionally and financially; the applicant has served as a father to his stepchildren and assisted in their care; the applicant has been involved in his community via a religious organization, and; the applicant has not been convicted of any crimes.

The positive factors in this case outweigh the negative factors.

In proceedings for an 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. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.