

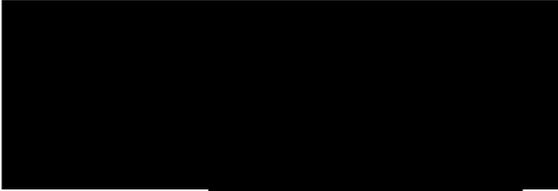
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U.S. Department of Homeland Security  
Citizenship and Immigration Services  
Administrative Appeals Office MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



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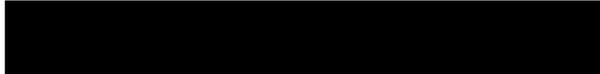
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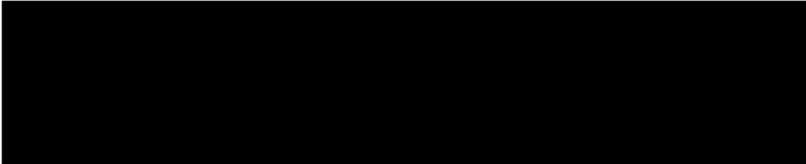
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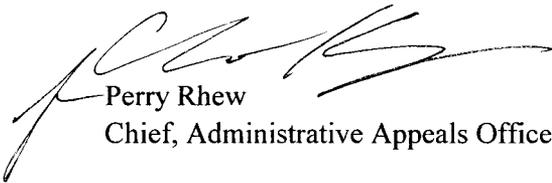
APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

  
Perry Rhew  
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 his last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his wife and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated October 30, 2006.

On appeal, counsel for the applicant asserts that the applicant's wife will suffer extreme hardship if the present waiver application is denied. *Statement from Counsel*, dated April 14, 2008.

The record contains statements from counsel and the applicant's wife; medical letters and records for the applicant's wife; a psychological evaluation of the applicant's wife; copies of bills and financial records for the applicant's wife; a copy of the applicant's wife's naturalization certificate; a copy of the applicant's marriage certificate, and; documentation regarding the applicant's unlawful presence in the United States. The applicant further provided documents in a foreign language. Because the applicant failed to submit translations of the documents, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated documents, the entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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 in or about 1995. On March 20, 2002 he filed a Form I-485 application to adjust his status to lawful permanent resident. The applicant's Form I-485 application was denied on September 11, 2003. Accordingly, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until March 20, 2002, the date he filed his Form I-485 application. This period totals over four years.

The applicant accrued unlawful presence again from the date that his Form I-485 application was denied, September 11, 2003, until he departed the United States. The date of the applicant's departure is not clear from the record. The applicant's wife reported that the applicant departed the United States in 2005. *Letter from the Applicant's Wife Regarding Removal Proceedings*, dated June 2, 2009. However, the applicant indicated on his Form G-325A, Biographic Information, dated January 6, 2006, that he departed the United States in November 2003. *Form G-325A, Biographic Information*, dated January 6, 2006. The applicant made the same representation to a consular officer in connection with his application for an immigrant visa. *Visa Refusal Worksheet*, dated January 5, 2006. The applicant's date of departure is material to determining the amount of unlawful presence he accrued after his Form I-485 application was denied. However, irrespective of whether the applicant accrued additional unlawful presence after September 11, 2003, he accrued over one year of unlawful presence from April 1, 1997 to March 20, 2002, as discussed above.

The applicant now seeks admission as an immigrant 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)(i)(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's wife will suffer extreme hardship if the present waiver application is denied. *Statement from Counsel* at 1. Counsel explains that the applicant's wife has been diagnosed with breast cancer and that she is suffering elevated hardship due to prolonged separation from the applicant. *Id.*

The applicant provides evidence that his wife is suffering from significant health problems. [REDACTED] reported that the applicant's wife was diagnosed with breast cancer on March 20, 2007, she had undergone extensive testing, and she would be undergoing major surgery for treatment. *Letter from* [REDACTED] dated April 3, 2007. The applicant's wife was scheduled for surgery on April 10 and 27, 2007. *Pre-surgery Notifications and Instructions*, issued in preparation for April 2007 surgeries.

[REDACTED] reported that the applicant's wife was being treated for degenerative arthritis in her left shoulder and left upper extremity which causes her difficulty working. *Letter from* [REDACTED] dated November 15, 2006.

The applicant provides a report that shows that on October 5, 2001 his wife underwent surgery due to ulnar compression neuropathy at her left elbow. *Operative Report*, dated October 5, 2001.

