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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

HG

FILE: [REDACTED] Office: MEXICO CITY (BROWNSVILLE, TX) Date: MAY 04 2011

IN RE: [REDACTED]

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:

[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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City (Brownsville, Texas), 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 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 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 the spouse of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated July 2, 2010, the field office director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and did not warrant the favorable exercise of the Secretary's discretion. The application was denied accordingly.

In a Notice of Appeal to the AAO, dated July 23, 2010, counsel states that the applicant's spouse is suffering medical, financial, and emotional hardship as a result of the applicant's inadmissibility.

The record indicates that during his visa interview on June 26, 2009, the applicant testified that he entered the United States without inspection in June 2000 at the age of eighteen. The applicant remained in the United States until June 2009. Therefore, the applicant accrued unlawful presence from June 2000 until June 2009. In applying for an immigrant visa, the applicant is seeking admission within ten years of his June 2009 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

The AAO notes that section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals 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). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record of hardship includes: medical documentation regarding the applicant's spouse; documentation regarding the applicant's spouse's business; a letter from the applicant's spouse's landlord; affidavits from the applicant's spouse's landlord, letters from the applicant's step-son, step-daughter, and the mother of the applicant's spouse's grandchild; a disconnection notice from a Georgia electric company, and additional medical documentation and financial documentation.

Counsel states, in an attachment to the Form I-290B, that the applicant's spouse suffers from chronic medical conditions which require regular doctor's visits. She states that the applicant's spouse suffers from pain due to a severe accident she had at work where she broke both her wrists and shattered vertebrae. Counsel states that the applicant's spouse does not want to take narcotic medication for this pain even though it has been prescribed to her because she has struggled with addiction in the past and wants to be able to care for her grandchild and her hair salon. Counsel also states that the applicant's spouse has been diagnosed with fibromyalgia, a chronic pain disorder that affects the muscles, joints, tendons, and soft tissues in her body. Counsel states that the chronic pain the applicant's spouse must deal with is causing her to also suffer from extreme depression. In addition to these medical problems the applicant's spouse has recently been diagnosed with a large fibroid tumor in her uterus, which requires surgery and follow-up care for a year after surgery.

Counsel states that the applicant's spouse is also suffering financially with her husband in Mexico. She states that the applicant's spouse is the owner of a hair salon, which she recently re-opened in an effort to earn more income to support the applicant in Mexico. The applicant's spouse also has full custody of her two-year old grandchild. Counsel states that the child has been abandoned by his parents and they do not take an active role in his life. Counsel states

further that the applicant's spouse will not be able to find employment in Mexico as a cosmetologist that will support herself, her husband, and her grandchild. Finally, counsel states that the applicant's spouse has significant community ties to the United States in that she was born a U.S. citizen, has a business in the United States that employs two people, has a network of doctors that she sees for her medical problems, has two U.S. citizen children, and a U.S. citizen grandchild.

In a letter dated July 22, 2010, the applicant's spouse's doctor states that the applicant's spouse has been suffering from fibromyalgia for years and has a huge uterus fibroid which needs surgery as soon as possible.

In an affidavit dated July 27, 2010, the applicant's landlord states that in July 2009 she leased her property to the applicant's spouse and stepson with a monthly rent of \$650.00 to be paid at the first of each month. She states that the applicant's spouse and stepson paid their rent on time until a couple of months ago. She states that she was aware that the applicant's stepson had moved out of the apartment and that the applicant was in Mexico, so she agreed to receive two payments of \$325.00 per month from the applicant's spouse. She states that the applicant's spouse is still two months behind in her rent.

In a letter dated June 1, 2009, the applicant's stepson states that the applicant helps his mother with her therapy and carpal tunnel syndrome. He states that he has a four month old son who is very attached to both his mother and the applicant. He states that he is worried about what will happen to his mother if the applicant cannot come back from Mexico.

