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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

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[Redacted]

FILE:

[Redacted]

Office: MEXICO CITY, MEXICO

[Redacted]

Date: **JUL 19 2010**

IN RE:

Applicant:

[Redacted]

APPLICATION:

Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

*Tariq Syed
for*

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 under section 212(a)(9)(B)(i)(II) of 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 is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated November 23, 2007.

On appeal, counsel for the applicant states that the applicant's spouse would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief.*

In support of these assertions the record includes, but is not limited to, statements from the applicant's spouse; a medical letter and records for the applicant's spouse; a homeowner's insurance policy for the applicant's spouse; a statement from the blind children's center; employment letters for the applicant's spouse; a medical letter for the applicant's child; a statement from the applicant's child's teacher; and a psychological evaluation. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

In the present case, the record indicates that the applicant entered the United States without inspection in June 1996 and voluntarily departed on October 1, 2006, returning to Mexico. [REDACTED], Mexico, dated October 16, 2006. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States on or about October 1, 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of his October 1, 2006 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or his child would experience as a result of his inadmissibility is not directly relevant to the determination as to whether he is eligible for a waiver. The only directly relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. Hardship to a non-qualifying relative will be considered to the extent that it affects the applicant's spouse. If 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 a lawful permanent resident or United States citizen family ties to 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 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 AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. She notes that shortly after her birth in the United States, her mother took her to Mexico where she spent her childhood. *Id.* She asserts that if she were to move to Mexico, both she and the applicant would have to work longer hours for lower wages and they would never be able to afford a house. *Id.* While the AAO acknowledges such assertions, it notes that the record fails to include documentation, such as published country conditions reports regarding the economy and availability of employment in Mexico, to support such assertions. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The applicant's spouse suffers from a history of Grave's disease and thyrotoxicosis. *Statement from Samuel A. Malayan, M.D., Ph.D.*, dated December 11, 2007. Her medical condition is very delicate and she takes methimazole in order to control her hypothyroidism. *Id.* While the record does not include documentation, such as published country conditions reports, regarding the healthcare system in Mexico and whether adequate care would be available to the applicant's spouse, the AAO acknowledges the documented health conditions of the applicant's spouse and the consistent care she has been receiving in the United States. The AAO notes that a move to a foreign country would cause a disruption in the care she has been receiving. The applicant's spouse's entire family is in the United States. *Statement from the applicant's spouse*, dated December 13, 2007. The applicant's spouse also notes that being separated from her entire family for an extended period of time would be devastating to her family and herself. *Statement from the applicant's spouse*, dated December 13, 2007. In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO notes that the applicant and his spouse have a U.S. citizen daughter who they would have to raise in Mexico. *See Statement from the applicant's spouse*, dated December 13, 2007. They would lose the free child care provided by the applicant's spouse's mother. *Id.* Counsel also states that the applicant's spouse would lose her job as a teacher's assistant at the Blind Children's Center and the applicant's spouse fears that she would cause the children emotional trauma. *Brief in Support of Appeal*, at 7, dated December 13, 2007. When looking at the totality of the aforementioned factors, particularly the health condition of the applicant's spouse as documented by a licensed healthcare professional and the impact a separation would have upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. Her entire family is in the United States. *Statement from the applicant's spouse*, dated December 13, 2007. She notes that shortly after her birth in the United States, her mother took her to Mexico where she spent her childhood. *Id.* The applicant's spouse suffers from a history of Grave's disease and thyrotoxicosis. *Statement from*

██████████, M.D., Ph.D., dated December 11, 2007. Her medical condition is very delicate and she takes methimazole in order to control her hyperthyroidism. *Id.* Her physician notes that being separated from the applicant has caused the applicant's spouse great stress and has an adverse affect on her autoimmune hyperthyroidism or Grave's disease. *Id.* Additionally, the stress that her three year old child feels as a result of being separated from the applicant also adversely affects the applicant's spouse's disease. *Id.* While the applicant's child is not a qualifying relative for the purposes of this case, hardship to the applicant's child may be considered to the extent that it affects the applicant's spouse, the only qualifying relative in this case. According to a psychological evaluation, the applicant's spouse is suffering from Acute Stress Disorder and Major Depressive Disorder, Single Episode without Psychotic Features as a result of her separation from the applicant. *Statement from* ██████████ dated October 12, 2006. The AAO notes that the initial examination of the applicant's spouse occurred on August 18, 2006 and as of the date of the October 2006 evaluation, she was undergoing continuous weekly one hour sessions. *Id.* The applicant's spouse underwent psychological testing which determined she was suffering from Extreme Depression and was referred to ██████████ M.D., for a medical and psychotropic medication consult. *Id.* One of the applicant's spouse's employers states that the applicant's spouse has no motivation to do anything. *Letter from* ██████████ dated December 6, 2007. In addition, the applicant's spouse is holding three jobs to keep her and the applicant's home and this has resulted in less time for her daughter. *Letter from Dr.* ██████████ dated December 10, 2007. When looking at the totality of the aforementioned factors, particularly the physical and psychological health conditions of the applicant's spouse as documented by licensed healthcare professionals, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain 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).

The adverse factors in the present case are the applicant's entry without inspection, his prior unlawful presence for which he now seeks a waiver, and his unauthorized employment while in the United States. The favorable and mitigating factors are the applicant's United States citizen spouse and child, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse as documented by letters of support submitted into the record.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.