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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: MEXICO CITY (CIUDAD JUAREZ) Date: **MAY 29 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 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 for more than one year and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility in order to enter the United States and reside with her U.S. citizen husband and children.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated April 28, 2006.

On appeal, counsel for the applicant asserts that the district director based his decision on erroneous facts. *Statement from Counsel on Form I-290B*, dated May 26, 2006. Counsel contends that the applicant has shown that her husband will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief in Support of Appeal*, undated.

The record contains statements from counsel; a copy of the applicant's passport; a copy of the applicant's husband's naturalization certificate; statements from the applicant and the applicant's husband; copies of birth records for the applicant's children; reports on the applicant's children's language disabilities; a letter regarding the applicant's husband's mental health from a social worker; a copy of a marriage document for the applicant and her husband, 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 in B status on September 8, 1997, with authorization to remain until February 7, 1998. The applicant remained in the United States after her B status expired. She filed a Form I-485 application to adjust her status to permanent resident on April 27, 2005. Thus, the applicant accrued over seven years of unlawful presence in the United States. The applicant departed the United States in approximately June 2005. She now seeks reentry as an immigrant pursuant to an approved I-130 relative petition filed by her husband on her behalf. Thus, she was deemed 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 more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant does not contest her 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.

The applicant's husband stated that he and the applicant have three U.S. citizen children, and that their two eldest sons do not read, write, or speak Spanish. *Statement from the Applicant's Husband*, dated October 10, 2006. He provided that his sons have attended a special school in Columbus, Ohio to address their developmental disabilities. *Id.* at 1. He explained that his sons are residing in Mexico with the applicant and that they have not been to school during the year due to a lack of services for speech therapy. *Prior Statement from the Applicant's Husband*, undated. He indicated

that his sons' developmental issues will become worse if they are unable to return to the United States and resume their specialized education. *Id.* at 1.

The applicant's husband provided that he earned almost \$40,000 in the previous year, but that he investigated job opportunities in Mexico and learned that it would be impossible for him to secure employment at a rate more than \$1,000 per month. *Statement from the Applicant's Husband* at 1. He stated that he would be unable to afford private English-language education for his sons should he relocate to Mexico and lose his income. *Prior Statement from the Applicant's Husband* at 1. He explained that he has traveled to visit the applicant and his sons at least once per month, but that the cost is high and they have depleted their savings. *Id.*

The applicant's husband expressed concern for the applicant's and their children's health in Mexico. *Id.* at 2. He provided that the applicant has lost weight and suffered depression. *Id.* He stated that their three children have become ill in Mexico with throat infections, likely due to drinking the water there, and that his older son was being tested for a possible disease. *Id.* He stated that the applicant and their children will not face such health issues if they return to the United States. *Id.*

The applicant's husband indicated that he does not have relatives in Mexico, as all of his blood relatives reside in Ohio including his mother, two brothers and their families, and his sister and her family. *Statement from the Applicant's Husband* at 1.

The applicant confirmed that her two children of school age do not speak, write, or read Spanish. *Statement from the Applicant*, dated October 11, 2006. She reiterated that her two sons attend a special school in Columbus, Ohio due to their disabilities. *Id.* at 1.

The applicant's husband explained that the applicant departed the United States due to erroneous advice from a U.S. Citizenship and Immigration Services officer, and that they were attempting to follow proper procedure to obtain a legal immigration status for the applicant. *Statement from the Applicant's Husband*, dated June 29, 2006.

The applicant submitted a letter from an emergency department social worker, [REDACTED] who indicated that the applicant's husband was evaluated for depression and increased alcohol consumption. *Letter from Emergency Department Social Worker*, dated May 20, 2006. Mr. [REDACTED] stated that the applicant's husband has had an increase in symptoms due to separation from the applicant and his children. *Id.* at 1. He indicated he gave the applicant's husband referrals for outpatient treatment. *Id.*

The applicant submitted documentation regarding her two sons' developmental disabilities. The reports reflect that [REDACTED] and [REDACTED] have been delayed in developing speech, and that they have qualified for and received special educational services in the United States. *Reports from [REDACTED] City School District*, various dates in 2004. The reports show that [REDACTED] did not speak words at age three, and that he communicated by pointing. *Id.* He received a home teacher twice per month and a speech therapist once per month, yet no results were observed as of April 2004. *Id.* Reports stated

that [REDACTED] language skills were moderately delayed and his academic skills were in the low average range. *Id.*

In a letter from Hillard City Schools District Preschool, [REDACTED] Preschool Director, stated that [REDACTED] and [REDACTED] have been identified and served educationally as children with a disability. *Letter from [REDACTED]*, dated December 20, 2005. [REDACTED] indicated that “[d]isruption of services in the designated areas of disability will significantly impact their educational opportunities especially in the areas of literacy, vocabulary and overall language development.” *Id.* at 1. She provided that “[i]n order for continued improvement academically and preparation for post secondary job training opportunities, it is critical that their educational program addresses their deficit areas.” *Id.* She added that “[t]he family was very involved with both boys’ educational program,” and they “were also actively involved in the Hillard community.” *Id.*

