

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

144

[Redacted]

FILE:

[Redacted]
(CDJ 2004 590 105)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: MAR 05 2009

IN RE:

[Redacted]

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:

[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 cursive script, appearing to read "John F. Grisson".

John F. Grisson, 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 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 and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with spouse and their child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated February 10, 2006.

On appeal, counsel for the applicant contends that United States Citizenship and Immigration Services (USCIS) has erred in finding that he has failed to meet the burden of establishing extreme hardship to his qualifying relative as necessary for a waiver under 212(a)(9)(B)(v) of the Act. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a statement from the mother of the applicant's spouse; a medical letter for the mother of the applicant's spouse; statements from the applicant's spouse; school records for the applicant's son; a statement from the applicant's pastors; employment letters for the applicant's spouse; court records; and a gas bill statement. 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.

In the present application, the record indicates that the applicant entered the United States without inspection in February 1997 and voluntarily departed the United States in April 2005. *Consular Notes, American Consulate General, Ciudad Juarez, Mexico*, dated April 14, 2005. The applicant, therefore, accrued unlawful presence from April 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States in April 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of his April 2005 departure from the United States. The applicant is, therefore, 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 a violation of 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 citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or his child would experience is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. If 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 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or the United States, as she is not required to reside outside 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.

If the applicant's spouse travels with the applicant to Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. The applicant's spouse lives with her mother who is unable to support herself due to her medical conditions and lives with her daughter. *Statement from the mother of the applicant's spouse*, dated March 9, 2006. The mother of the applicant's spouse suffers from chronic renal failure, secondary hyperparathyroidism, anemia and hypertension. *Statement from* [REDACTED], dated March 1, 2006. She is currently on hemodialysis three times a week and has been on dialysis for 14 years. *Id.* The mother of the applicant's spouse states that she is unable to stand for any appreciable period of time, therefore she depends upon the applicant's spouse for nearly everything she does. *Statement from the mother of the applicant's spouse*, dated March 9, 2006. Although the mother of the applicant's spouse is not a qualifying relative for purposes of this case, the AAO acknowledges her medical conditions and how they directly affect the applicant's spouse, the only qualifying relative. Having considered the serious health problems of the mother of the applicant's spouse, as documented by a licensed health professional, and the impact on the applicant's spouse of leaving her seriously ill mother in the United States or moving her to Mexico and away from her long-established treatment programs, the AAO finds that the applicant's spouse would suffer extreme hardship if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the mother of the applicant's spouse suffers from chronic renal failure and is dependent upon the applicant's spouse. *Statement from the mother of the applicant's spouse*, dated March 9, 2006; *Statement from* [REDACTED], dated March 1, 2006. The son of the applicant's spouse is also experiencing developmental problems at school, which are affecting his ability to learn. [REDACTED], dated November 1, 2005. While neither the mother nor the son of the applicant's spouse are qualifying relatives for purposes of this case, the AAO acknowledges counsel's statement that the applicant's spouse is torn due to her family's problems and is struggling to keep her job. *Attorney's brief*. The applicant's spouse states she has no help from anyone. *Statement from the applicant's spouse*, dated November 14, 2005. She notes that it has been very difficult to pay her rent and bills on time. *Id.* The AAO notes that the record includes a statement from Southern Company Gas showing the applicant's spouse has had several past due payments. *Account Activity, Southern Company Gas*, dated October 21, 2005 to February 21, 2005. The applicant's spouse notes that she has already received a dispossessory notice from the magistrate court to evict her for non-payment of rent. *Statement from the applicant's spouse*, dated November 14, 2005. The AAO notes that the record includes a court document showing the applicant's spouse's inability to pay her rent. *Dispossessory Affidavit, Magistrate Court of Henry County, State of Georgia*, dated July 12, 2005. The applicant's spouse notes that, as of October 2005, she has been without gas and heat. *Statement from the applicant's spouse*, dated November 14, 2005. The pastors for the applicant's spouse, one of whom has a medical degree and the other a degree in counseling, have observed several changes in the emotional and psychological well-being of the applicant's spouse since the applicant's departure. *Statement from* [REDACTED], dated March 7, 2006. The applicant's spouse feels depressed, hopeless and is struggling without the support of the applicant. *Id.* She has

received pastoral and professional counseling on many occasions due to her burden. *Id.* Her emotional condition has worsened since the applicant has left. *Id.* When looking at the aforementioned factors, specifically the additional family responsibilities placed upon the applicant's spouse by her mother's health and her son's learning difficulties, and her financial situation, as documented in the record, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

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).

The adverse factors in the present case are the applicant's entry without inspection, prior unlawful presence for which he now seeks a waiver, his unlawful employment and his 1999 conviction for driving with a suspended/revoked license. The favorable and mitigating factors are his United States citizen spouse and child, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse, mother-in-law, and church as evidenced by their affidavits.

The AAO finds that, although the immigration violations committed by the applicant were 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.