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U.S. Citizenship
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[Redacted]

FILE:

[Redacted]

Office: MEXICO CITY (CIUDAD JUAREZ, MEXICO)

Date: DEC 16 200

IN RE:

[Redacted]

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:

[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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(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 a qualifying relative and denied the application accordingly. *Decision of the Acting District Director*, dated March 23, 2007.

On appeal, counsel contends that the applicant's husband has suffered extreme hardship both physically and mentally.

The record contains, *inter alia*: a copy of the marriage license of the applicant and her husband, Mr. [REDACTED] indicating they were married on December 1, 2001; copies of the birth certificates of Mr. [REDACTED] and the couple's two daughters; letters from several doctors, including a psychological evaluation for [REDACTED]; a statement and a letter from [REDACTED] financial documents; a letter of support from the applicant's church; a letter from the couple's older daughter's teacher; photos of the applicant with her family; and photos of [REDACTED] from his recent surgery. The entire record was reviewed and considered in rendering this 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.

In this case, the record indicates that the applicant entered the United States without inspection in August 2001 and remained until February 2006 when she returned to Mexico. The applicant accrued unlawful presence for over four years. She now seeks admission within ten years of her February 2006 departure. Accordingly, she is inadmissible to the United States under section 212(a)(9)(B) of the Act for being unlawfully present in the United States for a period of more than one year.

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 applicant herself may experience, or hardship the applicant's children may experience, are not permissible considerations under the Act. Once extreme hardship to a qualifying relative 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 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. See *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 list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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 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). In addition, the Court of

Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

The record reflects that the applicant and her husband met in August 1999 in Mexico. In March 2000, [REDACTED] returned to the United States. The applicant and the couple’s daughter entered the United States in August 2001. The applicant and [REDACTED] got married on December 1, 2001, in Illinois. They had their second child in February 2005. In February 2006, the applicant, her husband, and their children went to Mexico to report for an interview and consular processing whereupon it was determined that the applicant had been unlawfully present in the United States for more than one year. The applicant remains in Mexico with the couple’s daughters, while [REDACTED] returned to the United States.

The record shows that the younger daughter has been diagnosed with “gastrointestinal infection and amboynas,” and has several allergies. *Letter from [REDACTED] regarding [REDACTED], dated March 28, 2007.* A letter from the older daughter’s teacher states that she cries excessively and misses her father. *Letter from [REDACTED] dated May 16, 2007.* Furthermore, the applicant has been treated for depression and was recently diagnosed with an abnormality in her ovaries. *Sworn Statement by [REDACTED] dated November 19, 2008; Letter from [REDACTED] regarding [REDACTED], dated March 28, 2007.*

The record also shows that [REDACTED] was discharged from the emergency department at Mount Sinai Hospital on April 24, 2007, with a provisional diagnosis of “Adjustment Disorder with Depressed and Anxious Mood.” He has been seen on a monthly basis for his depression and anxiety since June 2007. *Letter from [REDACTED], dated November 18, 2008.* Documentation in the record also shows that [REDACTED] has “uncontrolled hypertension and tachycardia,” as well as headaches, insomnia, tremors, anxiety, panic attacks, and blurred vision for which he takes several daily medications. *Letter from [REDACTED], dated April 17, 2007.* [REDACTED] states that the separation from his family has caused him to have insomnia and nightmares to the point that it affects his job as a truck driver. *Letter from [REDACTED] dated April 15, 2007.*

Most recently, [REDACTED] had “major surgery” on October 22, 2008, to remove part of his intestine and colostomy creation after his bowel ruptured from severe gastritis, “a condition that worsens with increased stress.” *Letter from [REDACTED], dated October 28, 2008; Letter from [REDACTED] supra.* Since the surgery, [REDACTED] is “adjusting to a colostomy bag and an open wound that is healing slowly.” *Letter from [REDACTED] supra.* Documentation in the record

indicates that [REDACTED] will require a second surgery at a later date, after he has “establishe[d] a healthy recovery.” *Letter from [REDACTED]*, undated. Photographs of [REDACTED] in the record show him in the hospital with a large hole across the middle of his abdomen.

Moreover, [REDACTED] was recently diagnosed with diabetes. *Letter from [REDACTED]*, dated October 24, 2008. All of the doctors’ letters request that the applicant be permitted into the United States in order to assist [REDACTED] with his recovery. *Letter from [REDACTED] supra* (stating [REDACTED] requires a minimum of three to six months of assistance from his wife for his recovery); *Letter from [REDACTED], supra* (stating [REDACTED] requires his wife’s help during his recovery); *Letter from [REDACTED], supra*; *Letter from [REDACTED] supra*.

Upon a complete review of the record evidence, the AAO finds that the applicant has established that her husband will experience extreme hardship if her waiver application is denied. The AAO notes that to the extent the record contains evidence of hardship on the applicant and the couple’s children, as explained above, hardship the applicant or the children experience is not a permissible consideration under the statute. *See* Section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

In this case, given [REDACTED]’s serious health problems, the denial of a waiver of inadmissibility constitutes extreme hardship. It is evident from the record that [REDACTED] has serious physical and mental health problems, all of which have been exacerbated due to the stress of being separated from his wife and children. In addition to his major depression, anxiety, panic attacks, blurred vision, and uncontrolled hypertension, all of which affect his ability to continue working as a truck driver, most recently, [REDACTED] underwent major surgery after he was diagnosed with a perforated bowel, a condition exacerbated by stress. *Letter from [REDACTED] supra*; *Letter from [REDACTED] supra*. [REDACTED]’s doctors describe his recovery from surgery as being a long process, estimating that, at a minimum, his recovery will take three to six months. All four of [REDACTED] health care providers emphasize the need for [REDACTED] to have assistance during this long recovery process. It is evident from the record that [REDACTED] lives alone and, considering the nature of his surgery and his need to use a colostomy bag, there is no indication that he has anyone else to help him aside from his wife. Furthermore, it appears critical that [REDACTED] have a successful recovery given that he requires a second surgery which is dependent upon a “healthy recovery” from his first surgery. *Letter from [REDACTED] supra*. If [REDACTED] remains in the United States without his wife, he risks serious health problems.

Moreover, moving to Mexico with the applicant to avoid separation would be an extreme hardship for [REDACTED]. Even assuming [REDACTED]’s physical health would permit him to travel to Mexico, as [REDACTED] states, relocating to Mexico would disrupt the continuity of his health care and the procedures his doctors have in place to treat him. *Sworn Statement by [REDACTED], supra*. In addition, [REDACTED] requires a second surgery and he would lose his health insurance if he moved to Mexico. In sum, the hardship [REDACTED] would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the

Cervantes-Gonzalez factors cited above, supports a finding that the applicant is refused admission. faces extreme hardship if

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 T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant's initial entry into the United States without inspection and her unlawful presence in the country. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission, particularly in light of his serious mental and physical conditions; two U.S. citizen children; the letter of support from the applicant's church; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when 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.