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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

H5

SEP 01 2011

DATE: Office: SEATTLE, WA FILE: [redacted]

IN RE: Applican[redacted]

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

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim Field Office Director, Seattle, Washington. 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. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure, and misrepresenting her intent to reside in the United States. She is married to a United States citizen and has two U.S. citizen children. She 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).

The Interim Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 29, 2009.

On appeal, counsel for the applicant asks that USCIS consider all evidence that has been submitted on appeal and previouly in rendering a determination of extreme hardship. *Form I-290B*, received on June 26, 2009.

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-
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> . . . .
>
> (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.
>
> . . . .

The record indicates that the applicant entered the United States with a B2 visa in 1995 and remained beyond her authorized period of stay until July 1997. She entered again in February 1999 and remained beyond her authorized period of stay until 2004. She again entered the United States with her B2, intending to resume her residence, in February 2004. Therefore, the applicant was unlawfully present in the United States from April 1, 1997, the effective date of the unlawful presence provision of the Act until July 1997, a period of three months, and again from September 1999 to 2004, and from September 2004 until the date she filed her form I-485 to adjust her status, a period of over one year, and is now seeking admission within ten years of her last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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)(6)(C) Misrepresentation, states in pertinent part:

> (i) In general. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

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

> (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

Although the applicant re-entered the United States in 2004 after having accrued a previous period of unlawful presence she is not inadmissible under section 212(a)(9)(C) because her entry was with admission under a B2. In addition to her periods of unlawful presence, however, the applicant withheld information during her entries with a B2 visa in 1999 and 2004, thereby misrepresenting her intent to reside in the United States and rendering her inadmissible under section 212(a)(6)(C). The applicant admitted during her adjustment interview that she misrepresented her intent when she entered with her B2 visas. Therefore, the applicant is inadmissible under § 212(a)(6)(C)(iii) for having misrepresenting his intent to reside in the United States, and under § 212(a)(9)(B)(v) for having resided unlawfully in the United States from July 1999 to September 2000, and April 2001 to August 2005.

The record includes, but is not limited to, counsel's briefs; statements from the applicant's spouse; medical records pertaining to the applicant's spouse's medical conditions; bank records and medical treatment invoices; tax returns and other tax records; an employment offer letter for the applicant's

spouse; copy of a birth certificate for the applicant's youngest child; a Mental Status Examination by [redacted]. and [redacted]; medical records and insurance documents related to the applicant's work related back injury; and country conditions materials on Mexico.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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 spouse 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-Moralez,* 21 I&N Dec. 296, 301 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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).

However, though 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.*

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.*, *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record contains recently updated documentation on hardships to the applicant's spouse. Counsel for the applicant has asserted that the applicant's spouse would experience financial, emotional and physical hardship if he had to relocate to Mexico with the applicant or if he was separated from the applicant while she and their young son relocated to Mexico. *Brief in Support of Appeal*, dated June 25, 2009. At the time of his original application counsel stated that the applicant's spouse suffered a work-related injury and that he had been diagnosed with having hernias that may require surgery. Counsel also noted that the applicant would lose his Lawful Permanent Resident status if he were to relocate to Mexico, and that he would have to sever important community and family ties in the United States from leaving his occupation as a Skilled Foreign Food Cook and separating from his 12 year old son from a previous relationship. Counsel explained that the applicant's spouse has resided in the United States, remaining employed as a Skilled Foreign Food Cook, since 2000, paying his taxes and receiving worker's compensation insurance benefits from his employer for his work-related injury.

The applicant's spouse has also submitted two statements, outlining his health history and the impacts that have rippled from it to create financial and emotional hardship. *Statement of the Applicant's spouse*, June 24, 2009; *Statement of the Applicant's Spouse,* April 7, 2010.

The record contains correspondence updating the applicant's spouse's condition. Counsel explains that the applicant's spouse, who travelled to Mexico in order to afford the costs of a hernia surgery, was discovered to have a serious infection and had to have emergency appendix and gall bladder removal surgery. *Supplemental Brief*, dated May 27, 2010. Counsel explains that the applicant's

spouse spent four months under hospital care for his condition for what was initially supposed to be a three day period of recovery. He explains that applicant's spouse is unable to work and will depend on the applicant as the sole source of revenue for himself and their newborn son during his rehabilitation.

The applicant's spouse states in an April 7, 2010, letter that he has accumulated at least $20,000 in medical related debt and that it will take years for he and the applicant to pay the debt off. He explains that the conditions in Mexico would not allow her to relocate and still be capable of supporting their entire family while he is unable to work, and that any such relocation for him would result in physical, medical and emotional hardships. He notes that his recent surgeries will have a lifelong impact on his physical and mental health and wellness.

The record contains numerous medical records related to the applicant's spouse's back injury and recent surgical operations, as well as a previous psychological evaluation of the applicant's spouse. There are also statements from the applicant's spouse's doctors and copies of medical bills. This evidence is probative and sufficient to establish that the applicant's spouse has experienced a substantial disruption of his life due to serious, unexpected health conditions, and that he will be dependent on the applicant for financial support as well as physical and emotional support during his rehabilitation.

This evidence also establishes that they have significant debt, and that it is crucial that the applicant is able to work in order to support her rehabilitating spouse and young son, a prospect which would be greatly complicated by relocating to Mexico. The AAO finds it reasonable to observe that the medical conditions of the applicant's spouse will have a lifelong impact on him, in terms of debt, in terms of physical abilities, in terms of mental and emotional health and in terms of his health and wellness, and that these impacts create an unusual hardship for the applicant's spouse.

Although the applicant's spouse sought medical assistance in Mexico, and has family ties in Mexico, the AAO finds that, given his previous, worker's comp related injury for which he receives benefits in the United States, his status as an LPR, his prospect for employment, his wife's improved prospect for employment in the United States, the AAO finds that the cumulative impacts on the applicant's spouse upon relocation would rise to the level of extreme. The AAO notes that the applicant's spouse would likely experience other impacts as well, such as a disruption in his current medical care and acculturation impacts due to his long-term residence and employment in the United States.

The record also establishes that the impacts on separation, which include the physical and financial impacts on the applicant from his medical conditions, his inability to work to provide for himself and his son, the physical challenges of having to raise a child while rehabilitating from serious medical conditions, the significant debt he has accumulated in relation to his medical conditions and the emotional impact related to separation from the applicant and his son in light of his physical condition, when considered in aggregate with the common impacts of separation, rise above the common impacts of separation to the level of extreme. As such, the record establishes that a qualifying relative will experience extreme hardship, upon both relocation and separation if the

applicant remains in the United States. As the applicant has established that a qualifying relationship the AAO may now consider whether she warrants a waiver 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).

> 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-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 AAO finds that the unfavorable factors in this case include the applicant's misrepresentation of her intent to reside in the United States and her periods of unlawful presence and employment without authorization. The favorable factors in this case include the presence of the applicant's spouse and two children, the extreme hardship that the applicant's spouse would experience and the lack of any criminal history during her residence in the United States. The favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The director's decision will withdrawn and the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests 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. The waiver application is approved.