

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H3

FILE:

(CDJ 2004 744 075)

Office: MEXICO CITY, MEXICO Date: DEC 29 2008

IN RE:

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.

John F. Grisson, Acting 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 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 a period of one year or more. The applicant has a U.S. citizen spouse. She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her family.

The 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 Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, at 4, dated February 17, 2006.

On appeal, the applicant's spouse details the hardship he is suffering in the applicant's absence and the assistance that she provides him. *Form I-290B*, fee paid April 24, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, statements from the applicant's children, a statement from the applicant's spouse's physician, country conditions information on Mexico, documents related to the applicant's spouse's business and photographs of the applicant's family. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in 1991 and remained in the United States until her departure in May 2005. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 2005, the date of her departure from the United States. 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 and seeking readmission within ten years of her May 2005 departure.¹

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

(B) Aliens Unlawfully Present.-

¹ The applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (making a false report of crime under section 148.5(a) of the California Penal Code (CPC) on May 23, 2001) and under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting a material fact (her failure to disclose her criminal history in her visa application, i.e. her May 23, 2001 conviction under section 148.5(a) of the CPC and section 20002(a) of the California Vehicle Code for hit and run, property damages, etc.). The respective waivers of these grounds of inadmissibility are under sections 212(h) and (i) of the Act and have the same extreme hardship standard as the waiver under section 212(a)(9)(B)(v) of the Act. Therefore, this decision applies to the applicant's inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act.

(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 is dependent first upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant or other family members experience is relevant only to the extent it causes hardship to the applicant's spouse. 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. These factors include the presence of 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. Extreme hardship to the applicant's spouse must be established whether he relocates to Mexico or remains in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he relocates to Mexico. Counsel states that the applicant's spouse has spent more than half of his life in the United States, he has one U.S. citizen child and three lawful permanent resident children, his parents are lawful permanent residents, his brother is a U.S. citizen, he has two U.S.

citizen grandchildren and he is extremely close to his family. *Brief in Support of Appeal*, at 4-5, dated January 19, 2007. Counsel states that if he relocates, the applicant's spouse would not be able to sustain his children and parents, he would lose his business and home, he would be unable to find work that would pay him enough to raise his family in Mexico and the rural living conditions are poor. *Id.* at 5. The record includes a business card, tax returns and letters verifying that the applicant's spouse has his own delivery business. The record reflects that 40 percent of the population of Mexico lives below the poverty line, a large segment of the population is underemployed and there is inequitable income distribution. *The World Fact book, Mexico*, at 1, 5, undated. Counsel details poverty, unemployment and child safety issues in Mexico. *Brief in Support of Appeal*, at 6.

Counsel states that the applicant's spouse has a minimal education, he would be forced to obtain a job in agriculture where he would be in severe pain due to joint inflammation in his back and arms. *Id.* at 7. Counsel states that the applicant's spouse's requires daily medication which costs \$200 per month, his treating physician is in Mexico, he purchases medication in Mexico, and he could not continue with this costly treatment if he resided in Mexico. *Id.* The AAO notes that there is no information in the record concerning the medication taken by the applicant's spouse.

The applicant's spouse's doctor states that the applicant's spouse has systemic arterial hypertension, dislipemia type IV and hyperuricemia; and he requires a diet low in cholesterol, triglycerides and animal proteins. *Letter from [REDACTED]*, dated December 20, 2006. Counsel states that the applicant's youngest son would be forced to join him in Mexico, the average education attained is eight years and his son would most likely need to work to assist with the basic survival of the family. *Brief in Support of Appeal*, at 7. The record reflects that problems in children's health and education in Mexico are pervasive. *Department of State, 2005 Country Reports on Human Rights Practices, Mexico*, dated March 8, 2006. The applicant's spouse also details the loss of opportunity and difficulties his son would encounter in Mexico. *Applicant's Spouse's Statement*, at 5, undated.

The applicant's spouse states that his four children are living with him and would be without a home if he could not pay the mortgage and there is no extra money for their education. *Applicant's Spouse's Statement*, at 5. However, the applicant's spouse states that all of his older children are working and are saving money for college. *Id.* The record does not reflect that the children would be homeless if the applicant's spouse relocated. Moreover, as previously noted, the hardships experienced by the applicant's children are not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent they affect the qualifying relative.

The applicant's spouse also states that he would live in a small ranch three miles from the closest town, where there are no paved roads or public transportation; he is considered too old to employ and he would not earn enough money to feed his family or pay for his medicine. *Id.*

In light of the long-term residence of the applicant's spouse in the United States, his family ties to the United States, the resulting loss of his delivery business and the poor economic situation in Mexico, the AAO finds that extreme hardship has been established in the event that the applicant's spouse relocates to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel states that the applicant's spouse would have to drive 42 hours to visit his spouse, it is difficult for him to visit the applicant as he is the sole income earner and sole proprietor of his business, the expensive cost of flights makes it difficult for him and his children to visit the applicant, and the applicant is in a rural location which makes telephone contact extremely rare. *Brief in Support of Appeal*, at 5. As previously mentioned, the record includes a business card, tax returns and letters verifying that the applicant's spouse has his own delivery business.

The applicant's spouse states that he became depressed when he learned that he would have to wait 16 months for a decision on the applicant's appeal. *Applicant's Spouse's Statement*, at 2. The applicant's spouse states that the same information was submitted for his son's hardship waiver and it was granted. *Id.* The applicant's spouse states that he has been married to the applicant for over 25 years, four of his children still live with him, and he details the important and involved role that she played in his life while in the United States. *Id.* at 4-5. The applicant states that he works from Thursday to Tuesday from 4 AM to 4 PM, he is constantly eating out which is not good for his high blood pressure and cholesterol, and he rarely sees his children. *Id.* at 5. The applicant's spouse's doctor states that the applicant's spouse has systemic arterial hypertension, dislipemia type IV and hyperuricemia; he requires a diet low in cholesterol, triglycerides and animal proteins; and he needs his wife to prepare his food in an appropriate manner at home. *Letter from [REDACTED]*

Considering the impact of separation on the long-term marriage of the applicant and her spouse, and the documented health problems of the applicant's spouse, the AAO finds that extreme hardship has been established in the event that the applicant's spouse remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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 main adverse factors in the present case are the applicant’s misrepresentation, lengthy unauthorized period of stay and criminal record.

The favorable factors include the presence of the applicant’s U.S. citizen spouse and child, three lawful permanent resident children, rehabilitation as reflected by the absence of any additional criminal charges in over seven years and extreme hardship to the applicant’s spouse.

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.