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U.S. Citizenship
and Immigration
Services



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FEB 06 2009

FILE: [Redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 applicant, [REDACTED] 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. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the district director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the District Director, dated June 26, 2006.* The applicant submitted a timely appeal.

On appeal, counsel states that [REDACTED] was a construction worker in the United States, and that [REDACTED] married [REDACTED] his wife, on December 21, 2003, and they had their first child on August 18, 2003. Counsel conveys that [REDACTED] has a seventh-grade education and has never held a full-time job, and from a prior relationship has two children for whom [REDACTED] has assumed the father and provider role. He states that [REDACTED] regularly assisted his wife's parents with bills and car repairs. Counsel states that [REDACTED] now lives in Michoacan, Mexico, with his parents and earns a small income selling fruit in a nearby city. According to counsel, the evaluation by [REDACTED] a licensed marriage and family therapist, demonstrates that the hardship the applicant's spouse has suffered, and will continue to suffer if the waiver application were denied, rises to the level of extreme hardship.

The AAO will first address the finding of inadmissibility. Section 212(a)(9) 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record reflects that the applicant entered the United States from Mexico without inspection in April 1998, remaining in the United States until July 2005, at which time he returned to Mexico. The applicant therefore accumulated seven years of unlawful presence, from April 1998 to July 2005, and when he departed from the country he triggered the ten-year-bar. Consequently, the district director was correct in finding him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is under section 212(a)(9)(B) of the Act, which provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative,

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In support of the waiver application, the record contains a psychological evaluation of [REDACTED] and an undated letter by [REDACTED]

The evaluation dated July 23, 2006, by [REDACTED] of [REDACTED] states that [REDACTED] is 30 years old, is one of four children, and has lived her entire life in Louisville, Kentucky. She states that [REDACTED] has a seventh-grade education and has never held a full-time job. [REDACTED] states that [REDACTED] has three children, who are 10, 8, and 2 years old, with [REDACTED] being the biological father of her youngest child. She states that [REDACTED] takes care of her children and that [REDACTED] is the family's sole provider. [REDACTED] indicates that while in the United States [REDACTED] was a construction worker, earning a sufficient income to support his family and financially assist his in-laws.

[REDACTED] states that since [REDACTED] return to Mexico in July 2005, he lives with his parents and has a small income selling fruit. Beginning in August 2005, [REDACTED] states that [REDACTED] and her youngest child went to Mexico for five and a half months, living with [REDACTED] s parents, which [REDACTED] states was difficult, they had no running water or sanitary facilities and bathed in a river, and were unable to communicate because she does not speak Spanish.

Since her return to her parent's house in Louisville, [REDACTED] states that [REDACTED] has "experienced a steady downhill emotional decline," and that [REDACTED] indicates that her two-year-old son has become hostile and angry about separation from his father, which causes Ms. [REDACTED] to feel "more and more powerless and depressed." She states that [REDACTED] and her son "have withdrawn from past social connections," and that [REDACTED] worries about the future, crying frequently. [REDACTED] states that [REDACTED] "currently suffers from an adjustment disorder with mixed anxiety and depression, a psychological condition that can worsen with time." [REDACTED] indicates that [REDACTED] has frequent headaches and insomnia, and mood swings that are becoming more severe, with days of lethargy.

[REDACTED] states that if [REDACTED] returns to Mexico with her youngest son, her two other children will be separated from her at a formative time in their lives, and [REDACTED], who is bonded to these children, would be emotionally devastated leaving them. Relocation to Mexico with all the children, [REDACTED] states, would place [REDACTED] and her two older children in a culture that is entirely foreign to them. Neither [REDACTED], nor her older children, she conveys, understand or speak Spanish and there would be no Spanish training in the schools there. She states that it is likely the family would live without basic services in Mexico.

[REDACTED] states that if [REDACTED] were to remain in the United States without her husband her parents would not be in a position to assist her financially or in the care of her children as they live on a fixed income and have serious health problems. She states that [REDACTED] conveys that her

father receives disability assistance and had stomach cancer in 1989 and part of his stomach removed and also has heart problems, and her mother was in a car accident and is unable to work.

indicates that either relocation to Mexico or staying in the United States without the support of has serious implications for and for the whole family. She anticipates's adjustment disorder will be exacerbated by the absence of her husband and the burdens of caring for the children alone, causing her to "become less and less able to provide for her own care and for the children." She states that "if this family had other resources and strengths to face this challenge they would be more resilient at this point, but they do not."

In an undated letter, states that she was born and raised in Louisville, Kentucky, and has always lived there. She states that the children from her prior relationship consider her husband their father, and that their biological father does not have anything to do with them. She conveys that she cannot financially provide for her children in the United States without her husband. She states that the financial hardship would be devastating if she moved to Mexico because she knows that her husband would not be able to find a good job to take care of their children. She indicates that she has a close relationship with her husband.

All of the evidence in the record has been carefully considered by the AAO in rendering this decision.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

With regard to family separation, courts have stated that "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); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to 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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s wife must be established in the event that she joins the applicant; and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In her detailed evaluation [REDACTED] conveys that [REDACTED] has a seventh-grade education, has never held a full-time job, and has an adjustment disorder with mixed anxiety and depression due to raising three young children without the emotional or financial support of her husband. She anticipates the burden of caring for her children alone will exacerbate [REDACTED]’s disorder and diminish her ability to provide care for herself and her children. [REDACTED] states that her parents are limited in assisting her. In light of these hardship factors, the AAO finds that [REDACTED] has experienced, and will continue to experience, extreme hardship if she were to remain in the United States without her husband.

Furthermore, the psychological evaluation conveys that relocation to Mexico would place the applicant’s spouse and her two older children in totally foreign environment where they do not understand the language and would likely not have basic services. Although hardship to the applicant’s children is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by [REDACTED], as a result of her concern about the well-being of her children, is a relevant consideration here. She would be dealing with her own adaptation to a foreign culture while simultaneously having to help her children adapt. Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to [REDACTED] rises to the level of extreme hardship if she joins her husband in Mexico.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant’s spouse and his familial ties to the United States through his spouse, child and step-children. The unfavorable factors in this matter are the applicant’s entry into the United States without inspection, his unlawful presence, and periods of unauthorized employment. The AAO notes that the record shows that the applicant was arrested for having an open container and no driver’s license in July 2001, but there does not appear to be a conviction based upon the arrest or any other criminal activities.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant’s breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the

applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.