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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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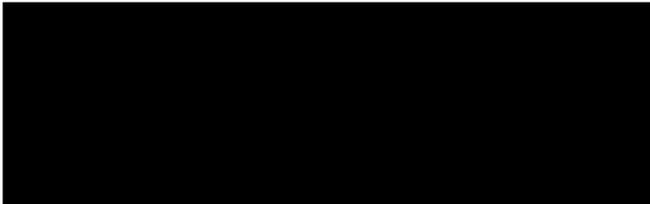


FILE: [REDACTED] Office: MEXICO CITY Date: **JUL 20 2010**

IN RE: Applicant: [REDACTED]

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

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.

Thank you,

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 record reflects that 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 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 naturalized U.S. citizen and 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 reside with her husband and daughter in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated June 8, 2009.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, Mr. [REDACTED], indicating they were married on March 27, 2002; a copy of Mr. [REDACTED] naturalization certificate; four affidavits from Mr. [REDACTED] two affidavits from Mr. [REDACTED] father; two affidavits from Mr. [REDACTED] mother; an affidavit from the applicant's daughter; letters from Mr. [REDACTED]s employers; copies of medical records for Mr. [REDACTED] father; two mental health assessments for Mr. [REDACTED], a copy of Mr. [REDACTED] settlement statement for his house and a copy of his property tax bill; photos of the applicant and her family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this 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 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 last entered the United States without inspection in February 1997 and remained until November 2007. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure from the United States in November 2007. Therefore, the applicant accrued unlawful presence of over ten years. She now seeks admission within ten years of her November 2007 departure from the United States. Accordingly, she is 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 one year or more and seeking admission to the United States within ten years of her last departure.

A section 212(a)(9)(B)(v) waiver of the bar to admission 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. See section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). An applicant must establish extreme hardship to his or her qualifying relative should the qualifying relative choose to join the applicant abroad, as well as should the qualifying relative choose to remain in the United States and be separated from the applicant. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. See *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996) (considering hardship upon both 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. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive 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 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 Court of Appeals for the Ninth Circuit has held that “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 Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, the record reflects that the applicant wed [REDACTED], a native of Cuba and a naturalized U.S. citizen, on March 27, 2002. The applicant claims that she has a 15-year-old daughter, [REDACTED], from a previous relationship who resides in the United States. The applicant’s spouse is a qualifying relative for purposes of a section 212(a)(9)(B)(v) waiver. Hardship to the applicant’s child will be considered only insofar as it results in hardship to the applicant’s spouse.

The applicant’s husband, [REDACTED], states that he was born in Cuba and that he and his parents are refugees. Mr. [REDACTED] states that his father, [REDACTED], refused to join the military in Cuba because he did not believe in the Communist government. Mr. [REDACTED] states that his father was imprisoned from the time he was fifteen years old until he was thirty and that his grandfather, Mr. [REDACTED] father, was also incarcerated as further punishment. According to Mr. [REDACTED], his father was forced to watch his grandfather be executed by firing squad. Mr. [REDACTED] contends that even after his father was released from prison, his family was consistently harassed, threatened, and intimidated by the military due to his father’s refusal to support the government. Mr. [REDACTED] states that he and his father arrived in the United States in January 1999 and his mother arrived in the United States in July 1999. According to Mr. [REDACTED] after arriving in the United States, his father developed kidney stones and was unable to work, and, therefore, Mr. [REDACTED] worked two jobs and walked everywhere instead of taking the bus in order to save money.

Mr. [REDACTED] states that he and the applicant had been inseparable since they first started living together and that they are completely dependent on one another for everything. He claims that despite his difficult upbringing in Cuba and adjustment to living in the United States, settling into a trusting relationship and allowing himself to need another person was one of the hardest obstacles he has overcome in his life. Mr. [REDACTED] states that if his wife is not permitted to return to the United States, he would have to find a third job in order to support his wife in Mexico while also paying the mortgage and bills in the United States.

In addition, Mr. [REDACTED] states that he cannot move to Mexico to be with his wife because after all he has struggled through, he does not want to lose everything he has worked for, including his job, health benefits, and his house. He contends he works two full-time jobs, averaging about nineteen hours per day, seven days per week, because he needs to pay his own expenses as well as support his wife in Mexico and his parents. He states he sleeps about three or three and a half hours per day and "often [he] simply want[s] to fall over dead." *Affidavits of Yunior Aguilera Curbelo*, dated August 10, 2009, July 9, 2009, November 2, 2007.

