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U.S. Citizenship
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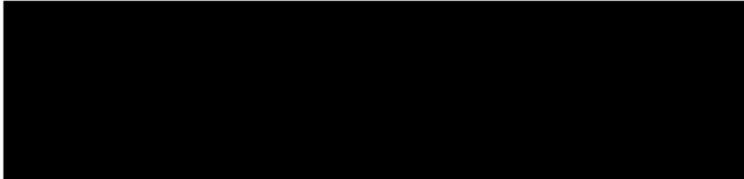
FILE: [REDACTED] Office: PHOENIX, AZ

Date: **DEC 18 2006**

IN RE: Applicant: [REDACTED]

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 "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Phoenix, Arizona and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the acting district director for continued processing.

The applicant is a native and citizen of Mexico. The record reflects that on August 10, 2005, the applicant gave sworn testimony to the interviewing officer admitting that she had initially entered the United States in 1990 using a valid Border Crossing Card and had remained beyond the period of authorized stay. She did not depart the United States until 1999. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until 1999, when she departed the United States. 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. The applicant seeks a waiver of inadmissibility in order to remain with her lawful permanent resident spouse in the United States.

The acting 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 Acting District Director*, dated January 31, 2006.

In support of the appeal, counsel for the applicant submitted a brief, dated March 20, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

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 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 alien has established extreme hardship to a qualifying relative. 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. The BIA held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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.

This matter arises in the Phoenix district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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) (remanding to the Board of Immigration Appeals (BIA)) (“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). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

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. In the present case, the applicant’s lawful permanent resident spouse is the only qualifying relative, and hardship to the applicant, her children and/or her grandchildren cannot be considered, except as it may affect the applicant’s spouse.

The applicant's lawful permanent resident spouse contends that he will suffer extreme emotional hardship if the applicant's waiver request is not granted. As stated by the applicant's spouse,

My wife has been my companion for more than 31 years. We have never been separated; we have always gone hand in hand supporting one another.... I would deeply appreciate it if you look into consideration that we have our children, grandchildren, and friends.... [M]y wife is my partner and the support of our family....

Letter from [REDACTED] dated January 19, 2006.

Counsel elaborates on the hardships the applicant's spouse will face if the applicant's waiver request is not granted. As counsel states,

[T]he Service failed to consider [the applicant's spouse's] integration into his community. Integration into his community is an element that must be considered when determining the existence of extreme hardship. The documentation submitted as part of the I-601 Waiver showed that he is a participating member of his local church and a friend to many of his neighbors....

The facts are that [REDACTED] and his wife [the applicant] have lived in the United States for at least the 15 years in a close knit family relationship. Removing the family from this situation will cause an extreme hardship under every definition of the term....

Brief in Support of Appeal, dated March 20, 2006.

Counsel further asserts that the applicant's lawful permanent resident spouse will suffer extreme financial hardship due to the applicant's absence, as he will have to maintain two households. As stated by counsel,

Severe hardship...would result if [REDACTED] [the applicant's spouse] is required to maintain two households, one in the U.S. and one in Mexico....

Id. at 8-9.

The AAO finds the court's finding in *Salcido-Salcido*, that separation of an alien from family living in the United States is the most important single hardship factor, to hold considerable weight in the instant appeal. Based on the applicant's and her spouse's marriage spanning over thirty years and the fact that the applicant and her spouse have never lived apart, the AAO concludes that a separation at this time would cause hardship beyond that normally expected of one facing the

removal of a spouse. The applicant's spouse needs the support that the applicant provides; the applicant's long-term absence would be an extreme hardship for the applicant's spouse. The AAO thus concludes that based on the evidence provided, it has been established that the applicant's spouse will suffer extreme hardship if the applicant's waiver is not granted.

The AAO notes that 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, counsel states as follows:

[the applicant's spouse] is a Lawful Permanent Resident of the United States entitled to live and prosper in his country.... If he were forced to relocate with his family to Mexico he would lose the rights and privileges of living in this country. The loss of these rights must be considered when determining extreme hardship.

The facts are that [has] lived in the United States for at least the 15 years in a close knit family relationship. Removing the family from this situation will cause an extreme hardship under every definition of the term. [and his children are accustomed to and entrenched in this country....

[will be forced to leave his well paying job in the U.S. to look for work in a country from which hundreds of thousands of people leave every year because of an inability to find work. Mexico's present economic situation is such that it is unlikely [will find employment necessary to care for his family. Instead, he will join the masses of impoverished Mexican citizens who compete for subsistence wages or live in abject poverty....

The fact that [will lose his home, his job, and his family's security constitutes an extreme hardship.... In addition, [will suffer extreme emotional hardship from not being unable [sic] to provide...with even basic necessities such as shelter, food and an education in Mexico....

Id. at 5-8.

Based on the applicant's spouse's potential loss of his lawful permanent resident status and the emotional and financial hardships he would face were he to relocate to Mexico with the applicant, the AAO finds that the situation presented in this application rises to the level of extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her lawful permanent resident spouse would suffer extreme hardship

were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's lawful permanent resident spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning 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.

The favorable factors in this matter are the extreme hardship the applicant's spouse, children and grandchildren would face if the applicant were to relocate abroad, regardless of whether they relocate or remain in the United States, the lawful status in the United States of the applicant's family members, the applicant's apparent lack of a criminal record, community ties, support letters from friends and family, property ownership, payment of taxes and the passage of eighteen years since the applicant's immigration violation. The unfavorable factors in this matter are periods of unauthorized presence in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the favorable factors, in particular the extreme hardship imposed on the applicant's lawful permanent resident spouse as a result of her 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), 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. The acting district director shall continue to process the adjustment application.