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U.S. Citizenship
and Immigration
Services

H3

[Redacted]

FILE: [Redacted]
(CDJ 2004 749 055 relates)

OFFICE: MEXICO CITY (CIUDAD JUAREZ)

Date **MAR 30 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:

[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.

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 matter will be returned to the district director for continued processing.

The record reflects that the applicant, a native and citizen of Mexico, entered the United States without authorization in 1991. He did not depart the United States until October 2005. The applicant accrued unlawful presence from April 17, 1998, when he turned 18 years of age¹ until October 2005. He was thus 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.² The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children, born in 2000, 2001 and 2003.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated June 30, 2006.

In support of the appeal, counsel for the applicant submitted a brief, dated September 27, 2006 with referenced exhibits. In addition, on March 5, 2007, counsel for the applicant submitted supplemental evidence in support of the appeal. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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-

....

¹ Section 212(a)(9)(B) of the Acts states, in pertinent part:

(iii) Exceptions—

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

² The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

(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 *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

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).

The record contains several references to the hardship that the applicant's U.S. citizen children would suffer if the applicant's waiver of inadmissibility is not granted. Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their children cannot be considered, except as it may affect the applicant's spouse.

The applicant's U.S. citizen spouse further contends that she will suffer emotional and financial hardship if the applicant is removed from the United States. In a declaration she states that she would suffer extreme emotional hardship due to the long and close relationship they have. She also asserts that she will suffer emotionally because of the constant worries she has for her husband who suffers from hypothyroidism and only has one kidney, which makes him more prone to infections and other medical problems in Mexico. She notes that medical treatment is cost prohibitive and not readily accessible in Mexico, unlike in the United States, where he is able to get affordable health care and prescription medications as needed. Finally, she asserts that she will suffer extreme financial hardship as she and her husband started a landscaping business, but without the applicant to do the heavy work, the business is unsustainable. She further references that she and the applicant managed their apartment building in lieu of paying rent. However, without the applicant's presence in the United States to perform his duties as handyman, she is unable to fulfill the job duties and is now forced to pay rent. *Supplemental Declaration of [REDACTED]* dated May 9, 2006. Due to the financial hardships referenced above, the applicant's spouse has been forced to seek aid in the form of food stamps to insure that she and the children have food on the table. *Additional Evidence in Support of Appeal*, dated March 5, 2006.

Documentation to corroborate the above statements has been provided by counsel. Were the applicant unable to reside in the United States, the applicant's U.S. citizen spouse would have to assume the role of primary caregiver and breadwinner to three young children, without the complete emotional, physical and financial support of the applicant. Moreover, as the applicant's spouse asserts, and country condition reports corroborate, the applicant has been unable to find gainful employment in Mexico with sufficient income to support his spouse and children in the United States; the applicant is working 14-16 hours a day but earning approximately \$50.00 per week. See *U.S. Department of State Profile-Mexico*, dated November 2008. Finally, the applicant's spouse would be constantly concerned with the applicant's medical situation while in Mexico, thereby causing her hardship. The AAO thus concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were the applicant to reside abroad while she remains in the United States. The applicant's spouse needs her husband's emotional and financial support on a day to day basis.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. In this case, the applicant's spouse asserts that relocating abroad to reside with the applicant would cause her extreme emotional and financial hardship. She would suffer emotional hardship due to the hardship her children would suffer in Mexico, a country that is unable to provide educational opportunities comparable to those available in the United States and a place where, when the children have visited in the past, have become sick, thereby compromising their health. Moreover, the applicant's spouse's concerns with respect to her husband's medical conditions while living in Mexico would cause her hardship. In addition, as documented, the employment situation in Mexico is bleak, and the chances of finding gainful employment in Mexico are minimal. Finally, the applicant's spouse would be forced to leave the country to which she is accustomed and her family, including her father, step-mother, and siblings, all residing in the United States and to whom she is close. *Supra* at 1, 4.

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 children would face if the applicant were to remain in Mexico, regardless of whether they accompanied the applicant or remained in the United States, the applicant's medical conditions, the applicant's history of gainful employment, letters in support provided on behalf of the applicant, community ties and payment of taxes. 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 under section 212(a)(9)(B)(i)(II), 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 processing the immigrant visa application on its merits.