More recently, Mr. [REDACTED] contends that he had a cousin in Cuba who had contacted fellow Cubans to get him out of Cuba, but that these people were actually a group of kidnappers. According to Mr. [REDACTED] "[o]nce these people got [his] cousin and others to Mexico they locked them into a house" and demanded \$10,000 ransom from Mr. [REDACTED]'s sister. Mr. [REDACTED] claims that his sister contacted the police and that his cousin was ultimately rescued. The kidnappers had purportedly hit and tortured their victims. Significantly, Mr. [REDACTED] claims that a few months later, his wife was robbed in [REDACTED] Baja California, and that the next day, "someone left [him] a voicemail [o]n his cell phone . . . warning [him] that if [they] didn't pay the money[, his] wife and cousin would suffer the consequences." Mr. [REDACTED] states that there is a law enforcement investigation of these threats. *Statement from Yunior Aguilera*, dated April 7, 2010.

The applicant states that in early February 2010, she was robbed as she was exiting an ATM. She states that after the robbery, "they called and said that they wanted the money that [her] family had given [her]." According to the applicant, "[t]he next day they called asking for \$15,000. They said that [she] should beware of the consequences if [she] didn't give them the money." The applicant states that her husband called and told her that a woman left a message on his cell phone stating that "what happen[ed] to [his wife] was a warning related to Yurisan, [her] husband's cousin." The applicant further states that the threats increased and became more aggressive. She contends they told her that "as soon as the police stopped watching them, they would get their revenge for what [her] family had done." Furthermore, the applicant states that on March 1, 2010, two men broke into her apartment. She states that they broke the door, grabbed her by the neck, demanded the money, hit her, and wounded her with a knife on the left side of her stomach. She claims they left when a white van pulled up to her apartment, but that they threatened her that if she did not have the money when they came back, they would kill her. *Statement from Elsa Abarca Aguilera*, dated April 6, 2010.

Mr. [REDACTED] mother, Ms. [REDACTED], states that she came to the United States from Cuba as a refugee in June 1999. According to Ms. [REDACTED] her husband spent fifteen years in a Cuban prison which has affected both his physical and mental health. She states that her husband was forced to witness the execution of his own father, was underfed, beaten, and subjected to electroshock, resulting in permanent nerve damage and persistent depression. In addition, she states that around the time her husband arrived in the United States, he had to have heart surgery for a radiofrequency catheter ablation, a procedure performed to correct a heart rhythm disturbance. Ms. [REDACTED] also contends that in 2003 and 2005, her husband had operations for kidney stones. Furthermore, Ms. [REDACTED] states that her son, Mr. [REDACTED], is "for all practical purposes . . . the head of our family." She states that he gives them between \$400 and \$500 per month, interprets for them, takes

them to doctor's appointments, helps their younger son with homework, and helped to get their daughter and her children settled in the United States.

Ms. [REDACTED] contends that since the applicant departed the country, Mr. [REDACTED] never sleeps because he is always working and helping them. She contends he is very unhappy and that he now has no contact with his stepdaughter, Anny, who has turned from a good student into a very distracted, confused fourteen-year old, pregnant teenager. According to Ms. [REDACTED], her son feels that his life is worth nothing and his separation from his wife is leading him to "destroy himself with overwork, with worry, with anxiety." Moreover, Ms. [REDACTED] states that moving to Mexico is also not an option for Mr. [REDACTED] because he does not have the job skills to get the kind of work that would allow him to support his own family as well as his parents. She contends the applicant's hometown is extremely poor, that half the houses have dirt floors, food is scarce, sanitary conditions are bad, and the water supply is contaminated and scarce. *Affidavits of Zoila Curbelo-Hidalgo*, dated August 10, 2009, and December 10, 2007.

Mr. [REDACTED] father, Mr. [REDACTED] states that he was born in Cuba and that he has had a difficult life. Mr. [REDACTED] contends he and his son were admitted into the United States as refugees and that his wife and daughter later joined them in the United States. In addition, Mr. [REDACTED] states that shortly after he arrived in the United States, he had heart surgery to correct a disturbance in his heart rhythm. He contends he has had problems with kidney stones, problems with his veins, and that he is "simply not a very healthy person" due to the many years he was mistreated in prison. Copies of Mr. [REDACTED] medical records indicate that he suffered from chest discomfort and palpitations and underwent a "radiofrequency catheter ablation procedure" in May 1999. Mr. [REDACTED] states that despite his health conditions, he still works forty hours per week as a janitor. He further states that Mr. [REDACTED] helps pay his mortgage, takes him and his wife shopping, drives them to medical appointments, and looks after the family as the head of the family. According to Mr. [REDACTED] since the applicant departed the United States, Mr. [REDACTED] is "very, very unhappy" and "spends all of his time working, working, working, and he never takes a rest." Mr. [REDACTED] claims that "[t]his process is destroying" his son. *Affidavit of [REDACTED]* dated August 10, 2009.

