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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

H3

[REDACTED]

FILE: [REDACTED]

OFFICE: PORTLAND, OR

Date: APR 20 2009

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:

[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, Portland, Oregon, 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 district director for continued processing.

The record reflects that the applicant, a native and citizen of Mexico, entered the United States without authorization in January 1997. She did not depart the United States until April 2000. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until her departure in April 2000. She 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.<sup>1</sup> The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse and children, born in 1999 and 2005.

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*, dated November 24, 2006.

In support of the appeal, counsel for the applicant submitted the following: a brief, dated December 27, 2006; a declaration and translation from the applicant's U.S. citizen spouse, dated December 23, 2006; a letter from [REDACTED], Child and Family Therapist, in relation to the applicant's spouse, dated December 21, 2006; and medical documentation regarding the applicant's father. In addition, on December 2, 2008, counsel for the applicant submitted supplemental evidence in support of the appeal, specifically, the applicant's spouse's Certificate of Naturalization, issued on September 30, 2008. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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.

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<sup>1</sup> The applicant does not contest the district director's finding of inadmissibility. Rather, she is filing for a waiver of inadmissibility.

(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 *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The 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).

The record contains several references to the hardship that the applicant's U.S. citizen children would suffer if the applicant's waiver of inadmissibility is not granted. 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. Nor is extreme hardship to the applicant herself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their children cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse further contends that he will suffer emotional and financial hardship if the applicant is removed from the United States. In a declaration he states that he would suffer extreme emotional hardship due to the long and close relationship they have and due to the emotional hardships his U.S. citizen children would experience based on their mother's long-term physical absence, as she has been a stay at home mother—the primary caregiver. The applicant's spouse attests to the emotional hardships he faced as a young child, when he was separated from his

mother at a young age to relocate to the United States to be with his father, and he worries that his children will suffer the same hardships were they to be separated from their mother on a long-term basis. An evaluation has been provided, confirming the applicant's spouse's stress and anxiety in light of his spouse's immigration situation and his own traumatic past. *Assessment from [REDACTED] MSW, QMHP, Child and Family Therapist*, dated February 25, 2006. The applicant's spouse would have to assume the role of primary caregiver and breadwinner to two young children, without the complete support of the applicant.

The applicant's spouse also contends that he would suffer extreme financial hardship as he would have to support two households as it would be difficult, if not impossible, for the applicant, who only completed three years of high school, to find gainful employment in Mexico with sufficient income to support herself, and her parents, who reside in Mexico, would be unable to assist her due to their own financial and physical hardships. *See U.S. Department of State Profile-Mexico*, dated November 2008. The applicant's spouse would also have to find affordable and dependable care for his children, as his relatives are unable to care for his children while he works as they have their own child care and financial responsibilities. He would also have the added costs of traveling back and forth to Mexico to visit his wife, and the risk of losing his full-time employment due to extended absences.

Alternatively, were the children to relocate abroad with the applicant, the applicant's spouse contends that he would suffer extreme emotional hardship as he would be separated from his young children, who are very important to him, and he would suffer due to the lack of educational opportunities for his children in Mexico. Moreover, he would suffer financial hardship as he would have to support two households and would have the added costs of paying for his children's education in Mexico. *Declarations from [REDACTED]*, dated April 24, 2006 and December 23, 2006. Finally, as referenced above, the applicant's spouse would suffer financial hardship due to the costs of traveling back and forth to visit his family, and the concern of losing his full-time employment due to extended absences.

The AAO thus concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were the applicant to reside abroad while he remains in the United States. The applicant's spouse needs his wife's support on a day to day basis. A prolonged separation at this time would cause hardship beyond that normally expected of one facing the removal of a spouse.

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. In this case, the applicant's spouse asserts that relocating abroad to reside with the applicant would cause him extreme emotional, academic and financial hardship. He would suffer emotional hardship due to the hardships he and his children would suffer in Mexico, a country that is unable to provide opportunities comparable to those available in the United States. In addition, the applicant's spouse would be forced to leave the country to which he is accustomed and his family, including his mother, father, four sisters, brother, and nieces and nephews, all residing in the United States and to whom he is close. *Supra* at 4. Moreover, the applicant's spouse has been actively pursuing his

education, including obtaining his General Education Diploma and taking English and computer classes, all in pursuit of a better life for himself and his family. *Supra* at 4. Were he to relocate to Mexico, he would lose the academic opportunities afforded to him in the United States. The employment situation in Mexico is bleak, and the chances of finding gainful employment in Mexico are minimal. Finally, the AAO notes that the U.S. Department of State has issued a travel alert, urging U.S. citizens and permanent residents to consider the risks of travel to Mexico. *Travel Alert-Mexico, U.S. Department of State*, dated February 20, 2009. The AAO concludes that the applicant's U.S. citizen spouse would experience extreme hardship were he to relocate to Mexico 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. 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 . . . 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 favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse and children would face if the applicant were to reside in Mexico, regardless of whether they accompanied the applicant or remained in the United States, the U.S. citizenship or lawful

permanent resident status of the applicant's relatives, support letters, community and family ties and the passage of more than eleven years since the applicant's unauthorized entry to the United States. The unfavorable factors in this matter are the applicant's unauthorized entry and unlawful presence in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. 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)(i)(II), 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 district director shall continue processing the applicant's adjustment of status (Form I-485) application on its merits.