

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

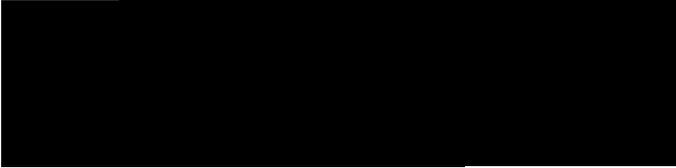


U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

fl3



FILE:

Office: MEXICO CITY (PANAMA) Date:

MAY 19 2009

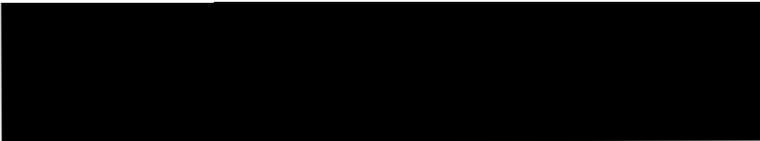
IN RE:



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.

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. 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 for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to enter the United States and reside with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen wife and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated November 29, 2006.

On appeal, counsel for the applicant asserts that the applicant has shown that his wife will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief from Counsel*, dated February 7, 2007. Counsel contends that the district director failed to consider the elements of hardship to the applicant's wife in aggregate. *Statement from Counsel on Form I-290B*, dated December 21, 2006.

The record contains statements from counsel; a copy of the applicant's wife's birth certificate; a copy of the applicant's marriage certificate; a copy of the applicant's passport; copies of birth certificates for the applicant's stepson and stepdaughter; documentation relating to the applicant's and the applicant's wife's employment; reports on conditions in Colombia; documentation relating to the applicant's stepson's diagnosis of autism, as well as reports on his progress and capacity; financial and tax documentation for the applicant's family; statements from the applicant and his wife, and; information regarding the applicant's unlawful presence in the United States. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

The record reflects that the applicant entered the United States without inspection on or about April 9, 2001. He remained without a legal immigration status until approximately January 6, 2006. Accordingly, he accrued over four years of unlawful presence in the United States. He applied for an immigrant visa at the U.S. Embassy in Bogota, Colombia pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

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. Hardship the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. 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 (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.

On appeal, counsel for the applicant asserts that the applicant has shown that his wife will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief from Counsel*, dated February 7, 2007. Counsel contends that the district director failed to consider the elements of hardship to the applicant's wife in aggregate. *Statement from Counsel on Form I-290B*, dated December 21, 2006.

Counsel explains that the applicant's wife resides with her two children from a prior relationship, including her son who is 17 years of age, and her daughter who is 15 years of age. *Brief from Counsel* at 3.

Counsel notes that the applicant's stepson has been diagnosed with autism. *Id.* Counsel states that the applicant's wife would endure significant hardship due to her son's autism, whether she relocates to Colombia or remains in the United States without the applicant. *Id.* at 9-10. Counsel contends that the applicant's wife cannot relocate to Colombia due to her son's needs. *Id.* Counsel states that the applicant's wife would be unable to provide her son with an environment in Colombia that would be conducive to his development. *Id.* at 10. Counsel indicates that the applicant's wife's son will suffer a lack of care if the applicant is prohibited from returning to the United States, which will cause him to deteriorate mentally. *Id.* Counsel explains that the applicant's presence affords the applicant's wife a respite from her responsibilities to care for her son, as he supports her emotionally. *Id.*

Counsel asserts that the applicant's wife will suffer emotional hardship if she relocates to Colombia due to a decrease in standard of living, a lack of employment opportunities, and separation from her children. *Id.* at 11.

Counsel explains that the applicant's wife has ties to the United States, including the presence of all of her relatives, and the fact that she owns a home in Florida. *Id.*

The applicant's wife explained that she has resided with the applicant and her two children. *Statement from the Applicant's Wife*, dated January 4, 2006. She provided that she has had to take a second job to meet her family's economic needs due to the applicant's absence. *Id.* at 1. She expressed that she fears that her children will suffer due to separation from the applicant and the fact that she must be away more due to her second job. *Id.* The applicant's wife indicated that her son has autism and language impairment, and that he attends special needs classes. *Id.* She expressed that she cannot fathom relocating him to Colombia. *Id.* She explained that her daughter attends a strong educational institution, and that she does not wish to move her to Colombia where she would not have access to comparable education. *Id.* The applicant's wife indicated that neither of her children is fluent in Spanish, thus they would have further difficulty adjusting to life in Colombia. *Id.* at 2.

The applicant's wife provided that her son's autism may become worse if he is separated from the applicant for a long period and suffers prolonged turmoil in their family. *Id.* at 1.

