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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship and Immigration Services

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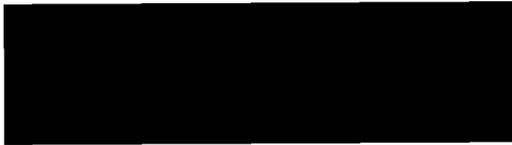
IN RE:



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 R. Hew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Panama City, Panama. 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 Colombia 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 her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated August 26, 2009.

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

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; medical letters and records relating to the applicant's spouse; a letter from the applicant's spouse's accountant; a statement from the applicant; and a Colombian police clearance letter for the applicant. 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 gained admission to the United States on August 3, 2001 with a B-2 visa, valid until February 2, 2002. *Form I-94, Departure Card*. The applicant remained in the United States, and, on July 5, 2003, was apprehended at the Rainbow Bridge, Niagara Falls, New York after being refused entry into Canada. *Form I-213, Record of Deportable/Inadmissible Alien*. The applicant was placed into proceedings and an immigration judge ordered her removed on September 5, 2003. *Order of the Immigration Judge, Immigration Court*, dated September 5, 2003. The applicant appealed and, on October 20, 2004, the Board of Immigration Appeals dismissed the appeal. *Decision of the Board of Immigration Appeals*, dated October 20, 2004. The applicant departed the United States on January 9, 2005. *Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal*. The applicant, therefore, accrued unlawful presence from February 3, 2002, the day after her nonimmigrant visa expired, until January 9, 2005, the date she departed the United States. As she is seeking admission within ten years of her 2005 departure, the applicant 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 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 would experience as a result of her inadmissibility is not directly relevant to the determination as to whether she 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 pursuant to section 212(i) of the Act. 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 he resides in Colombia or the United States, as he 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 travels with the applicant to Colombia, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. His family resides in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Statement from the applicant's spouse*, dated November 15, 2009. He does not speak Spanish. *Statement from the applicant's spouse*, dated September 2, 2008. The applicant's spouse was diagnosed with prostate cancer and had a prostatectomy in December 2007. *Medical records, Radiology Report, Brigham & Women's Hospital*, dated October 9, 2008. In June 2009, he returned to his physician for a follow-up appointment. *Statement from* [REDACTED] dated June 26, 2009. His physician notes that the applicant's spouse's prostate cancer is recurrent despite surgery and subsequent radiation. *Id.* Prognosis and treatment options were discussed, including hormonal therapy and chemotherapy, and he remains under the observation of his physician. *Id.* While the AAO notes that the record fails to include published documentation regarding the availability and adequacy of healthcare in Colombia, it acknowledges the documented health condition of the applicant's spouse, as well as his history of consistent treatment and plans for future treatment with healthcare professionals in the United States. The AAO also acknowledges the seriousness of his health condition and recognizes that a move to a foreign country would disrupt his current treatment.

The record also contains documentation showing the applicant's spouse to have received continuous psychological therapy from 1993 to the present time. *Statement from* [REDACTED] dated September 28, 2009. The applicant's spouse has been treated for severe refractory Obsessive-Compulsive Disorder (OCD) and Major Depressive Disorder (MDD). *Id.* He has been given serotonin reuptake inhibitors such as Prozac, atypical neuroleptics and has had cognitive behavior therapy in an effort to improve his condition. *Id.* The AAO acknowledges the documented psychological conditions of the applicant's spouse and the continuous treatment he has received with one psychiatrist. The AAO again recognizes that a move to a foreign country would disrupt this treatment and acknowledges the added difficulties the applicant's spouse would encounter in finding similar care in Colombia due to his inability to speak Spanish. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Colombia, his inability to speak Spanish and the effect that this would have upon his adjustment to Colombia, as well as his ability to seek treatment for his documented physical and mental health conditions, the AAO finds the applicant has demonstrated extreme hardship to her spouse if he were to reside in Colombia.

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. *Birth certificate*. His family resides in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Statement from the applicant's spouse*, dated November 15, 2009. The record also contains documentation showing the applicant's spouse to

have received continuous psychological therapy from 1993 to the present time. *Statement from* [REDACTED], dated September 28, 2009. The applicant's spouse has been treated for severe refractory Obsessive-Compulsive Disorder (OCD) and Major Depressive Disorder (MDD). *Id.* He has been given serotonin reuptake inhibitors such as Prozac, atypical neuroleptics and has had cognitive behavior therapy in an effort to improve his condition. *Id.* The applicant's spouse's psychiatric condition has worsened secondary to his inability to live with the applicant. *Id.* According to his psychiatrist, the positive effects of the applicant's presence in the United States would be that the applicant's spouse's Major Depressive Disorder, as it is worsened by feelings of loneliness, would be ameliorated and his general psychiatric and physical health would dramatically improve. *Id.*

The applicant, as noted above, has been diagnosed with prostate cancer and had a prostatectomy in December 2007. *Medical records, Radiology Report, Brigham & Women's Hospital*, dated October 9, 2008. His prostate cancer is recurrent despite surgery and subsequent radiation. *Statement from* [REDACTED] dated June 26, 2009. He is entering a research study for 18 months in which his cancer will be aggressively attacked with treatment consisting of chemotherapy, Avastan, and hormonal therapies. *Statement from the applicant's spouse*, dated November 15, 2009; *Research Consent Form, Dana-Farber/Harvard Cancer Center*, dated July 16, 2009. The applicant's spouse notes that he will be tired, have headaches, higher blood pressure, weight gain, and will be in pain a lot of the time. *Statement from the applicant's spouse*, dated November 15, 2009. He notes that the applicant is the only caregiver he has, as his mother is 83-years-old and incapable of assuming the responsibilities of caring for him and his brother has four children and lives in Boston. *Id.* When looking at the aforementioned factors, particularly the documented psychological and physical health conditions of the applicant's spouse and the effect that a continued separation would have upon these conditions, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside 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 prior unlawful presence for which she now seeks a waiver, as well as her unauthorized employment while in the United States. The favorable and mitigating factors are her U.S. citizen spouse, the extreme hardship to her spouse if she were to be refused admission, and the absence of a criminal 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.