

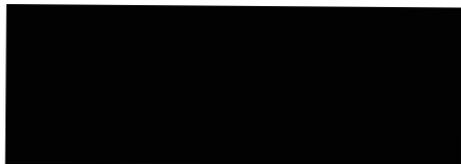
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U.S. Department of Homeland Security  
Citizenship and Immigration Services  
Administrative Appeals Office MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



H6 #2

FILE:

Office: MEXICO CITY

Date: JAN 04 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 Officer-in-Charge, [REDACTED]. 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 for more than one year and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her permanent resident husband.

The officer-in-charge found that the applicant failed to establish extreme hardship to her husband and denied the Form I-601 application for a waiver accordingly. *Decision of the Officer-in-Charge*, dated September 22, 2006.

On appeal, the applicant's husband asserts that he and his children will experience extreme hardship if the applicant is prohibited from residing in the United States. *Statement from the Applicant's Husband on Form I-290B*, dated October 17, 2006.

The record contains statements from the applicant's husband; copies of birth records for the applicant and her children; a copy of the applicant's marriage certificate; a letter from the applicant's husband's employer; documentation regarding the applicant's son's education; a copy of the applicant's husband's permanent resident card, and; documentation regarding the applicant's unlawful presence in the United States. The applicant further provided documents in a foreign language. Because the applicant failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the applicant's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated documents, 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 May 1993. She remained until approximately August 2003. Thus, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until August 2003, totaling over six years. She now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She 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 her last departure. The applicant does not contest her 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's husband asserts that he and his children will experience extreme hardship if the applicant is prohibited from residing in the United States. *Statement from the Applicant's Husband on Form I-290B*, dated October 17, 2006. The applicant's husband states that he and the applicant have two children who reside with the applicant in Mexico. *Id.* at 1. He explains that he is unable to work and support his children in the United States, and a babysitter cannot replace the moral guidance the applicant can provide for their children. *Id.* He notes that one of his children

had a minor accident and had a portion of her thumb amputated as a result. *Id.* He asserts that his child's thumb could have been saved if the procedure was performed in the United States. *Id.*

The applicant's husband previously stated that he and the applicant were married abroad in 1992, and he came back to the United States to continue his work. *Statement from the Applicant's Husband*, dated October 17, 2006. He explained that the applicant did not want to wait outside the United States and she entered without inspection. *Id.* at 1.

The applicant's husband stated that his son has attention deficit disorder, and that he had just completed a special training program in his first year of school before going to Mexico. *Id.* He provided that school officials believed that going to Mexico would reverse the efforts of the U.S. program to bring his son up to par with other children. *Id.* He indicated that his son does not speak Spanish and the food in Mexico does not agree with him. *Id.* The applicant's husband indicated that he previously brought his son back to the United States so that he could continue his educational activities, but that it was very hard for him to give his son the attention he needed. *Prior Statement from Applicant's Husband*, dated December 1, 2005.

The applicant's husband asserted that their daughter is also suffering the loss of educational opportunities in the United States. *Id.* at 1.

The applicant's husband stated that his employer believes that separation from his family is placing his work performance at risk. *Statement from the Applicant's Husband* at 1. The applicant's husband's employer stated that the applicant's husband has worked as a saw operator since 1996, and that his work is dangerous and requires a great deal of focus. *Statement from Western Extrusions*, dated October 12, 2006. The applicant's husband indicated that he is enduring economic hardship due to supporting the applicant's household in Mexico and his household in the United States. *Statement from the Applicant's Husband* at 2.

The applicant's husband expressed that he is experiencing emotional hardship due to being separated from the applicant, and that it is difficult to leave her when he must return to the United States. *Id.* He suggested that he is further impacted by the emotional hardship his children face due to having their family separated. *Id.*

The applicant provided a letter from a Bilingual Diagnostician/Case Manager who attested that the applicant's son was enrolled in academic and behavioral programs during the 2005-2006 school year, and that he made significant gains in his academic, social, and behavioral skills. *Letter from Bilingual Diagnostician/Case Manager*, undated.

The applicant submitted a letter from Ms. [REDACTED] a Behavior Resource Specialist, who stated that the applicant's son is an "11-year-old special needs child medically diagnosed with Attention Hyperactivity Disorder (ADHD)." *Letter from [REDACTED]*, dated December 2, 2005. She noted that the applicant's son participated in special education programs in the United States, and that the applicant had to send her son back to the United States because he "was not receiving the assistance needed to address his emotional, behavioral and academic needs." *Id.* at 1. Ms.

