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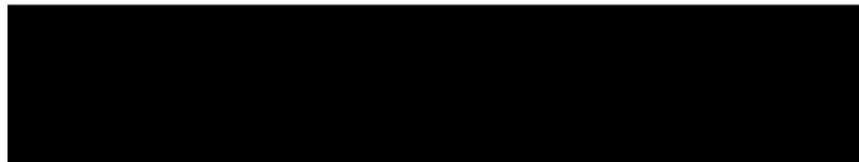
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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: **APR 21 2009**

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) and under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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. Grissom
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 waiver application will be approved.

The applicant, a native and citizen of Mexico, was found inadmissible to the United States under sections 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 under 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. In addition, the AAO notes that the applicant may be inadmissible under section 212(a)(2)(D)(i) of the Act, 8 U.S.C. § 1182(a)(2)(D)(i), for prostitution related activity. The applicant sought a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States with his U.S. citizen spouse and child, born in 2002.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated June 23, 2006.

In support of the appeal, the applicant's representative submits the following, *inter alia*: a brief, dated August 14, 2006; documentation relating to the applicant's child's medical and developmental conditions; a declaration from the applicant's U.S. citizen spouse, dated August 4, 2006; a psychological evaluation of the applicant's spouse, dated July 29, 2006; a letter from the applicant's and his family's pastor, dated July 10, 2006; and a letter confirming the applicant's gainful employment while in the United States, dated July 18, 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...

Section 212(a)(2) of the Act provides, in pertinent part:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- (D) Any alien who—
 - (i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-

- (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General (Secretary) that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Regarding the applicant's ground of inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act of the Act, the record establishes that the applicant entered without inspection in 1989, departed the United States in 1995, and subsequently re-entered the United States one month later. The applicant

voluntarily departed the United States in July 2005. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until his departure in July 2005. The district director correctly found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence. On appeal, the applicant does not contest this finding of inadmissibility.

Regarding the district director's finding that the applicant was also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude, the record is unclear as to whether the applicant was convicted of a crime of moral turpitude and/or prostitution-related activity, thereby making him inadmissible under section 212(a)(2)(D)(i) of the Act.¹ Although the district director references an arrest on or about September 24, 1999 for one count of prostitution, the record does not contain documentation which would confirm that the applicant was ultimately convicted for any crimes. Irrespective of this issue, the AAO has determined that the applicant's unlawful presence in the United States automatically renders him inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant is eligible to apply for a section 212(a)(9)(B)(v) waiver.²

Thus, the first issue to be addressed is whether the applicant's grounds of inadmissibility would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion.

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

¹ Although the applicant's representative has submitted a letter from Michael A. Ramos, District Attorney, County of San Bernardino Office of the District Attorney, dated July 28, 2006, confirming that the applicant was not prosecuted based on an October 10, 1997 citation under section 647b of the California Penal Code, for prostitution-related activity, the district director, in his Decision, referenced a September 1999 arrest for prostitution-related activity. As such, the letter from Mr. Ramos does not conclusively establish that the applicant has not been convicted for a crime of moral turpitude and/or prostitution-related activity at some point in his past.

² As the applicant is clearly inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence, the AAO does not find it necessary to analyze whether the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for a crime involving moral turpitude, and/or under section 212(a)(2)(D)(i) of the Act, for prostitution related activity.

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.

The applicant's spouse asserts that she will suffer extreme emotional, physical and financial hardship were she to reside in the United States while the applicant remains abroad due to his inadmissibility. In a declaration she states that she would suffer extreme emotional hardship due to the long and close relationship they have. In addition, she notes that their daughter was born with meningitis and cerebral palsy and thus, the applicant's spouse depends on her husband for emotional and financial support with respect to their daughter's day to day care and survival. As she contends,

Our daughter needs hundreds of special cares to make her life bearable. At her four years of age she is unable to walk or eat. On an everyday basis, I have to feed her thru a tube that goes thru her stomach. [redacted] [the applicant's child] has to be fed every two hours. At nighttime she has to be hooked to a machine that feeds her throughout the night. Also, I have to change her diaper many times a day. Since she is unable to walk, she has to be on a wheel chair to be transported anywhere. [redacted] needs to take medication three times a day for her muscles, stomach and sometimes for convulsions. Another issue for me is that I have to take my daughter for therapy twice a week to a place that is about half an hour away from home.... I cannot take care of [her] alone for long....

Declaration of [redacted] dated August 4, 2006.

A letter has been provided from [redacted] corroborating the applicant's child's medical situation. [redacted] confirms that the applicant's child has numerous disabilities, which include meningitis at birth, heart problems, feeding problems, VP shunt, epilepsy, GER, developmental delays, vision problems and cerebral palsy. *See Letter from Pediatrician*, dated July 27, 2006. [redacted] concludes that the applicant's child needs 24 hour care and follow-up by specialists.

Based on the documentation provided with respect to the applicant's child's medical and developmental conditions, the gravity and unpredictability of the symptoms associated with her conditions, the short and long-term ramifications for those afflicted and the financial costs associated with the proper care and treatment of said medical conditions by specialists, the AAO concludes that the applicant's spouse would suffer extreme hardship were she to remain in the United States while

the applicant resides abroad due to his inadmissibility. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to a young child who suffers life-threatening medical conditions and debilitating developmental delays that make her dependent on her parents for all functions in her life and for her survival, without the complete emotional, physical and financial support of the applicant. A separation at this time would cause hardship beyond that normally expected of one facing the removal of a spouse.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. Based on the applicant's child's medical and developmental conditions, the gravity and unpredictability of the symptoms associated with her conditions, the short and long-term ramifications for those afflicted, the need for those suffering from said conditions to be treated by professionals familiar with her conditions and the appropriate treatment in an affordable manner and the problematic socio-economic conditions in Mexico, as referenced by the applicant's spouse in a letter dated June 27, 2005, the AAO concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Mexico to reside with the applicant due to his inadmissibility.

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 child would face if the applicant were to reside in Mexico, regardless of whether they accompanied the applicant or remained in the United States, the applicant's child's serious medical and developmental conditions, community ties, the applicant's history of gainful employment and letters of support. The unfavorable factors in this matter are the applicant's unauthorized entry, presence and employment 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, 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 to process the immigrant visa application on its merits.