

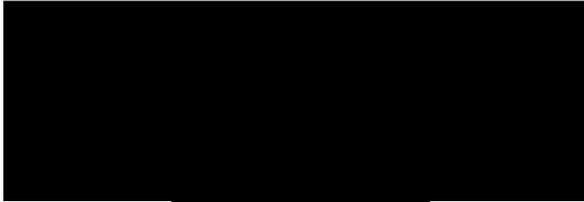
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U.S. Citizenship
and Immigration
Services



176

FILE:

Office: MEXICO CITY (CIUDAD JUAREZ) Date: **APR 15 2010**

IN RE:



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

ON BEHALF OF PETITIONER:



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, and the matter is now before the 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 under 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 a period of one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant 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), in order to return to the United States and reside with his spouse.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the District Director* dated February 9, 2007.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) abused its discretion and committed legal error in concluding that the applicant's wife would not suffer extreme hardship and failed to properly consider the facts and circumstances of the present case. *Brief in Support of Appeal* at 3. Specifically, counsel asserts that the applicant's wife would suffer extreme hardship if the waiver application were denied because she suffers from Type II Diabetes, a disease with a potential for serious and life-threatening complications. *Brief* at 3, 11-13. Counsel further states that the applicant's wife would suffer extreme emotional and financial hardship if she were to relocate to Mexico because she would be separated from her family members in the United States, would be unable to find employment there, and would experience a reduction in her standard of living. *Brief* at 19-20. In support of the waiver application and appeal counsel submitted the following documentation: a declaration from the applicant's wife, copies of family photographs, birth certificates and permanent resident cards for the applicant's wife's relatives in the United States, school records and copies of diplomas for the applicant's wife, copies of a baptism certificate and other church records for the applicant's wife, medical records for the applicant's wife, letters from the applicant's wife's doctor, an employment letter and evidence of employer-provided insurance for the applicant's wife, and information on conditions in Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 Secretary, 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.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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. *Id.* at 566. The BIA has held:

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). In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). 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).

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS*, *supra*, the court further held that the uprooting of family and

separation from friends does not necessarily amount to extreme hardship, but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a thirty year-old native and citizen of Mexico who resided in the United States from March 1997, when he entered without inspection, to November 2004, when he returned to Mexico under an order of voluntary departure. The record further reflects that the applicant's wife is a twenty-nine year-old native and citizen of the United States. The applicant married his wife on October 12, 2002 and he currently resides in Mexico while his wife resides in Oxnard, California.

Counsel asserts that the applicant's wife would suffer emotional and physical hardship if she continues to be separated from the applicant because she suffers from Type II Diabetes and requires the applicant's assistance and support to manage her condition and prevent complications. In support of this assertion counsel submitted a letter from the applicant's wife's physician that states that she has been diagnosed with Type II Diabetes, "which for the most part in her condition is an insulin resistant state," and she requires attention to improve insulin responsiveness to avoid serious complications because she is overweight. *See Letter from [REDACTED]*, dated February 21, 2007. [REDACTED] further states,

Under proper circumstances a supportive spouse can help patients with regard to the efforts of weight loss and exercise, be watchful of any problems resulting from the diabetes and if anything offer moral support in their efforts for better control of blood glucose.

Counsel also submitted information on diabetes, including information from the American Diabetes Association on complications of diabetes and the effects of stress on diabetes, including the altering of blood glucose by stress hormones. The applicant's wife states that she needs the applicant by her side to take better care of herself and monitor her health, and further states that she is depressed and under stress due to the applicant's immigration situation, which has had negative effects on her condition. *Declaration of [REDACTED]* dated February 23, 2007. The applicant's wife states that she was so lonely and depressed after the applicant left that she began staying with her parents, who live right next door, rather than be alone. *Letter from [REDACTED]* dated October 12, 2005. She further states that she had to leave her university studies in 2002 after two quarters even though she was only about an hour away from her parents' home because she was homesick, and although she wants to go back to school, she will be unable to do so until the applicant is back because she will not be able to focus due to the pain of being separated from him. *Id.* Letters from the applicant's wife's parents state that although she has an apartment next door to her parents, she stays at their house and sleeps on the couch every night because she feels lonely there, and they provide her comfort. *Letters from [REDACTED]s and [REDACTED]*

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that his wife would experience extreme hardship if the applicant is denied admission to the United States. Evidence on the record indicates that the applicant's wife is experiencing emotional hardship due to separation from that applicant and that the stress of their separation can exacerbate her diabetes, which is insulin resistant. Further, a letter from the applicant's wife's physician states that her weight is of concern because it could lead to complications, and the support of her spouse could be of assistance in managing her condition. It appears that being separated from the applicant, in light of the applicant's wife's medical condition and her difficulty living on her own and coping with the separation, amounts to emotional hardship beyond that which would normally be expected as a result of removal or inadmissibility.

Evidence on the record also establishes that the applicant's wife would suffer extreme hardship if she relocated to Mexico. As noted by counsel, the applicant's wife was born in the United States and has never lived in Mexico and has significant family ties in the United States, including her parents, who live next door to her and with whom she has a close relationship, and her brother, grandmother, and other relatives. As noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998). Counsel also submitted information on conditions in Mexico, and in light of these conditions and the difficulty the applicant's wife would have adjusting to life in Mexico after living in the United States her entire life, the applicant has established that his wife would suffer hardship beyond the common results of removal or inadmissibility if his waiver application were denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(i) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(a)(9)(B)(v) 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). *Matter of Mendez-Moralez*, 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 applicant’s entry without inspection and his unlawful presence and employment in the United States, as well as his convictions for vehicle theft and driving under the influence of alcohol. The favorable factors in the present case are the extreme hardship to the applicant’s wife and the applicant’s length of residence and ties to the United States.

The AAO finds that immigration violations committed by the applicant 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.