In an affidavit, dated July 27, 2010, the mother of the applicant's spouse's grandchild states that due to her being unemployed she agreed to give custody of her son to the applicant's spouse.

The record also indicates that the applicant's spouse owns a business in the United States. A letter from the [REDACTED] dated July 16, 2010, states that the applicant's spouse had been their tenant since 1999, but that the bank took possession of the property the applicant's spouse leased in April 2009 because she was not able to pay the rent. The letter states that in exchange for free rent, the applicant's spouse then managed the property on the bank's behalf from April 2009 until March 2010 when she decided to re-open her business and signed a new lease. The letter states that the current rent is \$850 per month.

The record includes U.S. Individual Income Tax Returns showing that the applicant and his spouse earned \$6,998 in 2009 and \$19,048 in 2008. The record also includes past due and disconnection notices for the electricity at the applicant's spouse's business.

In addition to the documentation summarized above concerning the financial, emotional, and medical hardship being suffered by the applicant, the AAO received a letter from applicant's counsel, dated November 17, 2010, stating that the applicant's spouse had underwent surgery to her uterine fibroid and suffered complications from this surgery.

In her letter, counsel states that the applicant's spouse underwent surgery on October 28, 2010 and after being released suffered severe back pain. Counsel states that her doctors later discovered that the cause of her pain was the result of her right ureter being bent, making it impossible for her kidney to release urine from the kidney to the bladder. Counsel states that the applicant's spouse has since undergone three interventions to release the urine from her kidney and one surgery. Counsel states that she will require another surgery in December 2010. Counsel states that the applicant's spouse's son has not visited her and that her daughter is pregnant and cannot help to take of her. Counsel also states that the applicant's spouse had to have the mother of her grandchild come to take of him because she cannot even care for herself. Finally, counsel states that without the applicant in the United States to help her, his spouse is suffering extreme depression and that the applicant's spouse cannot work so is falling behind on all of her bills.

The AAO notes that with this letter counsel submits evidence of the applicant's spouse's previous surgeries, her medical condition, and her visit to the emergency room following the initial surgery to remove the fibroid. In a letter, dated December 14, 2010, a [REDACTED] states that the applicant's spouse has been under his care for ureteral reimplantation surgery after having postoperative complications which have resulted in persistent leg pain. The record also includes: a copy of a cashier's check showing that the applicant's spouse's business is closed; a letter from her retail landlord stating that the applicant's spouse is in default on her lease and owes \$4,250 in back rent; another affidavit from the landlord from her home stating that she is still six months behind in rent; and numerous disconnection notices from an electric company as well as numerous medical bills.

The AAO finds that the applicant's spouse has established that she is suffering extreme hardship as a result of the applicant's removal. The record indicates that the applicant's spouse suffers from chronic medical conditions which involve dealing with pain on a daily basis. The record also establishes that she is suffering financially. The record indicates through numerous letters and billing statements that the applicant's spouse's business has suffered since the applicant's departure and that she is not able to pay her rent. The record also establishes that the applicant was his spouse's primary caretaker and that her children were not able to help her. Thus, the applicant's spouse is suffering extreme physical, emotional, and financial hardship as a result of being separated from the applicant. Furthermore, the AAO finds that the applicant would suffer extreme hardship as a result of relocating to Mexico. Given the applicant's medical condition, in particular the current postoperative complications she is suffering, the AAO recognizes that it would be a hardship to relocate to Mexico. In addition, the applicant's spouse has strong family ties to the United States including a grandchild for whom she was the primary caretaker until recently. The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 BIA has stated:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factors in the applicant's case include extreme hardship to the applicant's spouse and, as stated by the applicant's stepson, the emotional support he provided to his spouse.

The unfavorable factors in the applicant's case are his illegal entry into the United States and his unlawful presence in the United States and a conviction for driving while under the influence in December 2005. In addition, the AAO notes that at the time of the applicant's entry he was only eighteen years old.

The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.