

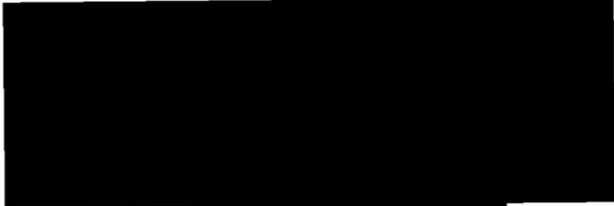
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FILE:

CDJ 2004 584 067

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: DEC 17 2008

IN RE:



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:

SELF-REPRESENTED

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 cursive script, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now 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 ten years of his last departure from the United States. The applicant is married to a U.S. citizen and has two U.S. citizen sons. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The district director found that based on the evidence in the record, the applicant had failed to establish that a qualifying relative would undergo extreme hardship as a result of his continued inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated September 22, 2006.

On appeal, the applicant's spouse states that since the applicant's departure her mother has become disabled and she is now her mother's primary caretaker as well as the only caretaker for her two children. She states that she is suffering financially, emotionally and physically because of being separated from the applicant. *Spouse's Brief*, dated November 21, 2006.

The AAO notes that the record contains correspondence from an individual who states that she represents the applicant in this matter. However, the record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the applicant and authorizing this individual to appear on his behalf. Therefore, the applicant will be considered to be self-represented.

In the present application, the record indicates that the applicant entered the United States without inspection in 1996. The applicant remained in the United States until October 2005. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of the unlawful presence provisions under the Act until October 2005, when he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his October 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

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 and/or parent of the applicant. Hardship the applicant experiences or his children experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse.

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 list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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.

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 AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or the United States, as she is not required to reside outside of the United States

based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The applicant's spouse submits a brief and in this brief she describes the current hardships she is experiencing. She states that since her husband's departure her mother has become disabled and she has become her mother's primary caregiver. *Spouse's Brief*, dated November 21, 2006. She states that her mother suffers from hypertension, hyperlipidemia and fibromyalgia. She also states that on September 8, 2006 her mother was hospitalized and underwent a cervical laminectomy (decompression of the spinal cord and nerves). The record includes a statement from the Social Security Administration showing that a fully favorable decision had been made in her mother's application for disability benefits. *Letter from Social Security Administration*, dated September 29, 2006. The record also includes the medical records for the spinal surgery performed on the applicant's mother-in-law. The record shows that the applicant's mother-in-law was diagnosed with significant cervical spondylosis, degenerative osteoarthritis and spinal cord stenosis. *Record of Operation*, dated August 31, 2006. The applicant's spouse states that her duties as the primary caregiver for her mother include: changing her "pick line" and IV, helping her move around the house, bathing her, feeding her and making sure her mother's financial responsibilities are met. *Spouse's Brief*, dated November 21, 2006.

The applicant's spouse states that, without the applicant's assistance, both emotional and financial, during this difficult time, she has become depressed and anxious. She states that she has sought treatment at the Corona Regional Medical Center. *Id.* In support of these statements, the record includes a letter written by [REDACTED] a registered nurse at the Corona Regional Medical Center. [REDACTED] states that the applicant's spouse has been involved in treatment at the Corona Regional Medical Center Outpatient Psychiatric Services since August 2006. *Letter from Ms. [REDACTED] RN*, undated. She states that the applicant's spouse's problems include severe depression and anxiety, and that she also has suicidal ideation. [REDACTED] states that the applicant's spouse's problems are related to social stressors and she recommends that the applicant's spouse continue her treatment to avoid "decompensation" and possible inpatient hospitalization. *Id.*

The applicant's spouse also states that she and the applicant shared everything and that he helped with childcare and provided for the family financially because she only worked part-time. *Spouse's Brief*, dated November 21, 2006. Since the applicant's departure and her mother's medical problems, she states that she has had to reduce her work schedule and that her finances have suffered. She states that currently her brother, a doctor, pays for most of her needs. She states that she has even sought assistance from the county of San Bernardino welfare office for food assistance. *Id.* In support of these statements, the applicant submits a Notice of Action from San Bernardino County, which states that her monthly food stamps benefit has been increased. *Notice of Action*, dated September 11, 2006. In addition, the record contains an affidavit from the applicant's spouse's brother, ([REDACTED]), which states that he has been helping the applicant's spouse financially since November 2005. *Letter from [REDACTED]*, dated November 10, 2006. He states that he is a family physician working for Kaiser Permanente and that he earns \$150,000 per year. *Id.*

Finally, the applicant's spouse states that although her children are not qualifying relatives, their suffering, as result of their father's absence, has caused her depression and anxiety. She states that

her son, [REDACTED] has been treated at Corona Physicians Associates for Attention Deficit, Hyperactivity Disorder. *Spouse's Brief*, dated November 21, 2006. The applicant's spouse states that she believes this disorder could have been avoided if the applicant was **with the family**. *Id.* In support of these assertions, the applicant's spouse submits a letter from [REDACTED]. Dr. [REDACTED] states that the applicant's son was seen at their clinic on October 31, 2006 presenting symptoms of Adjustment Disorder, Attention Deficit Hyperactivity Disorder and Depression for the previous six months. *Letter from [REDACTED]* dated October 31, 2006. He states that he has referred the applicant's son to a child psychologist and recommended the applicant's spouse for family support. [REDACTED] concludes that he believes the applicant's son's symptoms to be related to his separation from his father. *Id.*

Considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, the AAO finds the evidence of record establishes that the applicant's spouse is suffering extreme hardship as a result of his inadmissibility. The AAO finds that applicant's spouse is experiencing extreme emotional and financial hardship by being separated from her husband during a time when she has had to care for her disabled mother and her two children, one of whom has been diagnosed with emotional problems. The AAO also finds that relocating the family to Mexico would be an extreme hardship for the applicant's spouse considering her role as the primary caretaker for her mother.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 section 212(h)(1)(B) 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 adverse factors in the present case are the applicant's immigration violations, including his entry without inspection, his unlawful presence and his being employed in the United States without authorization. The favorable factors in the present case are the applicant's U.S. citizen spouse and children; the extreme hardship to his U.S. citizen spouse if he were to be denied a waiver of inadmissibility; and the absence of a criminal record for the applicant.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.