The applicant's wife stated that she fears relocating to Colombia due to reports of kidnappings. *Id.* at 2. She stated that she fears she or her children would be targets for crime due to their U.S. nationality. *Id.*

The applicant's wife expressed that she wishes to have the applicant in the United States, as he is a good husband and father. *Id.* She stated that the applicant's presence is essential to the physical and emotional well-being of their family. *Id.*

The applicant stated that his wife and children will endure extreme hardship if he is prohibited from returning to the United States. *Statement from the Applicant*, dated January 4, 2006. The applicant provided that his stepson with autism requires a stable family environment, and that a 10-year separation could be detrimental to his growth and development. *Id.* at 1. The applicant stated that his wife will continue to experience hardship due to the need to work a second job to meet her family's economic needs. *Id.* He provided that her time away will have long-term negative effects for their children. *Id.*

The applicant stated that his wife would be unable to find employment in Colombia that is comparable to her current position as a transcriptionist. *Id.* The applicant explained that his wife will experience economic hardship if he is prohibited from entering the United States, and that she may be unable to make mortgage payments, raise their children, and maintain their household tasks. *Id.* at 2.

Upon review, the applicant has shown that his wife will experience extreme hardship should he be prohibited from entering the United States. The applicant has shown that his wife would experience extreme hardship should she relocate to Colombia to maintain family unity. The record contains extensive documentation regarding the applicant's stepson's capacity and needs due to a diagnosis of autism. The applicant's stepson receives services in the United States. The AAO finds it reasonable that to separate him from his community and activities in the United States and relocate him to Colombia would create a disturbance in his progress and mental state. Such a change would create substantial emotional hardship for the applicant's wife. This element of hardship distinguishes the applicant's wife's challenges from those which are ordinarily experienced when a spouse relocates to a foreign country due to inadmissibility.

The applicant has shown that his wife would experience other elements of hardship should she relocate to Colombia, including the separation from her family and community in the United States, the loss of her employment, the loss of the ability to reside in the home that they own, and the challenges she would face due to conditions in Colombia including a risk of crime and a lack of economic opportunities. It is reasonable that the applicant's wife would experience additional emotional hardship due to the challenges that her children would face, including the loss of educational opportunities, the need to adapt to an unfamiliar language and culture, and a reduction in their general standard of living.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that his wife would experience extreme hardship should she relocate to Colombia.

The applicant has shown that his wife would experience extreme hardship should she remain in the United States without him. As discussed above, the applicant has submitted clear documentation to show that his wife has responsibility for their 17-year-old son who has autism and language development disability. The AAO appreciates the challenge of caring for a child or young adult with disability, including emotional and economic hardship. It is reasonable that the applicant's presence

would be of significant benefit to his wife, serving to support her emotionally and to assist her in meeting her economic needs.

The applicant's wife expressed that she will experience hardship due to her children's prolonged separation from the applicant should they remain in the United States. Direct hardship to an applicant's child is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. As is possible in the present case, when a qualifying relative is left alone in the United States to care for children, it is reasonable to expect that the children's emotional state due to separation from the applicant will create emotional hardship for the qualifying relative. The AAO acknowledges that the applicant's wife will experience additional hardship due to sharing in her children's loss of the applicant's daily presence.

It is noted that the applicant and his wife earned a combined income of \$20,412 in 2005, and the applicant's wife earned \$26,609.53 in 2004. Thus, the applicant's wife is of modest means, which lends weight to her claim to require two jobs to meet the financial needs of herself and her two children. The AAO finds it reasonable that the applicant's wife would experience significant economic and emotional hardship if she must work outside the home for a lengthy period, possibly requiring the expenses of childcare services for her son and disrupting the stability of his home life.

The applicant's wife expressed that she is close with the applicant and that she wishes for them to reside together in the United States. While emotional hardship due to separation is a common result of inadmissibility, the AAO acknowledges that family separation, by itself, is a significant hardship.

Based on the foregoing, considering all elements of hardship to the applicant's wife in aggregate, the applicant has shown that his wife will experience extreme hardship should he be prohibited from entering the United States and she remain. Thus, the applicant has shown by a preponderance of the evidence that denial of the present waiver application will result in extreme hardship to his U.S. citizen wife. Section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility 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 factors in this case consist of the following:

The applicant entered the United States without inspection and remained for over four years without a legal immigration status, in violation of the immigration laws of the United States.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from entering the United States; the applicant is helpful to his family, including providing support for a child with autism and language disability, and; the record reflects that the applicant has an inclination to work and pay taxes in the United States.

While the applicant's violation of U.S. immigration law 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.