U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: AAO 06 090 50010 Office: CIUDAD JUAREZ, MEXICO Date: OCT 3 1 2007
(CDJ 2002 756 232 relates)

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

SHELLEY WITTEVRONGEL
1547 QUINCE AVE.
BOULDER, CO 80304

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

cc: client 11-5-07

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Ciudad Juarez, Mexico, and 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 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 10 years of his last departure from the United States. The record reflects that the applicant is the spouse of a United States citizen and that he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 in the United States with United States citizen wife and two United States citizen children.

The OIC found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer-In-Charge*, dated November 24, 2005.

On appeal, the applicant's wife states she "will suffer extreme hardship if [the applicant] is not permitted to return immediately." *Form I-290B*, filed December 23, 2005.

The record includes, but is not limited to, counsel's brief, the applicant's wife's affidavit, affidavits and statements from the applicant's family and employers, and a letter from M[redacted]y regarding the applicant's wife's mental health, dated December 19, 2005. The entire record was reviewed and considered in arriving at 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.

The AAO notes that the record contains several references to the hardship that the applicant's United States citizen children would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(v) of the Act provides that a waiver, under section 212(a)(9)(B)(i)(II) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's children will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that in April 1999, the applicant entered the United States without inspection. On May 28, 2001, the applicant's son, Mario, was born in Colorado. On January 9, 2002, the applicant married M[redacted]a, a United States citizen, in Colorado. On February 4, 2002, the applicant's spouse filed a Form I-130 on his behalf, which was approved on August 29, 2002. On May 28, 2004, the applicant's daughter, Maria, was born in Colorado. On April 11, 2005, the applicant voluntarily departed the United States. On April 27, 2005, the applicant filed a Form I-601. On November 24, 2005, the OIC denied the applicant's Form I-601, finding that the applicant accrued more than a year of unlawful presence and he failed to demonstrate extreme hardship to his United States citizen wife. The OIC stated the applicant accrued unlawful presence from April 1999 until April 2005. The applicant is attempting to seek admission into the United States within 10 years of his April 11, 2005 departure from the United States. The applicant is, therefore, 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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon deportation is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (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.

Counsel asserts that the applicant's spouse would face extreme hardship if she relocated to Mexico in order to remain with the applicant. *Brief in Support of Appeal*, page 9, dated December 21, 2005. Counsel states that

the applicant's wife has her "family, relatives, friends and community in the San Luis area of Colorado where she was raised...[Her] community ties are those of a lifetime. The children benefit by [the applicant's wife's] rootedness in the Costilla County community. Separating them from this community by forcing them to live in Mexico would cause a great disruption in their young lives." *Id.* The applicant's wife states "[i]f [they] move to Mexico, that would separate [her] from [her] relatives here in the United States. Without [her] mom and dad and twin sister to support [her] emotionally, [she does] not believe that [she] would be able to go on." *Affidavit of V[redacted]*, page 4, dated December 20, 2005. The applicant's wife and "children would have a serious cultural separation if they were to leave San Luis in order to be with the [applicant]." *Brief in Support of Appeal*, page 9, *supra*. The applicant's wife states that if she relocated to Mexico, they would have to live in a small home with "[the applicant's] parents, his brother and wife and their children and [the applicant's] sisters. They have two rooms. They have only cold water." *Affidavit of [redacted]*, page 3, *supra*. The applicant's wife worries for her children's heath and educational opportunities in Mexico. *See Id.* The applicant's son is in the Head Start Program in Colorado and if they moved to Mexico, he would have to be taken out of Head Start. The applicant's wife states she is "very grateful for the Head Start Program which not only provides [her] son [redacted] educationally but it also gives him an opportunity to interact with other children his own age, which [she] know[s] is so important for his development." *Id.* With the amount of money the applicant makes in Mexico, the applicant's wife states that they could not afford health services in Mexico. *Id.* at 4. "Where [the applicant] lives is about 20 miles from a clinic but [the applicant] says that he would not take the children there because he does not trust the quality of care. Also, the sanitary conditions there are very poor...In Mexico...governmental assistance does not exist really." *Id.*

The AAO notes that since the applicant departed the United States, his wife has requested Temporary Assistance for Needy Families (TANF). Additionally, the applicant's wife's mother states that she has given her "daughter approximately $100.00 a month to help her pay her bills." *Affidavit of [redacted]*, dated December 20, 2005. The applicant's mother-in-law states if the applicant "were allowed to return to the United States and work legally, [she] would no longer have to worry about helping [her] daughter." *Id.* The applicant's wife states that when the applicant resided with her in Colorado, they "were living poorly but [they] were able to meet [their] expenses." *Affidavit of V[redacted]*, page 3, *supra*. The AAO notes that if the applicant returns to the United States, he has employment with two separate businesses. *See Letter from [redacted]*, dated September 9, 2005 ("You have our assurance that when Mario arrives to the United States he will have a job with us"); *see also Letter from [redacted]*, dated December 19, 2005 ("I...guarantee [redacted] employment once he is allowed to return to the United States."); *see also Letter from M&M Farms*, dated September 9, 2005 ("He would have employment upon his return to this country."). The applicant's wife states she is not employed because there are no jobs available. *Affidavit of [redacted]*, page 2, *supra*. The AAO notes that the applicant's wife "was in special education throughout her school years and has only started to learn to read within the past year." *Letter from [redacted], MA, LPC, San Luis Valley Comprehensive Community Mental Health Center*, dated December 19, 2005. [redacted] states the applicant's wife has "symptoms of depression and anxiety," and after the applicant's wife's trip to Mexico, "she agreed to contact [redacted] to set up treatment...A medication evaluation may also be of consideration to determine the usefulness of psychotropic medication in managing her depression and anxiety symptoms." *Id.*

The AAO finds that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, in that the applicant's spouse is suffering emotional and financial hardship as a result of her separation from the applicant, which cumulatively amount to extreme hardship. The record establishes that the applicant's spouse's mental and emotional problems would be exacerbated whether she remains separated from her spouse or whether she joins him in Mexico. The hardship in this case is beyond that which is normally experienced in cases of removal. The record establishes that the applicant is the only wage earner in the family and the family is suffering financial hardship as a result of their separation from the applicant. The applicant's wife is incapable of maintaining her well being in the absence of the applicant. Accordingly, the AAO finds that the applicant has established that his United States citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The favorable factors are the extreme hardship to his United States citizen wife, who depends on him for emotional and financial support, having no criminal record in the United States, his voluntary departure from the United States, and positive character references. The unfavorable factors in this matter are the applicant's unlawful presence in the United States from April 1999 until April 11, 2005, and periods of unauthorized employment.

While the AAO does not condone his actions, the AAO finds that the favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

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.