

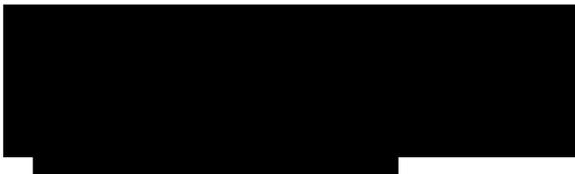
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

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U.S. Citizenship  
and Immigration  
Services



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FILE:  Office: CIUDAD JUAREZ Date: JAN 04 2011

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, [REDACTED], Mexico, and 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 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 a period of one year or more and under Section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii) for having a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others (Alcohol abuse). The applicant is married to a U.S. Citizen and is the beneficiary of an approved petition for alien relative. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(g) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(g), in order to return to the United States and reside with his wife and children.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director* dated December 28, 2009.

On appeal, the applicant asserts that his wife is suffering extreme financial and emotional hardship and is unable to raise their children and financially support them on her own. *See Notice of Appeal to the AAO (Form I-290B)*. The applicant further states that he has attended classes and paid restitution as required by law, and his arrest record should not preclude him from being granted permanent residence. In support of the waiver application and appeal, the applicant submitted letters from his wife's employer, documentation related to his wife's petition for bankruptcy, records of his conviction for driving under the influence of alcohol and court-ordered alcohol abuse counseling, family photographs, and a psychological evaluation of his wife. The entire record was reviewed and considered in rendering this decision.

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.

....

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

Section 212(a)(1)(A) of the Act provides, in pertinent part:

(A) In general.-Any alien-

....

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible. is inadmissible.

(B) Waiver authorized.-For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

Section 212(g) of the Act provides, in pertinent part:

(g) The Attorney General may waive the application of-

....

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. 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. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id. See also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

Although hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of the family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial

hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record reflects that the applicant is a twenty-seven year-old native and citizen of Mexico who resided in the United States from January 2003, when he entered without inspection, to October 2008, when he returned to Mexico. He is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. The record further reflects that the applicant’s wife is a thirty-seven year-old native of Mexico and citizen of the United States. The applicant currently resides in Mexico and his wife resides in Anaheim, California.

The applicant states that his wife is suffering financial hardship because she must work and support their daughter on her own and had to file for bankruptcy and move out of her home and rent a room for her and her daughter. *Notice of Appeal to the AAO*. He further states that she is expecting her second child and will be unable to pay the family’s bills and afford childcare and will continue to face financial hardship. In support of these assertions the applicant submitted a copy of an order from the U.S. Bankruptcy Court for the Central District of California discharging the applicant’s wife’s debt in Chapter 7 bankruptcy proceedings. *See Order of U.S. Bankruptcy Judge* dated December 24, 2009.

A letter from the medical office where the applicant’s wife has been employed as office manager for fifteen years states she is dependable and hardworking but “has endured several severe stressors recently, such as financial strain and being suddenly required to move when her landlord underwent foreclosure.” *Letter from* [REDACTED] dated January 13, 2010. Another letter from her employer states,

She is bright energetic and totally reliable but lately has been suffering symptoms of progressive depression. This condition corresponds to the loss of her husband who was penalized. This couple had a 2 year old daughter and a son is due in April.

Susan is in danger of losing her job due to symptoms of depression. *Letter from* [REDACTED] dated January 7, 2010.

A psychological evaluation of the applicant's wife submitted with the waiver application states that she has exhibited symptoms of depression and anxiety since her father died and the applicant left the United States, and "does not have appropriate coping skills" and "tends to avoid situations that are stressful for her which, in this situation, is unavoidable." *Psychological Assessment from* [REDACTED] dated September 6, 2008. [REDACTED] further states that the applicant's wife is having sleep problems, appetite problems, fatigue, concentration problems, and "has been noted at work to be having significant difficulties completing her job tasks." She concludes that the applicant's wife is suffering from depression and anxiety and has underlying difficulties dealing with stress that has resulted in serious signs of depression and anxiety in times of uncertainty, including the present time, when she feels her financial stability will be uncertain. She recommends mental health therapy "in order to develop skills to cope with the uncertainty in her life." *Psychological Assessment from* [REDACTED]

Documentation on the record indicates that the applicant's wife is experiencing depression and anxiety as a result of separation from the applicant and concerns about her ability to support her children in his absence. As noted above, separation from close family members is a primary concern is assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9<sup>th</sup> Cir. 1998). Letters from her employer state that she has had difficulty coping with the separation and resulting financial strain and is in danger of losing her job as a result of her symptoms of depression. The record further indicates that the applicant's wife, who has one daughter and was expecting their second child at the time the appeal was filed, has experienced financial difficulties since the applicant departed the United States and filed for bankruptcy in 2009. When considered in the aggregate, the emotional and financial hardships to the applicant's wife caused by separation from the applicant rise to the level of extreme hardship if she remains in the United States without him.

The AAO additionally finds that relocating to Mexico would pose other hardships for the applicant's wife, who has resided in the United States since she was a young child. The record indicates that the applicant's mother died when she was ten years old and her father died about two years ago, and she has no apparent ties to Mexico. The record further establishes that the applicant's wife has been employed as an office manager for fifteen years, and although she is currently having difficulties at work due to her depression and anxiety, she is a valued employee with a secure position there. When considered in the aggregate, the factors of hardship to the applicant's wife should she relocate to Mexico, including severing her ties and losing her employment in the United States and having to adjust to conditions in Mexico after living most of her life in the United States, constitute extreme hardship.

The record contains documentation indicating that the applicant completed an alcohol abuse counseling program in 2005 after a 2004 conviction for driving under the influence, and he was later convicted of disorderly conduct with alcohol involved on February 21, 2007. The record also contains a psychological evaluation of the applicant indicating that he continued to drink alcohol but his prognosis is favorable provided he attends counseling and other programs to help him stop drinking alcohol and prevent relapses. [REDACTED]

dated September 22, 2008. The record also contains a Statement in Support of Application for Waiver of Inadmissibility signed by a Public Health Service reviewing official indicating that the applicant will be evaluated by a physician within 30 days of his arrival in the United States, the physician will submit an initial report to the Centers for Disease Control and Prevention, and the applicant will be in outpatient or other status for appropriate clinical follow up and/or medical supervision.

Based on the forgoing, the AAO finds that the applicant has complied with the requirement for a waiver under section 212(g) of the Act for the Class A mental disorder of alcohol abuse. Further, as noted above, the applicant has shown that a qualifying relative would suffer extreme hardship if he is denied admission to the United States. The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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 Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

In evaluating whether 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). *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 negative factors in this case are the applicant's entry without inspection and unlawful presence in the United States for more than one year as well as his convictions for driving under the influence and disorderly conduct and his history of alcohol abuse. The positive factors in this case include the applicant's family ties in the United States and extreme hardship to the applicant's wife and children if he is denied admission to the United States.

The AAO finds that applicant's violation of the immigration laws cannot be condoned and his history of alcohol abuse is a serious matter. Nevertheless, the AAO finds that the applicant has

complied with the requirements of a waiver under section 212(g) of the Act and taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted for a waiver to be granted under sections 212(a)(9)(B)(v) and 212(g) of the Act. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.