██████████ indicated that she worked with the applicant's son for four years, and that the applicant was very supportive and active in ensuring her son received the best quality education possible. *Id.* Ms. ██████████ asserted that separation from the applicant has been very difficult for the applicant's son, and that the applicant is needed for the emotional and developmental support of her son. *Id.*

Upon review, the applicant has established that her husband will suffer extreme hardship if she is prohibited from entering the United States. The record contains references to hardships experienced by the applicant's children. Direct hardship to an applicant's children is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. Thus, hardship to the applicant's children will be examined to determine the impact it has on the applicant's husband.

The record clearly reflects that the applicant's son has attention deficit hyperactivity disorder that requires special education. The record supports that the applicant's son has received special services in the United States for at least four years, and that continuing his special education is important for his development. The applicant and her husband attempted to relocate their son to Mexico, but found that sufficient services were not available and returned him to the United States. Thus, the applicant has shown by a preponderance of the evidence that her son requires a special education program, and that adequate services were not available in Mexico. Thus, if the applicant's husband relocates to Mexico to maintain family unity, his son will be deprived of access to his programs in the United States, which will in turn impact his development. It is evident that this consequence would create significant emotional hardship for the applicant's husband.

It is evident that the applicant's husband is faced with unusual parenting responsibilities if he cares for his son alone in the United States due to his son's special needs. The applicant has provided sufficient evidence to show that she has been an active participant in her son's education, and that her presence is of significant benefit to his development. Ms. ██████████ asserted that the applicant's son has experienced difficulty due to separation from the applicant. Accordingly, the record supports that the applicant's son will endure significant detriment to his academic and emotional development without the applicant's presence, which will create substantial emotional hardship for the applicant's husband.

U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991). However, the AAO finds that the applicant's son's disability presents unusual circumstances for her husband that go beyond the challenges commonly experienced when families are separated or relocate due to inadmissibility.

The record presents other elements of hardship to the applicant's husband should he remain in the United States without the applicant. He noted that he engages in employment to support his family in the United States, and it is evident that he would be compelled to relinquish his position should he relocate to Mexico. The applicant's husband expressed concern for his daughter in Mexico due to the fact that she is missing the opportunity to receive education in the United States, and she is

lacking quality medical care that led to her losing a portion of her thumb. While the record does not contain sufficient evidence to show that the applicant's daughter's loss of her thumb would have been prevented by medical services in the United States, the AAO acknowledges that the applicant's husband is enduring emotional hardship due to his daughter's presence in Mexico.

The applicant's husband explained that he will endure economic hardship should he remain in the United States without the applicant due to the need to support both households. It is noted that the applicant has not shown that she is unable to work in Mexico to help meet her family's needs. Nor has the applicant shown that her husband would be unable to secure employment in Mexico. However, the AAO considers all elements of hardship to the applicant's husband in aggregate. It is understood that the applicant's husband is encountering financial challenges due to the applicant residing in Mexico, and that the need to travel to Mexico to visit the applicant and his daughter creates economic need that would not exist if the applicant returned to the United States. The AAO further acknowledges that the applicant's husband has held steady employment in the United States for approximately 13 years, and that to abandon his position to relocate to Mexico constitutes an emotional and financial hardship for him.

The applicant's husband expressed that he is experiencing emotional hardship due to separation from the applicant and his daughter. While the emotional effects of family separation are a common consequence when family members reside apart due to inadmissibility, the AAO acknowledges that family separation often results in significant psychological hardship.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that her husband will experience extreme hardship should the present waiver application be denied, whether he relocates to Mexico or remains in the United States with his son. As discussed above, this finding is largely based on the impact the applicant's son's disability would have on her husband, whether the applicant's husband continues to care for him without the applicant's presence or they relocate to Mexico.

In *Matter of Mendez-Moralez*, 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 permanent resident husband would experience extreme hardship if she is prohibited from residing in the United States; the applicant's U.S. citizen son with a disability will experience significant hardship if he resides in the United States without the applicant or relocates to Mexico; the applicant's U.S. citizen daughter will benefit from residence in the United States, and; the applicant has cared for her U.S. citizen children and cultivated a strong family unit.

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 her burden that she merits approval of her application.

**ORDER:** The appeal is sustained.