The applicant submits an evaluation of his wife conducted by a licensed professional counselor, [REDACTED]. Ms. [REDACTED] reported that the applicant's wife has been in the United States for 36 years and she became a U.S. citizen in 1981. *Report from* [REDACTED] dated November 19, 2006. [REDACTED] stated that the applicant's wife has concern for her economic circumstances, as she must support herself and the applicant. *Id.* at 1. [REDACTED] indicated that the applicant's wife reported symptoms including insomnia, weight loss, nightmares, sadness, crying easily and often, heart palpitations, fatigue, low energy, poor concentration, distraction, forgetfulness, feelings of uneasiness and restlessness, lack of enjoyment in activities, difficulty making decisions, feelings of being a failure, guilt, hopelessness, feelings of worthlessness, and panic attacks. *Id.* [REDACTED] stated that the applicant's wife failed to complete recommended physical therapy for her elbow due to a lack of financial resources. *Id.* [REDACTED] concluded that the applicant's wife presented symptoms that are indicative of Major Depressive Disorder, Severe, with anxious features. *Id.* at 2. [REDACTED] posited that the applicant's wife's depression is situational, and that her symptoms will decline if she is reunited with the applicant. *Id.*

The applicant's wife states that she is experiencing emotional hardship due to separation from the applicant. *Statement from the Applicant's Wife*, dated November 29, 2006. She discusses her health problems, and explains that they cause her difficulty in engaging in employment. *Id.* at 1. She expresses that she loves the applicant and she cannot be without him much longer. *Id.*

Upon review, the applicant has established that his wife will suffer extreme hardship if he is prohibited from entering the United States. The applicant has shown that his wife will experience extreme hardship should she relocate to Mexico. The record shows that the applicant's wife suffers from serious health problems including breast cancer. The applicant's wife has undergone two surgeries as part of her cancer treatment. Breast cancer is a potentially life-threatening illness that requires significant medical care and close supervision. The applicant's wife has also suffered degenerative arthritis in her left shoulder and left upper extremity, as well as problems with her elbow that required surgery. [REDACTED] commented that the applicant's wife's degenerative arthritis inhibits her ability to engage in employment. It is evident that the applicant's wife would endure emotional and physical hardship should she depart the United States and become separated from the doctors who provide her care and are familiar with her medical history. The applicant's wife's health problems, particularly her struggle with breast cancer, constitute unusual circumstances not ordinarily faced by individuals who relocate abroad due to the inadmissibility of a spouse.

The applicant's wife would face other hardships should she depart the United States, including the separation from her community and country after a lengthy, continuous residence of over 36 years. She indicated that she provides economic support for the applicant in Mexico, thus she would likely endure financial challenges should she join him and lose access to employment opportunities in the United States. It is evident that a reduction in her income would impact her ability to fund needed medical treatment in Mexico.

Considering all elements of hardship to the applicant's wife in aggregate, should she relocate to Mexico she would endure extreme hardship.

The applicant has shown that his wife will suffer extreme hardship should she remain in the United States without him. As noted above, the applicant's wife faces serious health problems including breast cancer. The AAO acknowledges that the struggle with a serious disease involves significant emotional hardship, and that the unwanted absence of a spouse would compound such psychological challenges. [REDACTED] indicated that the applicant's wife reported numerous symptoms due to her separation from the applicant, and [REDACTED] concluded that the applicant's wife exhibited the elements of Major Depressive Disorder. It is noted that [REDACTED] conducted her evaluation of the applicant's wife prior to the applicant's wife's diagnosis of breast cancer. Thus, the record supports that the applicant's wife is enduring emotional challenges much greater than those addressed in [REDACTED] report. The applicant's wife is facing emotional challenges not commonly experienced when spouses are separated due to inadmissibility.

The applicant's wife expressed concern for her financial situation without the applicant's assistance, and she stated that she supports herself and the applicant in Mexico. The applicant submitted documentation of wire transfers from his wife as evidence that she assists him. As discussed above, [REDACTED] commented that the applicant's wife's degenerative arthritis inhibits her ability to engage

in employment, and subsequent to [REDACTED] letter the applicant's wife was diagnosed with breast cancer. The record supports that the applicant's wife's physical health is an impediment to her ability to engage in employment, and the pressure to support the applicant from the United States contributes to her hardship.

Considering all elements of hardship to the applicant's wife in aggregate, should she remain in the United States without the applicant she will suffer extreme hardship.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that denial of the present waiver application "will result in extreme hardship" to his wife, as required for a waiver under 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 a lengthy duration without a legal immigration status.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime, and the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States.

While the applicant's violations 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 eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

**ORDER:** The appeal is sustained.