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

H6

FILE:

(CDJ 2004 820 352)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: APR 02 2013

IN RE:

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

Perry Rhew
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. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure. She is married to a United States citizen and claims two U.S. citizen daughters.¹ She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on April 11, 2007.

On appeal, the applicant, through counsel, states that her husband is suffering physically and emotionally due to her absence, and that he needs her to prepare meals and administer the medications necessary for his medical condition.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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 [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.

¹ The AAO notes that the record contains no documentary evidence, e.g., birth certificates, that establishes the applicant and her spouse as the parents of U.S. citizen daughters.

The record indicates that the applicant entered the United States without inspection in May 2000 and remained until she departed voluntarily in March 2006. Accordingly, the applicant accrued unlawful presence from February 8, 2003, the date of her 18th birthday, until she departed the United States in 2006. As the applicant resided unlawfully in the United States for over a year and is now seeking admission within ten years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children is not directly relevant in section 212(a)(9)(B)(v) proceedings and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record includes, but is not limited to, a statement from counsel on behalf of the applicant; a statement from the applicant’s spouse; photographs of the applicant’s spouse and their two children; statements from the applicant’s sister-in-law and mother-in-law; and a statement from [REDACTED], as well as medical records concerning the applicant’s spouse’s health.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal the applicant's spouse states that he had a severe heart attack in July 2005, and that he has to take numerous medications on a daily basis. He further states that the applicant provided for his daily care after his heart attack, helping to administer his medications, cook his meals and look after their children. A letter from [REDACTED] the applicant's spouse's physician, establishes that he suffered a heart attack in July 2005 and is under her care for coronary artery disease as well as ischemic cardiomyopathy, congestive heart failure, accelerated hypertension, hyprventricular tachycardia, obesity, sleep apnea, dyslipidemia, visual disturbances, degenerative joint disease and depression. [REDACTED] also states that the applicant's spouse requires constant assistance with the administration of his medication, food preparation, and household maintenance, and that it is vitally important that the applicant be with him. As such, the record establishes that the applicant's spouse would experience extreme hardship if the applicant were excluded and he were to remain in the United States.

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. The applicant's spouse states that it would be hard for him to adjust to life in Mexico as he does not read or write Spanish and it would be difficult to obtain employment. He contends that without a job he would be unable to obtain medical treatment in Mexico. Having reviewed the record, the AAO notes that the applicant's spouse suffers from a number of serious medical conditions and that moving to Mexico would require him to leave the doctor who is familiar with his medical history and has been caring for him since his hearth attack. Further, relocation would place him in an unfamiliar medical environment where his inability to read or write in Spanish could compromise his ability to obtain adequate health care. These same language deficits would also have a significant impact on his ability to obtain employment and adjust to Mexican culture and society. As such, the AAO finds that the record also establishes that it would constitute an extreme hardship for the applicant's spouse to join the applicant in Mexico.

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 in the present case are the unlawful presence for which the applicant seeks a waiver, her entry without inspection and unauthorized employment. The favorable factors include the applicant's U.S. citizen husband, the extreme hardship he would experience if her waiver application is denied, and the absence of any criminal activity.

While the AAO does not condone the applicant's immigration violations, as noted above, it finds that the favorable factors in this case outweigh the unfavorable factors. The AAO therefore finds that the applicant qualifies for a waiver of her inadmissibility pursuant to 212(a)(9)(B)(v) of the Act.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.