

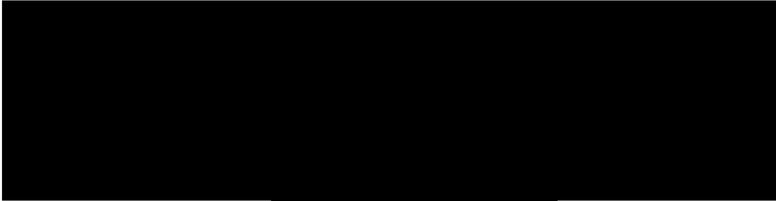
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



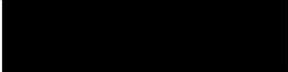
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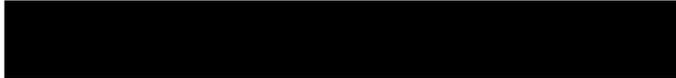
FILE:



Office: MEXICO CITY (PANAMA CITY)

Date: FEB 24 2010

IN RE:



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.



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. 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 Ecuador 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 for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his wife and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated March 16, 2007.

On appeal, counsel for the applicant asserts that the applicant's wife will experience extreme hardship if the applicant is prohibited from residing in the United States, and his wife is pregnant and suffers from physical limitations due to a prior back injury. *Statement from Counsel on Form I-290B*, dated April 23, 2007.

The record contains correspondence and a brief from counsel; statements from the applicant's wife, the applicant's wife's grandmother, a coworker and friends of the applicant's wife, the applicant's mother-in-law, the applicant's brother-in-law, the grandmother of the applicant's stepchildren, the applicant's wife's aunt, and the applicant's wife's godmother; a letter from a school where one of the applicant's stepchildren attends; medical documentation for the applicant's wife; copies of birth records for the applicant and his wife; a copy of the applicant's marriage certificate, and; documentation regarding the applicant's unlawful presence in the United States. The entire record was reviewed and 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 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.

The record reflects that the applicant entered the United States without inspection in or about August 2000. He remained until approximately January 2006. Thus, the applicant accrued approximately five years of unlawful presence in the United States. He now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

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 the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. 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 pursuant to section 212(i) of the Act. These factors include 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.

On appeal, the applicant presents evidence that his wife suffered a neck and back injury in an automobile accident that occurred on March 19, 2005. *Statement from* [REDACTED] [REDACTED], dated March 21, 2005; *Report from* [REDACTED] [REDACTED], dated May 15, 2005; *Report from* [REDACTED] [REDACTED], dated April 23, 2005. The applicant provides numerous documents to show that his wife receives chiropractic treatments and that she has had to limit herself in everyday activities. *See e.g., Letter from* [REDACTED] [REDACTED], dated December 9, 2005. [REDACTED] [REDACTED] noted that the applicant's wife has had to rely on the applicant for housework such as cooking, cleaning, maintenance, snow shoveling, and yard work. Id. at 1. [REDACTED] [REDACTED] explained that the applicant's wife is "restricted from repetitive movements,

frequent bending, lifting and twisting, . . . frequent and heavy lifting or activities that require significant exertion” due to injuries to her neck and back. *Letter from* [REDACTED], dated March 14, 2007. The record shows that the applicant’s wife continued to experience recurring pain in her neck which resulted in headaches and an interference with her physical ability. *Reports from* [REDACTED], dated October 17, 2005 and January 20, 2006.

The applicant provides documentation to show that his wife is pregnant, with a due date of May 27, 2010. *Medical Document from Registered Nurse, University of Minnesota*, dated October 30, 2009. The applicant’s wife was given a weight lift restriction of 25 pounds for the duration of her pregnancy. *Medical Document from Registered Nurse, University of Minnesota*, dated November 25, 2009.

The applicant’s wife states that she has experienced significant hardship due to the applicant’s four-year absence. *Statement from the Applicant’s Wife*, dated December 8, 2009. She reports that she had to leave her job as a personal care attendant, as she could not meet the weight lifting requirements during her pregnancy. *Id.* at 1. She expresses that she is enduring economic difficulty without the applicant’s assistance, and that she lost their house. *Id.* She provides that she does not have medical insurance, thus she is paying for her medical bills directly. *Id.* She notes that she is taking care of her two children, ages nine and 12, and that the emotional hardship they are suffering due to separation from the applicant is having an impact on her as well. *Id.* The applicant’s wife states that she cannot join the applicant in Ecuador due to her pregnancy and related needs. *Id.* The applicant’s wife described her history that included an abusive relationship with the father of her two children, and she expressed that she and her children have found emotional happiness with the applicant. *Prior Statement from the Applicant’s Wife*, dated December 28, 2005.

The applicant has submitted numerous statements from friends, relatives, and a coworker of his wife who attest to the applicant’s wife’s prior life challenges, and her emotional and financial hardship due to separation from the applicant.

Upon review, the applicant has established that his wife will suffer extreme hardship if he is prohibited from entering the United States. The applicant has shown that his wife is pregnant, and that she faces the common physical challenges associated with pregnancy, as well as weightlifting restrictions which have affected her employment. The record supports that the applicant’s wife continues to have physical problems as a result of an automobile accident. The applicant’s wife’s pregnancy and chronic physical problems due to her prior injury constitute unusual circumstances that are not ordinarily faced when an individual relocates abroad or endures family separation due to the inadmissibility of a spouse.

The applicant’s wife’s pregnancy and physical challenges would create significant hardship for her should she join the applicant in Ecuador. The applicant’s wife is presently under the care of a clinic in the United States for her special needs related to her pregnancy, thus she would face emotional and hardship if she is compelled to find new medical professionals in Ecuador to address her needs for a successful pregnancy and birth. The AAO acknowledges that relocating to a new country

during the third trimester of pregnancy itself presents significant physical challenges, particularly given the applicant's wife's chronic pain due to her prior automobile accident. The applicant's wife cares for her two children, which would complicate her ability to move to Ecuador due to the need to enroll them in a new school and the emotional hardship they would endure due to departing their home in the United States. The applicant's wife would face employment challenges in Ecuador due to her physical limitations, thus she would likely endure economic hardship.

The applicant's wife faces significant hardship should she remain in the United States without the applicant. The applicant's wife faces present difficulty performing all necessary tasks to operate her household and engage in employment in her field, and her physical ability will decrease as her pregnancy progresses. The AAO acknowledges that the applicant's wife will face substantial physical and emotional hardship once her third child is born, as she will be faced with caring for a newborn and two other children while coping with the chronic pain from her prior injury. It is evident that the applicant's assistance would be of great benefit to relieve her burden.

The applicant's wife faces emotional hardship due to separation from the applicant. While such psychological challenge is a common result when spouses reside apart due to inadmissibility, the AAO takes notice of the applicant's wife's prior relationship challenges and experience with domestic abuse, and the fact that the applicant's wife and stepchildren have a close relationship with the applicant and they desire to reside with him as a family in the United States.

All elements of hardship to the applicant's wife have been considered in aggregate. The record supports that she will experience extreme hardship should the applicant be prohibited from residing in the United States, whether she joins him in Ecuador or remains in the United States without him. As noted above, the applicant's wife's hardship is distinguished by her physical challenges to due her prior injury and present pregnancy. Thus, the applicant has shown by a preponderance of the evidence that denial of the present waiver applicant "would result in extreme hardship" to his wife, as required for a waiver by section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for a lengthy duration without a legal immigration status.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States; the applicant's U.S. citizen stepchildren would experience hardship if the applicant resides outside the United States, and; the applicant has acted a good father for his two U.S. citizen stepchildren.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.