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U.S. Citizenship
and Immigration
Services

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FILE [REDACTED] Office: MEXICO CITY
(CDJ 2004 677 427 relates)

Date:

MAR 05 2009

IN RE: [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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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 more than one year. The applicant is married to a naturalized U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 212(a)(9)(B)(v), in order to reside with her husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated April 10, 2006.

On appeal, counsel contends that the applicant's husband has suffered and will continue to suffer extreme hardship if the applicant's waiver application is denied.

The record contains, *inter alia*: a copy of the marriage license of the applicant and her husband, indicating they were married on December 6, 2002; copies of the birth certificates of the couple's two daughters; the applicant's declaration; letters from the applicant and the couple's daughters; letters from the applicant's doctor; a disability certificate; a copy of the applicant's medical records; letters from the couple's daughter's doctor; tax documents; school records; photographs of the applicant and his family; and a copy of an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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 -

....

(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.

In this case, the district director found, and counsel does not contest, that the applicant entered the United States without inspection in 1991 and remained until June 2005 when she returned to Mexico. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure from the United States in June 2005. Therefore, the applicant accrued unlawful presence for over eight years. She now seeks admission within ten years of her June 2005 departure. Accordingly, she is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. *See* section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). Hardship the applicant herself may experience, or hardship the applicant's children may experience, are not permissible considerations under the Act. *Id.* Once extreme hardship to a qualifying relative 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).

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. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: 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 relocate. *Id.* at 566. The BIA has held:

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 Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

The record reflects that the applicant and her husband began their relationship shortly after she arrived in the United States in 1991. *Declaration of* [REDACTED], dated April 27, 2006. They had their first child in April 1996 and their second child in October 1997. On September 29, 2000, [REDACTED] became extremely ill with severe pancreatitis. He underwent surgery on October 7, 2000, and fell into a coma for two months. [REDACTED]’s medical records indicate that he subsequently underwent a series of additional surgeries for his pancreatitis on November 4, 2000, November 8, 2000, November 21, 2000, January 5, 2001, and in May 2002. After surviving the surgeries and coming out of a coma, [REDACTED] was diagnosed with diabetes as a result of his pancreas not functioning properly. He requires insulin injections twice daily. In addition, for approximately one year, [REDACTED] required the use of a colostomy bag. Most recently, on April 30, 2006, [REDACTED] was hospitalized for eight days due to his “chronic pancreatitis.” *Letter from* [REDACTED], dated April 30, 2006. [REDACTED] states that [REDACTED] must continue with “strict medical management,” should maintain a good diet, and requires the care of his wife to “avoid possible down falls.” *Id.* The applicant contends [REDACTED] needs her assistance in ensuring he takes his medications on time and that he eats regularly and properly. *Letter from* [REDACTED], dated May 2, 2006. [REDACTED] states that the doctors have told him that his diabetes is permanent and that he will need special care for the rest of his life. *Declaration of* [REDACTED] *supra*. [REDACTED] states that he loves his wife with all his heart and that her absence, as well as the absence of his daughters who went to Mexico with the applicant, has been devastating to him and very damaging to his health. *Id.*

Upon a complete review of the record, the AAO finds that the applicant has established that her husband will experience extreme hardship if her waiver application is denied. The AAO notes that to the extent the record contains evidence of hardship on the applicant and the couple’s children, as explained above, hardship the applicant or her children experience is not a permissible consideration under the statute. See Section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

In this case, given [REDACTED]’s serious health problems, the denial of a waiver of inadmissibility constitutes extreme hardship. It is evident from the record that [REDACTED] has chronic

pancreatitis that has necessitated numerous surgeries and hospitalizations over the course of more than six years. The record shows that when [REDACTED]'s pancreatitis bothers him, he suffers from stomach pain, vomiting, and a very swollen abdomen. He is unable to work when he is experiencing pancreatitis and, as [REDACTED] doctor states, he requires the assistance of his wife to manage his medical care and monitor his health in order to avoid another possibly serious "down fall." *Letter from [REDACTED]; supra.* In addition, [REDACTED] pancreatitis has caused him to have diabetes, which he has been told will be permanent, requiring insulin injections and regular monitoring of his blood sugar levels. He has also needed to rely on a colostomy bag. Based on [REDACTED]'s serious health conditions and need for assistance from his wife, the AAO finds that the denial of the applicant's waiver application would result in extreme hardship to her U.S. citizen spouse.

Moreover, moving to Mexico with the applicant to avoid separation would be an extreme hardship for [REDACTED]. Even assuming [REDACTED]'s physical health would permit him to move to Mexico, relocating to Mexico would disrupt the continuity of his health care and the procedures his doctors have in place to treat him. In addition, [REDACTED] has lived in the United States for over thirty years since 1978 and would need to readjust to a life in Mexico, a difficult situation made even more complicated by his diabetes and chronic pancreatitis. In sum, the hardship [REDACTED] would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant's initial entry into the United States without inspection and her unlawful presence in the country. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission, particularly in light of his serious medical conditions; two U.S. citizen children; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when 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.