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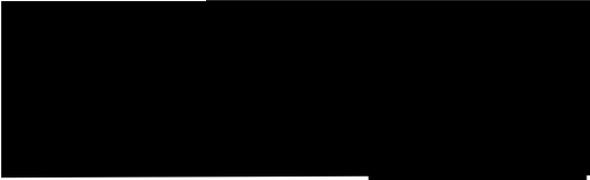
U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Rm. 3000  
Washington, DC 20529-2090



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Office: PHOENIX, AZ

Date: FEB 20 2009

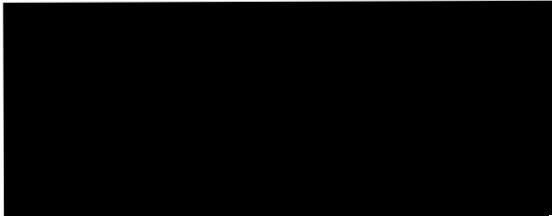
IN RE:



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:



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, Phoenix, Arizona, 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 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 a period of one year or more and seeking readmission within ten year of her last departure. The applicant's spouse is a lawful permanent resident and she seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on her spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, at 3, dated August 18, 2006.

On appeal, counsel asserts that the district director failed to give adequate weight to the applicant's spouse's potential loss of his lawful permanent residence and that a long separation will make having a baby nearly impossible. *Form I-290B*, received September 20, 2006.

The record includes, but is not limited to, counsel's brief, counsel's brief in response to the district director's Request for Evidence, the applicant's statement, a physician's letter for the applicant, the applicant's medical records and the applicant's spouse's business license. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in January 1995, departed the United States on or around March 25, 2002 and returned to the United States on March 26, 2002 in V nonimmigrant status. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until on or around March 25, 2002, the date of her 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 having been unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of her March 25, 2002 departure. The AAO notes that section 245(i) of the Act does not waive this ground of inadmissibility.

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 is dependent first upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse or parent of the applicant. 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. These factors include the presence of lawful permanent resident or United States citizen family ties to 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in Mexico or remains 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 first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides in Mexico. Counsel states that the applicant's spouse would have to relinquish his lawful permanent residence if he accompanied the applicant to Mexico. *Brief in Support of Appeal*, at 1, undated. Counsel states that a bleak financial future awaits the applicant's spouse, he has no idea how to start a similar business in Mexico, there is obvious knowledge that Mexicans are flooding the United States for the lowest paying jobs and he should not be forced to prove the obvious. *Id.* at 2. The record does not include persuasive evidence of the counsel's claims of financial hardship. However, based on the potential loss of the applicant's spouse's lawful

permanent residence, the AAO finds that he would suffer extreme hardship if he resided in Mexico permanently.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel states that the applicant's spouse has lived in the United States for over 20 years, he has been a lawful permanent resident for over 19 years, he has a 12 year old U.S. citizen daughter and he is struggling to have another child. *Id.* at 1. Counsel states that the applicant's spouse's daughter is in school and he needs the applicant's help in raising the child. *Id.* The record does not include a birth certificate for the girl claimed to be the applicant's spouse's daughter or other evidence establishing that he is her father. Counsel states that the applicant and her spouse have been visiting fertility clinics since 1996, the applicant has no child of her own and the couple is working very hard to have a child. *Id.* at 2. The record reflects that the applicant has been a patient of the South Phoenix Community Health Center since June 25, 2003, she has been evaluated for DUB associated with infertility, she has been unable to conceive after multiple treatments (clomid and injectables) and multiple evaluations, she is being seen by an infertility specialist, and her spouse has been evaluated and suffers from hypogonadism associated with low sperm count. *Letter from [REDACTED] dated May 11, 2006.* Counsel states that the financial burden of maintaining two households requires the applicant's spouse to get another job. *Brief in Response to Request for Evidence*, at 8, dated May 12, 2006. The AAO notes that the record does not establish that the applicant could not work in Mexico or receive money from her parents, thereby reducing the financial burden on her spouse. However, considering the documented history of fertility treatment, and the inability to continue to pursue fertility treatment in the United States without the applicant's presence, the AAO finds that the applicant's spouse would suffer extreme hardship if he remained in the United States without the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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 adverse factors are the applicant’s initial entry without inspection, and her period of unlawful presence.

The favorable factors include the presence of the lawful permanent residence spouse, approved Form I-130, lack of a criminal record and extreme hardship to the applicant’s spouse.

The AAO notes that the violations of law committed by the applicant are 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.