identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship
and Immigration
Services

[redacted]

#6

FILE: [redacted] (CDJ 2004 824 656)

Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ)

Date: APR 0 5 2010

IN RE: [redacted]

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:

SELF-REPRESENTED

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. He 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 his last departure. He is married to a United States citizen and 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 his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 27, 2007.

On appeal, the applicant's spouse asserts that she has a serious medical condition that cannot be treated in Mexico and which interferes with her ability to function in the United States. She states that the applicant's removal would result in extreme hardship for her.

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.

The record indicates that the applicant entered the United States without inspection in April 2001 and remained until he departed voluntarily in March 2006. As the applicant resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he 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 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 the United States based on the denial of the applicant's waiver request.

The record includes, but is not limited to, statements from the applicant's spouse; statements from family members of the applicant's spouse; a statement from [redacted] dated March 16, 2007; medical records from the Clinica Campesina; a printout describing Trigeminal Neuralgia; and copies of acupuncture treatment records.

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

On appeal, the applicant's spouse states that she has been diagnosed with Trigeminal Nerve Post Herpetic Neuralgia and that the only thing that relieves her pain is acupuncture, which cannot be found in Mexico. The applicant's spouse has previously submitted statements indicating that she is struggling to care for her children without the applicant, and that the additional financial burden of child care costs and medical expenses are resulting in extreme hardship for her.

The record includes a statement from a Physician's Assistant at Clinica Campesina, in Thornton, Colorado confirming the applicant's spouse's medical condition, as well as materials that discuss the condition generally. The medical statement also indicates that stress and anxiety exacerbate the applicant's spouse's condition.

The record contains sufficient evidence to establish the applicant's spouse has a serious and debilitating medical condition. When her health problems are considered in the aggregate with the hardships normally created by the exclusion of a spouse, the AAO finds the applicant to have established that his spouse would experience extreme hardship if his waiver request were to be denied and she remained 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 has submitted a letter describing the living conditions in Mexico, including the lack of heating and electricity, cramped, unsanitary conditions and the inability to procure adequate medical care for herself and her children. On appeal, the applicant's spouse states that she would be unlikely to find medical care for her condition in Mexico. The record does not contain documentary evidence that establishes that the applicant's spouse would be unable to obtain adequate medical treatment in Mexico. However, the AAO acknowledges that, in relocating to Mexico, the applicant's spouse would be required to leave her current health care providers who have been treating her since her condition was diagnosed and would have to seek medical treatment in a health care environment with which she is unfamiliar. When the applicant's spouse's medical condition and the likely disruption in her medical care are added to the normal difficulties created by relocation to a new country, the AAO finds that the applicant's spouse would also suffer extreme hardship if she were to relocate to Mexico.

In light of the fact that the record indicates that a qualifying relative of the applicant will experience extreme hardship upon separation or relocation, the AAO must now weigh the positive and negative factors in exercising its discretion to grant the applicant's waiver of inadmissibility. 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, 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).

In this case, the negative factors include the applicant's unlawful presence and employment in the United States. The positive factors are the presence of the applicant's U.S. citizen spouse and children in the United States, the extreme hardship that would be experienced by his spouse if he were to be excluded from the United States, the letters of support from his spouse's family attesting to his character and dependability, and the absence of a criminal record in the United States.

Although the AAO does not condone the applicant's violations under the Act, it, nevertheless, concludes that the favorable factors in his case outweigh the unfavorable and that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.