Counsel contends that the applicant has shown that her husband will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief in Support of Appeal* at 14. Counsel asserts that denial of the waiver application will result in the separation of the applicant’s close family. *Id.* at 16. Counsel contends that the applicant’s husband would be compelled to chose between residing in Mexico and depriving himself and his children of regular contact with their family members and community in the United States, and residing in the United States with his children and facing separation from the applicant. *Id.* at 17. Counsel asserts that either choice will result in extreme emotional hardship for the applicant’s husband and children. *Id.* Counsel states that the applicant’s husband has held secure employment in the United States, but that he would face significant economic hardship should he relocate to Mexico due to a lack of employment opportunities with adequate compensation. *Id.* at 20.

Upon review, the applicant has shown that her husband will experience extreme hardship should she be prohibited from entering the United States. The record contains references to the applicant’s sons’ disabilities and hardship they will face if the present waiver application is denied. Direct hardship to an applicant’s children is not a basis for a waiver under section 212(i)(1) 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. When a parent’s children face significant hardship, it is reasonable that such hardship creates emotional suffering for the parent.

In the present matter, the applicant’s sons’ learning disabilities present unusual circumstances. The record clearly shows that the applicant’s sons require specialized educational services in order to address their language disability, and without such assistance they will face compounding challenges in the future with employment and socialization. The applicant’s sons received special educational services in the United States, yet they have been unable to attend school for the previous year in Mexico due to a lack of such assistance. It is reasonable that this serious detriment to the applicant’s children is having a significant emotional impact on the applicant’s husband. Should the applicant’s husband choose to relocate to Mexico to maintain family unity, his sons would continue to be limited in their educational and developmental opportunities which constitutes substantial emotional hardship for their family.

The record reflects that the applicant's husband has numerous family members in the United States and stable employment with favorable compensation. Should he relocate to Mexico, he would face separation from his family members in the United States and the loss of his employment. While the applicant has not shown that her husband would be unable to find employment to meet his needs in Mexico, it is reasonable that he would face economic challenges and a likely reduction in his standard of living.

The AAO has examined the letter from [REDACTED] regarding the applicant's husband's mental health. It is noted that [REDACTED] based his opinion on a single meeting with the applicant's husband, thus his report does not represent treatment for alcohol consumption or a mental health disorder. The report is not sufficient to show, by itself, that the applicant's husband is experiencing mental challenges that rise to the level of extreme hardship. Yet, the AAO gives due consideration to the opinion of a mental health professional.

Considering all elements of hardship in aggregate, the applicant has shown that her husband would experience extreme hardship should he relocate to Mexico to maintain family unity.

The applicant has submitted sufficient evidence to show that her husband would experience extreme hardship should he remain in the United States without the applicant. As discussed above, should the applicant's two sons with disabilities remain in Mexico, they will be compelled to forego educational services which will impact their development. Such arrangement will have a significant emotional impact on the applicant's husband. However, should the applicant's husband remain in the United States and bring his children to join him, he and his children will be faced with separation from the applicant. The AAO acknowledges that family separation often causes significant emotional hardship. However, family separation is a common result of inadmissibility, and without distinguishing factors does not represent extreme hardship. For example, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. Yet, the applicant's sons' disability represents an unusual circumstance faced by the applicant's family.

It is reasonable that the applicant's husband would face challenges should he attempt to care for his three children in the United States alone, including expenses due to childcare needs and emotional difficulty due to his children's loss of the applicant's daily presence. The record reflects that the applicant's husband is suffering emotional difficulty due to his present separation from the applicant and his children which has led to increased alcohol consumption and depression. The AAO acknowledges that visiting Mexico and continuing regular communication constitutes an expense to the applicant's husband.

Thus, the applicant's husband is faced with a choice of bringing his children to the United States and facing separation from the applicant, enduring continued separation from both the applicant and his children to remain in the United States which would continue to negatively affect his sons' development, or enduring the extreme hardship of residing in Mexico as discussed above.

Based on the foregoing, considering all elements of hardship to the applicant's husband in aggregate, the applicant has shown that her husband will experience extreme hardship should she be prohibited from entering the United States and he 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 her U.S. citizen husband. Section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 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 remained in the United States without a legal immigration status for over seven years.

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 husband would experience extreme hardship if she is prohibited from entering the United States; the applicant's U.S. citizen sons will experience significant hardship if they do not return to the United States and resume their special education services; the applicant has shown a propensity to follow U.S. immigration laws in the future, as she has made a bona fide attempt to obtain a legal status, and; the applicant has cared for her U.S. citizen children and cultivated a strong family unit.

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 her burden that she merits approval of her application.

ORDER: The appeal is sustained.