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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: CUIDAD JUAREZ (MEXICO CITY) Date: SEP 2 1 2010

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) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Kamnitz

for Perry Rhew
Chief, Administrative Appeals Office

ACTION COMPLETED
APPROVED FOR FILING
Initials: JT Date: 6/22/11
FCO/Unit COW

**DISCUSSION**: The waiver application was denied by the Acting Deputy District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for being convicted of a crime involving a controlled substance. The applicant is married to a U.S. citizen and has three children. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated April 28, 2008, the acting deputy district director found that the applicant failed to demonstrate that a qualifying relative would suffer extreme hardship as a result of his continued inadmissibility to the United States. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated May 15, 2008, counsel states that the acting deputy director did not give sufficient weight to the applicant's spouse's affidavit and to the cumulative evidence of hardship provided by the applicant.

The record indicates that the applicant entered the United States in February 1996 and did not depart until January 2, 2007. Thus, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted, until January 2, 2007. In applying for an immigrant visa the applicant is seeking admission within ten years of her January 2007 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.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
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> > (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.
> >
> > . . . .

> (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 present application also indicates that the applicant was arrested on January 25, 2003 and subsequently convicted for possession of marijuana in the amount of 1.2 grams.

The record also indicates that the applicant was arrested in Iowa in August and September 2002 for two separate domestic violence charges. One of those charges was dismissed. The applicant pled guilty to the other as an aggravated misdemeanor.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
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> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
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> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

As the applicant was convicted of a crime involving a controlled substance, the AAO will not make a determination as to whether his conviction for domestic violence involved moral turpitude.

However, the AAO notes that assault or battery has been deemed to involve moral turpitude where the assault or battery involved some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The AAO also notes that section 708.2A of the Iowa Code states at subsection 3(b) that an an domestic assault offense is an aggravated misdemeanor if, "the domestic abuse assault is committed with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault." In addition, the maximum penalty possible for an aggravated misdemeanor is two years in prison. Thus, based on the current record it would seem that the applicant has been convicted of a crime involving moral turpitude and that his conviction would not qualify for the petty offense exception.

Furthermore, the applicant's conviction for domestic assault indicates that he may be subject to the heightened discretion standard of establishing exceptional circumstances (i.e.exceptional or extremely unusual hardship) under 8 C.F.R. § 212.7(d) because he has been convicted of a violent or dangerous crimes. Nevertheless, as stated above, because the record is incomplete as to the disposition of the applicant's conviction, and because the appeal will be dismissed on other grounds, the AAO will not making a final finding on this conviction. However, should the applicant again seek a waiver of inadmissibility, he must demonstrate either that his domestic violence conviction is not a crime involving moral turpitude or meets the petty offense exception; or, in the alternative, that it is either not a violent or dangerous crime or, if it is, that he warrants a favorable exercise based on extraordinary circumstances.

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

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-
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> . . . .
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The AAO notes that as the applicant was convicted of possession of less than thirty grams of marijuana he is eligible for a section 212(h) waiver for his inadmissibility under 212(a)(2)(A) of the Act. In addition to a section 212(h) waiver, the applicant requires a waiver under 212(a)(9)(B)(v) of the Act resulting from his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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 dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent and/or child of the applicant. Hardship the applicant or his children experience is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it is shown that hardship to the applicant or his children is causing hardship to the applicant's spouse. In section 212(h) waiver proceedings hardship to the applicant may not be considered, but hardship to his children can be considered. 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).

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.

The record of hardship includes, but is not limited to: counsel's brief, photographs of the applicant and his family, a statement from the applicant's spouse, ten letters from family and friends, a letter of employment, and a psychological assessment. The entire record was reviewed and considered in rendering a decision on the appeal.

In his brief counsel states that the applicant will suffer extreme hardship as a result of the applicant's inadmissibility because she has extensive family ties and a support group of friends in the United States that she would be forced to separate from if she relocated to Mexico. Counsel also states that the applicant has no family ties in Mexico and the conditions in Mexico would result in extreme hardship upon relocation. The AAO notes that the psychological evaluation submitted as part of the record states that the applicant's spouse's mother and sister live in Mexico. Counsel states further that as a result of separation the applicant's spouse is suffering financial hardship. He states that she works fulltime, but struggles to pay for childcare for her three children, and worries if she will be able to feed them. Counsel also asserts that the applicant battles depression and has been suffering from the condition for several years, at varying degrees of severity. He states that her condition requires regular doctor visits and monitoring and that during the year she underwent outpatient therapy for a few months time. Counsel also states that the applicant's spouse is now having discipline problems with her three children.

The record includes numerous statements from family and friends of the applicant and his spouse. These letters support counsel's assertions that the applicant's spouse is suffering from depression, having problems with her children because of the applicant's absence, and is suffering financially.

The AAO notes that the record contains a letter from the applicant's spouse's employer, dated December 19, 2007. The letter states that the applicant's spouse is [redacted] in the Cut Department of Farmland Foods, Inc., she is a fulltime employee, earns $13.80 per hour, and is guaranteed 36 hours per week.

The psychological assessment, dated January 23, 2008 and completed by [redacted] at the West Iowa Community Mental Health Center, states that the applicant's spouse reported no prior mental health counseling, but was prescribed an antidepressant medication about two years ago, which she discontinued because it made her drowsy. [redacted] recommends therapy for four to eight weeks for the applicant's spouse to treat what Ms. Haase diagnosed as adjustment disorder with depressed mood.

The AAO finds that the current record establishes that the applicant will suffer extreme hardship as a result of separation, but does not establish extreme hardship as a result of relocation. The record indicates, through a psychological assessment and numerous supporting statements that the applicant's spouse is suffering from depression requiring therapy. However, the record does not establish through statements and/or supporting documentation that the applicant's spouse would suffer extreme hardship upon relocation to Mexico. The AAO notes that the U.S. Department of State has issued a travel warning to U.S. citizens visiting and/or living in Mexico. This warning names several areas of Mexico where violence is a serious problem, but the applicant has not provided documentation of where he is currently living in Mexico for the AAO to properly analyze whether the applicant's spouse would be in danger of experiencing such violence upon relocation. Thus, the applicant has failed to establish that his U.S. citizen spouse will suffer extreme hardship as a result of his inadmissibility.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) and 212(h) 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 not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.