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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: JAN 29 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:

SELF-REPRESENTED

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 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 resided in the United States from March 2002, when she entered without inspection, to October 2006, when she returned to Mexico. She was found to be inadmissible to the United States under 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 one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant 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 return to the United States and reside with her spouse and children.

The district director concluded that the applicant 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 23, 2007.

On appeal, the applicant asserts that her husband is suffering emotional and financial hardship as a result of separation from the applicant. Specifically, the applicant's husband states that separation from the applicant and having to provide care on his own for their children, including one daughter who has chronic, persistent asthma, is causing him to suffer hardship. Further, he states that he has been employed with the same company for ten years, and that he fears losing his job, which provides insurance benefits that pay for his daughter's asthma medications and treatments. In support of the appeal and waiver application the applicant submitted the following documentation: Letters from the applicant and her husband, letters from the applicant's daughter's pediatrician, letters from the principal of the school attended by the applicant's two daughters, copies of medical records for the applicant's daughter, and letters from friends and from the pastor of the applicant's church in support of the waiver application. The entire record was reviewed and considered in rendering this decision.

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

- (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 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.

The record contains references to hardship the applicant's children would experience if the waiver application is denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These 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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's wife would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The record reflects that the applicant is a thirty-four year-old native and citizen of Mexico who resided in the United States from March 2002 to October 2006, when she returned to Mexico. The record further reflects that the applicant's husband, whom she married on January 12, 2002, is a thirty-seven year-old native of Mexico and citizen of the United States. The applicant currently resides in Mexico City, Mexico and her husband resides in Yakima, Washington with their two daughters.

The applicant's husband states that he and his two daughters have suffered financial, physical, and mental hardship since the applicant departed the United States in 2002. He states that he relies on his job to provide benefits to pay for his daughter's asthma treatments, including two different inhalers and daily treatments with a nebulizer machine. He further states,

This is how her asthma is being controlled, but still she had so far four asthma attacks this year. All this (sic) medicines and treatments cost about 300.00 dollars a month, and (sic) is thanks to the medicine is that I was able to save my daughter . . . I cannot function fully without my wife helping me to take proper care of her . . . Also I had to leave work several times to (sic)care of my daughter [REDACTED] and I cannot miss too much work or my employment will be terminated. *Letter from [REDACTED]* dated December 12, 2007.

A letter from the applicant's daughter's pediatrician states that [REDACTED] has had moderate persistent asthma her entire life and needs multiple medications to control her symptoms. *Letter from Dr. [REDACTED]* dated December 13, 2007. The letter further states,

Without treatment, [REDACTED] could die, as she could stop breathing. She has been in Emergency Rooms and Hospitals for her asthma. It is unlikely she will "outgrow" her asthma, as she is still symptomatic at 11 y.o. If she had to relocate to a big city like Mexico City, her symptoms would be significantly exacerbated. . . . Many of her treatments are time consuming, and require parental support. [REDACTED] father has been doing the best he can, but [REDACTED] really needs her Mom for treating her symptoms. Additionally, [REDACTED] is starting to exhibit severe signs of depression. She has lost interest in eating, playing, school, and extra-curricular activities. . . . As [REDACTED] Pediatrician, I request that [REDACTED] and her mother be reunited. *Letter from [REDACTED]* dated December 13, 1997.

Records from Yakima Valley Memorial Hospital submitted with the waiver application further indicate that [REDACTED] was hospitalized in July 2006 due to her asthma. Further, [REDACTED] states in a subsequent letter that the applicant's younger daughter has developed migraine headaches since the applicant's departure and that her father has had to take time off of work to attend to her, and fears he may lose his job because he has missed so much work. *Letter from [REDACTED]* dated October 31, 2008.

The applicant's husband states that he works rotating shifts and must work afternoons and nights, and he fears his daughter [REDACTED] will have an asthma attack while he is not with her. *Undated letter*

from [REDACTED] A letter from the principal of the girls' school also states that the girls are "sad and worried about their mother, and this makes doing well at school difficult." Letter from [REDACTED] dated October 20, 2006. Principal [REDACTED] further states,

Her daughters need to have their mother with them to give emotional and academic support. Dad is working full time and works a rotation shift, so for two weeks at a time, he does not get to spend time with his girls when they are awake. *Id.*

The applicant's husband further states that he has been employed with Weyerhaeuser Company for ten years, and that where they reside in Yakima Washington is the place they call home. Letter from [REDACTED] dated December 12, 2007. His daughter's pediatrician states that if [REDACTED] had to relocate to Mexico City, where the applicant currently resides, "her symptoms would be significantly exacerbated," and states that asthma attacks are "brought on by things such as pollution, extreme weather changes, illness etc." Letter from [REDACTED] dated December 13, 2007.

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that her husband would experience extreme hardship if she is denied admission to the United States. The evidence on the record indicates that the applicant's stepdaughter [REDACTED] suffers from persistent asthma and that the applicant was primarily responsible for her treatments, as well as providing for the general needs of both her stepdaughters. The applicant's husband states that the girls' biological mother abandoned them when they were very young, and the applicant is the only mother they have known. Undated letter from [REDACTED]. Although her daughters are not qualifying relatives, the emotional effects on the applicant's husband of any hardship they would experience as a result of separation from the applicant is a relevant factor in assessing extreme hardship. The evidence on the record further indicates that the applicant's husband is having great difficulty proving the care his daughters need for their medical conditions, and that he fears his older daughter will have a serious asthma attack and he will not be there to treat her because of his work schedule. He also fears he will lose his job because of the time he must take off to care for his daughters, and would not then be able to afford the medications and daily treatment his daughter needs. The emotional effects of the hardship to his daughters and the difficulty he is having in maintaining his employment and providing the care his daughters need, combined with the emotional and financial hardships caused by separation from the applicant, rise to the level of extreme hardship for the applicant's husband if he remains in the United States. Further, as noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

The evidence further indicates that the applicant's daughter suffers from persistent asthma that can be life-threatening if not treated, and would be exacerbated if she relocated to Mexico. The emotional effects on the applicant's husband of his daughter's condition, which would likely worsen if she moved to Mexico, combined with financial hardship caused by leaving his employment in the United States, would amount to extreme hardship if the family relocated to Mexico to reside with the applicant.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(a)(9)(B)(v) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factor in this case is the applicant's illegal entry and unlawful presence in the United States from 2002 to 2006. The positive factors in this case include the applicant's significant family ties to the United States, including her husband and stepdaughters; hardship to the applicant's husband and stepdaughters if she is denied admission to the United States; letters in support of the waiver application from friends, her stepdaughters' school principal, and her church pastor indicating that the applicant is a good mother who volunteered regularly at the church, was involved in the girls' education, and also obtained her GED when she resided in Yakima, Washington; and her lack of a criminal record.

Although the applicant's immigration violation cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.