identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

[redacted]

1/6

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: APR 27 2010
CDJ 2005 505 167

IN RE: [redacted]

APPLICATION: Application for Waiver of Ground 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 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, and is now before the Administrative Appeals Office (AAO). The appeal will be sustained.

The record reflects that the applicant is a 35-year-old 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. The applicant is married to a U.S. citizen, and she seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with her husband and daughter in the United States.

The director found that the applicant failed to establish extreme hardship to her citizen spouse, and denied the application accordingly. *Decision of the Director*, dated Aug. 11, 2007. On appeal, the applicant's husband contends that the denial of the waiver imposes extreme hardship on him and his daughter. *See Notice of Appeal*, dated Sep. 8, 2007.

The record contains, among other things, declarations from the applicant's husband and his mother; a letter from the applicant's husband; letters from the applicant's husband's doctor and stepfather; a psycho-educational evaluation report for the applicant's husband, dated September 16, 1994; and a letter from [redacted] from [redacted] at Kaiser Permanente, dated June 23, 1988. The entire record was 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 [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 being inspected and admitted or paroled in or around September, 1994. The applicant departed from the United States in 2000 or 2001. The applicant's spouse filed a Petition for Alien Relative (Form I-130), which U.S. Citizenship and Immigration Services approved on December 22, 2004. The applicant's unlawful presence for one year or more after April 1, 1997, and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006).

In order to obtain a section 212(a)(9)(B)(v) waiver, an applicant must show that the ten-year bar imposes an extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse or parent. *See* 8 U.S.C. § 1182(a)(9)(B)(v). Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-68 (BIA 1999) (en banc) (considering the hardships of family separation and relocation). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the INA that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

> 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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." *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 mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), the U.S. Supreme Court affirmed that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO reviews each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In this case, the AAO finds that the applicant has established that the denial of a waiver imposes extreme hardship on her spouse if he remains in the United States without his wife and daughter, or if he relocates to Mexico to be with his family.

The record reflects that the applicant's spouse, [redacted], is a 30-year-old native of Colombia and citizen of the United States. The applicant and her husband have been married for over 11 years. The couple has a 9-year-old daughter, who resides in Mexico with the applicant. The applicant's spouse asserts that he is suffering extreme medical, emotional, and financial hardships as a result of the denial of the waiver.

The record contains a detailed letter from [redacted] physician explaining the severity of his medical condition and its impact on his ability to care for himself. *See Letter from* [redacted], dated Jan. 30, 2007. [redacted] has been diagnosed with long-standing Attention Deficit Disorder Hyperactivity Disorder which has continued into adulthood. *Id.*; *Letter from* [redacted], dated June 23, 1988 (listing multiple neuromaturational deficits); *Psycho-educational Evaluation Report*, dated Sep. 16, 1994 (documenting [redacted] learning disabilities). As a result of his conditions, [redacted] did not graduate from high school and he "continues to struggle with completion of tasks both at home and at work [and] requires constant redirecting." *Letter from* [redacted] *supra*. He also requires "supervision of high risk tasks such as cooking and driving, the latter of which he does not perform" because his disorder "is so severe that he would be a danger to himself and others if he did drive." *Id*; *see also Declaration of* [redacted] (indicating [redacted]'s marginal ability to care for himself). [redacted] indicates that [redacted]

[redacted] prognosis is guarded because of the severity of his permanent disorder, and states that his low self-esteem and loneliness is negatively impacted by the separation from the applicant and his daughter. *Letter from* [redacted] He also opines that [redacted] prognosis would be enhanced by being reunited with his family and living in a structured and loving environment. *Id.* [redacted] states that he loves his wife and daughter, and that it is very hard and depressing to be apart from them. *See Declaration of* [redacted] *Letter from* [redacted], dated Sep. 8, 2007.

According to the record, [redacted] lives with his parents and works as a janitor, making $10.00 per hour. He uses most of his money to support the applicant and his daughter in Mexico, and to pay for telephone calls and occasional visits. When the applicant returned to Mexico in 2000 or 2001, [redacted] lived with her for approximately one year. He states that he was not able to find employment to support his family during the time he lived in Mexico.

[redacted] has presented evidence of a serious medical condition, which has rendered him unable to adequately care for himself without assistance. *See Letter from* [redacted] *supra*; *Letter from* [redacted] *supra*; *Psycho-educational Evaluation Report*, *supra*; *Declarations of* [redacted] *and* [redacted]. The record indicates that when [redacted] moved from his parents' home to Los Angeles in 1997, he was not able to support himself and he became homeless until he met the applicant, who cared for him. [redacted] physician indicates that reunification with the applicant and his daughter in the United States would improve his medical and psychological prognosis. *Letter from* [redacted] *supra.* Accordingly, the record supports a finding that the denial of the wavier imposes extreme hardship, above and beyond the normal difficulties of separation, upon [redacted]

[redacted] also has provided evidence that he would suffer extreme hardship if he were to relocate to Mexico to live with his wife and daughter. First, the record indicates that [redacted] has lived in the United States since 1983, and he has been able to obtain medical care and treatment in the United States. He resides with his mother and stepfather, and they assist with his daily care and financial needs. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565 (recognizing importance of the presence of family ties to U.S. citizens or lawful permanent residents in the United States).

Second, [redacted] lived with the applicant in Mexico in or around 2001, and he was unable to obtain sufficient employment to support himself and his family there. *See Declarations of* [redacted] *and* [redacted]. [redacted] doctor and mother attest that his documented disabilities and resultant lack of education seriously inhibit his employment opportunities both in the United States and in Mexico. Additionally, given [redacted] inability to independently meet his financial needs based on his income in the United States, he would lack the resources to support himself and his family in Mexico without employment. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 566 (recognizing importance of the financial impact of departure).

Based on [redacted] evidence of medical, psychological, and financial hardships to himself as a result of family separation, and his long residence, family ties, and employment in the United States, coupled with his inability to find work in Mexico, the AAO finds that the applicant has established extreme hardship to her spouse if the applicant is prohibited from entering in the United States, or if

her husband leaves the United States to be with his family. Here, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of Coelho,* 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the applicant's entry without inspection and the unlawful presence for which she seeks a waiver. The favorable and mitigating factors in this case include: the applicant's ties to her U.S. citizen spouse in the United States; the applicant's lack of a criminal record; and the extreme hardship to the applicant's spouse caused by the denial of a waiver. *See Matter of Mendez-Moralez,* 21 I&N Dec. at 301 (setting forth relevant factors).

The AAO finds that the favorable factors in this case outweigh the adverse factors, and that a grant of relief in the exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.