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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

U.S. Citizenship and Immigration Services

H6

[redacted]

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: NOV 0 9 2010

IN RE: Applicant: [redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to 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,

Tariq Syed for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The was appealed to the Administrative Appeals Office (AAO). On June 22, 2010 the AAO faxed counsel a complete copy of the District Director's decision, per counsel's request. The AAO advised counsel that he had 30 days to respond directly to the AAO. On August 18, 2010 the AAO summarily dismissed the applicant's appeal, as the AAO had not received a response from counsel and the appeal failed to identify any erroneous conclusion of law or statement of fact in the District Director's decision. On August 23, 2010 the AAO received a response from counsel with evidence that he timely responded to the June 22, 2010 fax from the AAO. As such, the AAO will re-open the applicant's 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 United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director,* dated October 29, 2007.

On appeal, counsel for the applicant states that the applicant has shown that her qualifying relative would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*; *Attorney's brief.*

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a statement from the applicant's spouse; published country conditions reports; a medical letter for the applicant's child; a psychological evaluation for the applicant's child; and a statement from the applicant's child's school. The AAO notes that the record also includes a document in the Spanish language unaccompanied by certified translations. Accordingly, the AAO will not consider this document. *See* 8 C.F.R. § 103.2(b)(3). The entire record, with the exception of the document in the Spanish language, 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 1999 and voluntarily departed on August 17, 2006, returning to Mexico. *Consular Memorandum, American Consulate General, Ciudad Juarez, Mexico*, dated August 23, 2006. The applicant, therefore, accrued unlawful presence from 1999 until she departed the United States on August 17, 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of her August 17, 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.

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.

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 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).

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).

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.*

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 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.

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 was born in Mexico. *Approved Form I-130, Petition for Alien Relative.* He has lived in the United States since he was one year old. *Statement from the applicant's spouse*, dated September 11, 2009. The majority of his family is in the United States, including his parents, siblings, aunts and uncles. *Id.* His grandparents and two aunts reside in Mexico. *Id.* The applicant's spouse notes that in Mexico, particularly in the state of the applicant's residence, [redacted], there is widespread crime and violence. *Id.* The record includes published country conditions reports as well as a Travel Warning issued by the United States Department of State warning United States citizens of the dangers of traveling to Mexico. *Country conditions reports; Travel Warning, Mexico, United States Department of State*, dated May 6, 2010. The AAO acknowledges this documentation and notes that the most recent Travel Warning issued by the United States Department of State declares that recent violent attacks and persistent security concerns have prompted the United States Embassy to urge United States citizens to defer unnecessary travel to [redacted] and to advise United States citizens residing or traveling n those areas to exercise extreme caution. *Travel Warning, Mexico, United States Department of State*, dated September 10, 2010. The applicant's spouse notes that his child has a congenital eyelid abnormality requiring surgery, and that the scheduled surgery was cancelled due to his child accompanying the applicant to Mexico. *Statement from the applicant's spouse*, dated September 11, 2009. A medical statement included in the record notes that the applicant's child has had the same physician in the United States since 2004, and that she has a history of congenital eyelid abnormality of the left upper eyelid which has led to disfigurement (left upper eyelid blepharoptosis). *Statement from* [redacted], dated December 7, 2007. Her physician states that in July 2006, they planned for a surgical correction of this problem before the child turned five years of age and that her physician was planning on seeing the child again in the summer of 2007, but socioeconomic limitations have prevented a follow-up examination. *Id.* While the record does not include published country conditions reports regarding the adequacy of healthcare in Mexico, the AAO acknowledges the health condition of the applicant's child as documented by a licensed healthcare professional and recognizes that a relocation to Mexico would disrupt the consistent care she has been receiving and subsequently affect the applicant's spouse. When looking at the aforementioned factors, particularly the amount of time the applicant's spouse has lived in the United States, his numerous family ties to the United States, the documented country conditions in Mexico as they pertain to safety, the Travel Warning issued for United States citizens, and the documented health conditions of the applicant's child and their effect upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in 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 was born in Mexico. *Approved Form I-130, Petition for Alien Relative.* He has lived in the United States since he was one year old. *Statement from the applicant's spouse*, dated September 11, 2009. The majority of his family is in the United States, including his parents, siblings, aunts and uncles. *Id.* His grandparents and two aunts reside in Mexico. *Id.* The applicant's spouse notes that in Mexico, particularly in the state of the applicant's residence, [redacted], there is widespread crime and violence. *Id.* The AAO notes that the United States Department of State has issued a Travel Warning stating that recent violent attacks and persistent security concerns have prompted the United States Embassy to urge United States citizens to defer unnecessary travel to [redacted] and to advise United States citizens residing or traveling in those areas to exercise extreme caution. *Travel Warning, Mexico, United*

States Department of State, dated September 10, 2010. As such, the AAO recognizes the difficulties the applicant's spouse would have in visiting the applicant in Mexico. A medical statement included in the record notes that the applicant's child has a history of congenital eyelid abnormality of the left upper eyelid which has led to disfigurement (left upper eyelid blepharoptosis). *Statement from* [redacted] dated December 7, 2007. A psychological evaluation for the applicant's child conducted in Mexico observes her to be anxious, stressed, uneasy and hyperactive and suggests follow-up therapy. *Psychological evaluation from* [redacted] *Licensed Psychologist*, dated January 2008. The AAO acknowledges the difficulties of being separated from a child with documented health conditions. The applicant's spouse states that he became so depressed after being separated from the applicant that he was unable to work and lost his apartment. *Statement from the applicant's spouse*, dated September 11, 2009. While the AAO acknowledges these statements, it notes that the record fails to include documentation of the dismissal of the applicant's spouse, the loss of his apartment, as well as documentation of his various expenses, such as rent/mortgage, credit card statements, and utility bills. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nevertheless, when looking at the aforementioned factors, particularly the inability of the applicant's spouse to visit Mexico due to the Travel Warning and the difficulties of being separated from his child with documented health conditions, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to remain 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 1999 entry without inspection and her prior unlawful presence for which she now seeks a waiver. The favorable and mitigating factors are her United States citizen spouse and child, the extreme hardship to her spouse if she were refused admission and her supportive relationship with her spouse and family, as documented by letters of support submitted into the record.

The AAO finds that, although the immigration violations committed by the applicant are 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)(v) 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.