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U.S. Citizenship
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Services

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FILE: Office: MEXICO CITY, MEXICO Date: **MAR 30 2009**

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

A handwritten signature in cursive script that reads "Michael Shumway".

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Colombia 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 and seeking readmission within 10 years of her last departure from the United States. The applicant is married to a U.S. citizen and has two U.S. citizen children. She seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the record failed to establish extreme hardship to her U.S. citizen spouse as a result of her inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated July 26, 2006.

On appeal, counsel states that the applicant's spouse has been diagnosed with schizoaffective disorder and as a result is under the care of a number of physicians and is unable to work. Counsel states that he is submitting documentation of the applicant's spouse's condition because he does not believe this condition was taken into consideration when the district director denied the applicant's waiver application. *Form I-290B*, dated August 24, 2006.

The record indicates that the applicant last entered the United States in March 1997. The applicant remained in the United States until May 2005. Therefore, the applicant accrued unlawful presence from April 1, 1997 when the unlawful presence provisions were enacted under the Act until May 2005, when she departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of her May 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

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 and/or parent of the applicant. Hardship the alien experiences or her children experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's U.S. citizen or lawful permanent resident spouse and/or parent.

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 applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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 relocate. *Id.* at 566.

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). 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).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Colombia and in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The record includes a letter from the applicant's mother-in-law stating that her son, the applicant's spouse has been diagnosed as a schizophrenic with bipolar disorder and has been put on disability. *Letter from* [REDACTED] dated December 25, 2007. She states that losing his family has made her son, the applicant's spouse, more depressed. She states that his wife is in Colombia and his stepdaughter, [REDACTED], has been moving from household to household because she is an adolescent and needs the supervision and stability of having her mother with her. The applicant's mother-in-law states that she is trying to help raise her granddaughter, [REDACTED], but she states that she is old and has many chronic illnesses. She states that since the applicant returned to Colombia her son and granddaughter have moved in with her, but that the situation has become so hard for her son that he has made two attempts at suicide and has been hospitalized multiple times. *Id.*

The applicant's spouse states that when he became sick and disabled his wife worked very hard to support him financially and emotionally. *Spouse's Statement*, dated August 19, 2006. He states that due to her not being able to return to the United States he and his daughter had to move in with his parents. *Id.*

Medical documentation in the record includes a letter from the applicant's spouse's psychiatrist, various documentation of treatment, evidence that the applicant is on disability and a report on schizoaffective disorder. The applicant's spouse's psychiatrist, [REDACTED], states that the applicant's spouse has been his patient since his discharge from the hospital in September 2004. *Letter from* [REDACTED], dated August 24, 2006. He states that the applicant's spouse suffers from severe psychiatric illness and schizoaffective disorder. He states that the applicant's spouse is currently on three medications, is unable to leave his home due to his severe psychosis and needs constant supervision. [REDACTED] states that the presence of the applicant is crucial for the applicant's spouse's wellbeing and for his round-the-clock care. *Id.*

The AAO notes that the record also includes statements from the applicant's daughters. The applicant's oldest daughter, [REDACTED], states that she failed ninth grade while in Florida because she missed her mother and would get really sick. *Letter from Applicant's Daughter*, dated August 17, 2006. She states that she has since relocated to Colombia, but cannot go to school because she cannot read or write Spanish. She states that she is homesick and misses her family in the United States. *Id.* The applicant's youngest daughter, [REDACTED] states that she misses the applicant, that her father is very sick and that she feels very alone. *Letter from Applicant's Daughter*, dated August 20, 2006. She asks for her mother to be able to come back to the United States. *Id.*

The AAO finds that due to the severe nature of the applicant's spouse's illness, his need for constant care and the existence of a U.S. citizen daughter that requires his care, the applicant's spouse is suffering extreme hardship as a result of the applicant's inadmissibility. In addition, he would suffer extreme hardship as a result of being relocated to Colombia, away from his current doctors, treatment and family.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 section 212(h)(1)(B) 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 adverse factor in the present case is the applicant's unlawful presence in the United States. The favorable factors in the present case are the applicant's family ties to the United States; extreme hardship to her U.S. citizen spouse and the hardship the applicant's U.S. citizen daughters are suffering as a result of her inadmissibility; and the applicant's lack of a criminal record or offense.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.