

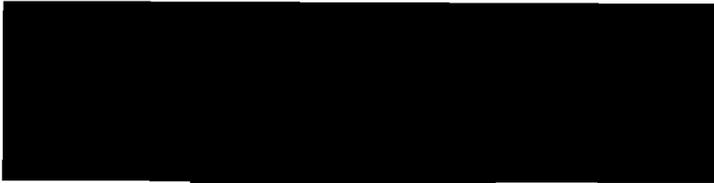
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:

(CDJ 2004 829 693)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: **MAY 06 2010**

IN RE:



PETITION: 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 PETITIONER:



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, 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 her last departure from the United States. The applicant is married to a naturalized United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and children.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated December 26, 2006.

On appeal, counsel contends that the applicant's qualifying relative would suffer extreme hardship and United States Citizenship and Immigration Services (USCIS) erred in denying the waiver application. *Form I-290B, Notice of Appeals to the Administrative Appeals Office (AAO) and 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 statements, records, appointment notices, and prescriptions for the applicant's spouse; a statement from the facilitator of [REDACTED]; statements from friends; and a workers' compensation form. 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 January 2000 and departed in March 2006, voluntarily returning to Mexico. *Consular Memorandum, American Consulate General, Ciudad Juarez, Mexico*, dated March 17, 2006. The applicant, therefore, accrued unlawful presence from January 2000 until she departed the United States in March 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of her March 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 her children 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 Mexico 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 joins the applicant in Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Mexico. *Naturalization certificate*. The parents of the applicant's spouse reside in the United States. *Form G-325A, Biographic Information, for the applicant's spouse*. The record does not address whether the

applicant's spouse has family members in Mexico. The applicant lives in Tijuana, Mexico with her children and parents. *Statement from the applicant's spouse*, dated January 26, 2007; *Form G-325A, Biographic Information, for the applicant*.

On appeal, counsel states that if the applicant's spouse relocates to Mexico, he would suffer great physical, psychological and economic hardship. *Attorney's brief*. Counsel contends that the applicant's spouse's employment opportunities in Mexico are limited because of his age and a permanent physical disability from a construction accident in 2004, and that he will have difficulty obtaining employment with pay sufficient to support his family. *Id.* Counsel also asserts that in moving to Mexico the applicant's spouse will lose access to the quality, specialized medical care and treatment he needs. *Id.* The record contains medical documentation that establishes that, on April 12, 2004, the applicant's spouse suffered a work-related injury to his right hand which required surgical intervention. *Statement from [REDACTED]*, dated January 23, 2007. Nearly two years after his injury, his physician noted that the applicant's spouse's ability to grip firmly had been substantially compromised and that he was not capable of resuming his preinjury position without a restriction to the dominant hand avoiding very forcible gripping activities using this extremity. *Treating Physician's Impairment Rating Report by [REDACTED]*, dated January 17, 2006. His physician has also found that the applicant's spouse has some limitation in terms of his daily activities. *Statement from [REDACTED]*, dated January 23, 2007. The AAO acknowledges the applicant's spouse's disability, as documented by a medical professional, and notes its likely impact on his ability to obtain employment in Mexico.

The AAO also notes that on March 14, 2010 the United States Department of State issued a Travel Warning for Mexico addressing the recent increase in violence along the U.S. – Mexico Border. *Travel Warning, United States Department of State*, dated March 14, 2010. The Department of State has issued this Travel Warning to inform U.S. citizens traveling to and living in Mexico of concerns about the security situation in northern Mexico, including in the cities of Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Matamoros, Reynosa and Monterrey. *Id.* When considered in the aggregate with the normal disruptions created by relocation, the safety risk to the applicant's spouse in northern Mexico and the hardships created by his physical disability establish that he would suffer extreme hardship were he to relocate to Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of Mexico. *Naturalization certificate*. The parents of the applicant's spouse reside in the United States. *Form G-325A, Biographic Information, for the applicant's spouse*. On April 12, 2004, the applicant's spouse suffered a work-related injury to his right hand which required surgical intervention. *Statement from [REDACTED]*, dated January 23, 2007. Nearly two years after his injury, his surgeon noted that the applicant's spouse's ability to grip firmly had been substantially compromised and that he was not capable of resuming his preinjury position without a restriction to the dominant hand avoiding very forcible gripping activities using this extremity. *Treating Physician's Impairment Rating Report by [REDACTED]*, dated January 17, 2006. His physician notes that the applicant's spouse has some limitation in terms of his daily activities and would clearly benefit from having the assistance of a significant other or family member with these activities. *Statement from [REDACTED]*, dated January 23, 2007. The

AAO acknowledges the physical health condition of the applicant's spouse as documented by a licensed healthcare professional. Although his children are currently living in Mexico with the applicant (*Statement from the applicant's spouse*, dated January 26, 2007), the AAO recognizes the added physical difficulties that caring for his two daughters would create for the applicant's spouse. The AAO also notes the record includes a statement from a medical doctor who states that the applicant's spouse is suffering from major depressive disorder and has been prescribed medication. *Statement from [REDACTED]* dated January 22, 2007. The applicant's spouse informed this physician that his condition is severely affected by his separation from the applicant and their children. *Id.* The record also includes medical appointment notices for follow-up care as well as prescriptions for antidepressants. *Medical appointment notices; Medical prescriptions.* A statement from a friend expresses concern about the applicant's spouse's emotional health due to the absence of his family. *Statement from [REDACTED]*, dated January 28, 2007. A statement from the facilitator of [REDACTED] also indicates that when the applicant's spouse visited her, he sounded very depressed, sad, and was suffering from being separated from the applicant and his children. *Statement from [REDACTED], San Ysidro School District, [REDACTED]*, dated January 29, 2007. When looking at the aforementioned factors, particularly the documented physical and mental health conditions of the applicant's spouse, the AAO finds the applicant's spouse would suffer extreme hardship if the applicant's waiver request were denied and he remained 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 and her January 2000 entry without inspection. The favorable and mitigating factors are the applicant's United States citizen spouse and the extreme hardship to her spouse if she were refused admission.

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.