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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**

H6

FILE: [REDACTED] Office: MEXICO CITY, MEXICO Date: **APR 05 2010**  
(CDJ 2005 527 609) (CIUDAD JUAREZ)

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:

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 "Perry Rhew".

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 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's spouse and two children are U.S. citizens and he seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, at 4, dated January 23, 2007.

On appeal, counsel states that the applicant's spouse would experience extreme hardship and the applicant merits a waiver as a matter of discretion. *Form I-290B*, received February 23, 2007.

The record includes, but is not limited to, counsel's brief and letters; statements from the applicant and his spouse; country conditions information on Mexico; letters of support from the applicant's family, friends and former employer; financial and tax documents for the applicant and his spouse; a psychological evaluation of the applicant's spouse; and a physician's letter and medical records for the applicant's younger son. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in January 1999 and departed the United States in February 2006. The applicant accrued unlawful presence during this entire period of time. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his February 2006 departure from the United States.

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.

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 to the applicant or his children is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. 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. These factors include the presence of 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 AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or in 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 first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Mexico. Counsel states that the applicant and his spouse would not be able to properly care for their children in Mexico, the applicant's spouse has no ties to Mexico and her ability to speak Spanish is limited, she was born and raised in the United States, she has a close relationship with her family and her children would lose the significant benefits of specialized medical care if they relocated to Mexico. *Brief in Support of Appeal*, at 7, 14, 16, dated March 20, 2007.

The applicant's spouse states that 13 members of the applicant's family share a three-bedroom house, they do not have an indoor bathroom, the shower is in the courtyard with a dirt floor, it was hard on her during her visit there and she did not adjust to it, her older son was bitten by mosquitoes

and had an allergic reaction that lasted the entire visit, the applicant's family home is in an economically depressed area, there is only one person in the town who speaks English, she is not fluent in Spanish, she was lonely for the month that she was in Mexico, she does not have work prospects there as she works in coffee shops and needs to talk with customers, she is very close to her parents, and she does not want to leave her extended family. *Applicant's Spouse's Statement*, at 3, dated March 10, 2007. The applicant's spouse was evaluated by a psychologist who states that the applicant's spouse was overwhelmed by the extreme poverty, lack of sanitation and limited medical care in Zapotlanejo, Mexico; her belief that she could not bring her children to live there is reinforced by the death of four of the applicant's siblings in infancy or early childhood; her younger son suffers from asthma, which could worsen due to the many allergens in Mexico and lower air quality standards than in California; she was unable to get satisfactory medical care for her older son when she was there; and she has concerns about her children's educational needs being met as the applicant was only able to complete fifth grade. *Psychological Evaluation*, at 8, dated March 9, 2007. The record reflects that the applicant's younger son has a cough with wheezing, uses Albuterol and QVAR Inhalers for his condition, and needs regular visits with his doctors for his care. *Letter from [REDACTED]*, dated February 26, 2007. Medical reports in the record also indicate that the applicant's younger son has been diagnosed with asthma. *Progress Notes, Kaiser Permanente*, dated November 14, 2007. The record includes articles on asthma and pollution in Mexico. While the AAO does not find the record to support all of the hardship claims presented, it, nevertheless, concludes that there is sufficient proof to establish that the applicant's spouse would suffer extreme hardship if she relocated to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant's younger son has asthma and receives regular treatments, the applicant's older son has failed to emotionally adjust to the applicant's absence and cries every night for his father, the applicant's spouse's mental health has been damaged by family separation, and the family's financial situation has reached a crisis point. *Brief in Support of Appeal*, at 4, 5. The record reflects that the applicant's younger son has labyrinthitis, asthma, and a history of serious otitis media. *Medical Records for Applicant's Second Son*, dated November 1 and 14, 2007.

Counsel states that the applicant's spouse does not have health insurance for herself and her children, she is currently depending on her parents, her father has been unable to support them on his retirement savings and has had to come out of retirement to work. *Counsel's Second Letter*, at 2, dated April 20, 2009. The applicant's spouse's father states that the living situation with the applicant's spouse, her two children, his wife and a grandson for whom he is a guardian is cramped; he is working four days a week at a salary substantially less than when he retired; it is very difficult to provide for the needs of all of them; and the applicant has been a hard-working, excellent provider and the loss of his income and medical insurance continues to create a financial burden. *Applicant's Spouse's Father's Statement*, dated March 30, 2009.

The applicant's spouse states that she has been raising her two sons alone, her older son is being affected emotionally; her younger son does not know his father; she has been seeing a clinical psychologist; she has received Medicaid but the children are not covered since she moved back to

California; and the applicant is not doing well in Mexico, as he has been going through different stages of depression and is unable to find work. *Applicant's Spouse's Second Statement*, at 1, dated April 13, 2009. Counsel states that the applicant's spouse, before moving to Texas, received food stamps, cash aid, supplemental nutrition, WIC benefits and Medi-Cal as the applicant could not support them from Mexico. *Counsel's First Letter*, at 1, dated January 8, 2008. The record includes supporting documentary evidence of the applicant's spouse's reliance on the California WIC Program, food stamps and Medicaid. There is also documentation reflecting that the applicant's spouse accessed Medicaid while residing in Texas. Twice in April 2009, the applicant's spouse was seen by a psychologist who created a treatment plan to assist her in re-entering the work force. *Letter from [REDACTED]*, dated April 17, 2009. The record does not reflect that the applicant's spouse has obtained employment since these appointments. Although the applicant has not submitted documentation that establishes he is unable to find employment in Mexico, the AAO finds the applicant's spouse's dependence on the above referenced social service programs to establish her financial hardship in the applicant's absence.

With regard to the emotional hardship experienced by the applicant's spouse, the AAO notes the psychological evaluation, the letter from [REDACTED] indicating that the applicant's spouse continues to require counseling, and letters from the applicant's spouse's friends noting the changes to her personality and attitude in the applicant's absence.

Based on the hardship factors presented, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained 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).

In evaluating whether section 212(h)(1)(B) 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 main adverse factors in the present case are the applicant’s unlawful presence and unauthorized employment.

The favorable factors include the presence of the applicant’s U.S. citizen spouse and children, extreme hardship to his spouse if his waiver request were to be denied, his payment of taxes and his good moral character based on the letters of support in the record.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.