The record also contains two mental health assessments for Mr. [REDACTED]. The assessments of Mr. [REDACTED] state that he has thoughts of killing himself, suicidal ideation, depression, a mood disorder, and severe anxiety. Mr. [REDACTED] reportedly works from five o'clock in the morning until midnight every day of the week and sleeps only four hours per night, if he can fall asleep. According to one assessment, Mr. [REDACTED] stated that he worked two jobs for ten years, and that he has sometimes worked three jobs, but that it has never been as hard as it is now with his wife gone. He reported that he must support himself, his parents, his wife in Mexico, and even his step-daughters who no longer live with him. The social worker describes Mr. [REDACTED] as having deep circles under his blood shot eyes and appearing fatigued, overwhelmed, and exhausted. Mr. [REDACTED] has also experienced significant sleep disturbance, headaches, body pain and tension, bowel urgency, lack of appetite, fatigue, and outbursts of anger. In addition, Mr. [REDACTED] has purportedly been diagnosed with pneumonia. The social worker spoke with Mr. [REDACTED] employers and one employer stated that Mr. [REDACTED] was "pretty close" to being suicidal and that "[h]e started talking about how he wished sometimes it was all

over, that he could go to sleep and not wake up. . . . [H]e was talking about driving fast and running into something because he said the pain is so bad, missing his wife is really killing him.”

Furthermore, the social worker states that Mr. ██████ could not imagine himself moving to Mexico to be with his wife and that being separated from his parents, family, and friends is reminiscent of his childhood in Cuba. The social worker concludes that even if the applicant is permitted to return to the United States, Mr. ██████ should nonetheless seek treatment from a qualified mental health profession given his “ongoing clinical symptoms of mood and anxiety disorder, and to process and find relief from the memories and feelings associated with this experience, particularly in light of past experiences of persecution and the current sense of not-belonging to and deserving the protection of the government.” *Mental Health Assessments*, dated June 30, 2009, and October 28, 2007.

Letters from Mr. ██████ employers state that since the applicant departed the United States, Mr. ██████ “is working as many hours as one person can physical[ly]/mentally work, including a second evening job.” Mr. ██████ has “red eyes, and a sad somber face.” *Letter from ██████*, undated; *see also Letter from ██████*, undated (stating that since the applicant left the country, Mr. ██████ “has been working non-stop to earn money for his legal battle,” and that the stress is taking a toll on him physically and mentally).

Upon a complete review of the record evidence, the AAO finds that the applicant has established her husband has suffered, and will continue to suffer, extreme hardship if her waiver application is denied.

In this case, the AAO finds that Mr. ██████ has suffered, and will continue to suffer, extreme hardship if he remains separated from the applicant. The record shows that Mr. ██████ has significant mental health problems. According to the mental health assessments in the record, as well as Mr. ██████ own affidavits and those of his coworkers, he has thoughts of killing himself, suicidal ideation, and is very depressed. The most recent mental health assessment in the record diagnoses the applicant’s spouse with severe major depressive disorder and generalized anxiety disorder. Furthermore, the record shows that there is an ongoing law enforcement investigation of the applicant’s and Mr. ██████ claims that individuals in Mexico are threatening and attempting to extort money from the applicant. The AAO finds that the applicant’s spouse will continue to suffer extreme emotional harm due to concern about the applicant’s well-being and safety in Mexico if they remain separated. Considering these unique factors cumulatively, the AAO finds that the effect of separation from the applicant on Mr. ██████ goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility and rises to the level of extreme hardship.

Moreover, moving to Mexico to avoid separation would be an extreme hardship for Mr. ██████. If Mr. ██████ relocated to another country, he would need to adjust to life in Mexico, a difficult situation made even more complicated given his past in Cuba, his mental health issues, his significant family ties in the United States, as well as the threats of violence in Mexico. The AAO notes that the most recent U.S. Department of State alert for U.S. citizens traveling to Mexico states that “violence has occurred throughout the country, including in areas frequented by American

tourists. U.S. citizens traveling in Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.” *U.S. Department of State Travel Warning for Mexico*, dated July 16, 2010. In sum, the hardship Mr. [REDACTED] would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with inadmissibility. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that Mr. [REDACTED] faces extreme hardship if the applicant is refused admission.

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 T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant’s unlawful entry and presence in the United States, and evidence in the record that shows the applicant presented a fraudulent Resident Alien Card and Social Security Card for employment eligibility on an Employment Eligibility Verification Form (Form I-9) in October 1995. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant’s husband if he were refused admission; the applicant’s family ties in the United States; and the fact that the applicant has not had any criminal convictions in the United States.

The AAO finds that, although the applicant’s immigration violations are 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.