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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 Date: SEP 23 2010

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

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,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

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

DISCUSSION: The waiver application was denied by the District Director, Mexico City, 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. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States and reside with his wife.

The district director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Decision of the District Director* dated April 28, 2008.

On appeal, the applicant asserts that his wife is suffering extreme hardship since he departed the United States, including emotional hardship exacerbated by her mother's illness. Specifically, the applicant's wife states that her mother has cancer and at the time the appeal was submitted had been told she did not have much time to live. *See Statement in Support of Appeal* at 1. The applicant's wife states that her mother worried about her and her daughter because they were separated from the applicant and she would like her mother to be able to live without worrying about the effects of the applicant's immigration situation on their family. *Statement in Support of Appeal* at 1-2. She further states that she has various medical conditions that require surgery, and she is scared because in the past her mother helped her with her daughter when she needed surgery to remove an ovarian cyst and now her mother is not able to help her. *Statement in Support of Appeal* at 2. The applicant's wife further states that the applicant has always provided her with a great deal of support and she really misses him and needs him by her side. *Statement in Support of Appeal* at 2. In support of the waiver application and appeal the applicant submitted medical records for his wife and mother-in-law, records indicating that his wife was pregnant at the time the appeal was filed, and letters from his wife and other relatives. The entire record was reviewed and considered in arriving at decision on the appeal.

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.

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-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).

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.

In the present case, the record reflects that the applicant is a thirty-four year-old native and citizen of Mexico who resided in the United States from April 30, 1997, when he entered without inspection, to January 24, 2006, when he returned to Mexico under a grant of voluntary departure. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of one year or more. The applicant's wife is a thirty year-old native and citizen of the United States. The applicant currently resides in Chihuahua City, Mexico, and his wife resides in Denver, Colorado.

The applicant's wife states that she is suffering emotional hardship because her mother has been diagnosed with terminal cancer and needs the applicant's support during this difficult time. She further states, "This has been very hard on the whole family and its [sic] going to get worse. I would really like [for] my mom live the best days of her life happy and without any worries thinking we are going to be okay." *Statement from* [redacted] *in Support of Appeal.* The applicant's wife further states that she has been diagnosed with gallstones and an ovarian cyst but has not had surgery because she is too busy caring for her mother, and also does not have her mother to help with her daughter as she did during her recovery from ovarian surgery in the past. *Statement from* [redacted] *in Support of Appeal.* She additionally states that she is pregnant with her second child, which complicates her situation, especially in light of her need for gallbladder surgery. In support of these assertions, the applicant's wife submitted medical records indicating that her mother was

suffering from advanced lung cancer, and because of the advanced state of the disease was considered by physicians to be a candidate for admission into a hospice. A letter from the applicant's wife physician states that she had surgery three months after the birth of her daughter, after the applicant had departed the United States, for a complex abdominal mass. Other records states that she has a history of gallstones and depression and was diagnosed with an ovarian cyst in November 2007. The applicant's wife states,

> . . . I have Gallbladder stones and need to be removed. With all that has been going and taking care of my mother I have not yet done anything about it, which I am scared because my mom was the one who helped me when I had surgery to my right ovary . . . she helped me with my baby when she was only 3 months of age, my mom took care of her while I stood in the hospital for 3 days. Now I also have the same problem again. . . Again I still have not yet done nothing because my mom has been feeling sick.

The applicant's wife states that she is experiencing emotional hardship due to separation from her husband and needs his support because her mother is terminally ill. The record indicates that the applicant's wife's mother was suffering from advanced lung cancer in 2008, the applicant's wife was involved in her mother's care, and she had medical problems of her own, including an ovarian cyst. It is not known whether the applicant's wife's mother succumbed to her illness after the appeal was submitted, but the evidence on the record does establish that the applicant's wife was suffering extreme emotional hardship due to her mother's illness. In light of this situation, the emotional hardship of continued separation from the applicant and the difficulties of raising her children on her own without her mother's help amounts to hardship beyond the common results of inadmissibility or removal. This hardship, when combined with the financial difficulty resulting from loss of the applicant's income and having to support her children on her own, rises to the level of extreme hardship for the applicant's wife if she remains in the United States without the applicant.

The record further indicates that the applicant's wife was born in the United States and resides in Denver, Colorado with her parents and siblings. The hardship that would result from having to leave her family, especially in light of her mother's terminal illness and the emotional hardship this has caused her family, and adjust to conditions in Mexico, would amount to hardship beyond the common results of removal or inadmissibility for the applicant's wife if she were to relocate to Mexico. As noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998). The AAO further takes note that since the appeal was filed, the level of drug-related violence has increased significantly in Mexico, including in the state of Chihuahua where the applicant resides. The U.S. Department of State has issued Travel Warnings for Mexico, and the most recent warning states:

> Since 2006, the Mexican government has engaged in an extensive effort to combat drug-trafficking organizations (DTOs). Mexican DTOs, meanwhile, have been engaged in a vicious struggle with each other for control of trafficking routes. In order to prevent and combat violence, the government of Mexico has deployed military troops and federal police throughout the country. U.S. citizens should expect to encounter military and other law enforcement checkpoints when traveling in

> Mexico and are urged to cooperate fully. DTOs have erected unauthorized checkpoints, and killed motorists who have not stopped at them. In confrontations with the Mexican army and police, DTOs have employed automatic weapons and grenades. In some cases, assailants have worn full or partial police or military uniforms and have used vehicles that resemble police vehicles. According to published reports, 22,700 people have been killed in narcotics-related violence since 2006. The great majority of those killed have been members of DTOs. However, innocent bystanders have been killed in shootouts between DTOs and Mexican law enforcement or between rival DTOs.
>
> Recent violent attacks and persistent security concerns have prompted the U.S. Embassy to urge U.S. citizens to defer unnecessary travel to Michoacán and Tamaulipas, to parts of Chihuahua, Sinaloa, Durango, and Coahuila, (see details below) and to advise U.S. citizens residing or traveling in those areas to exercise extreme caution. . . .
>
> Since 2006, large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues. Such firefights have occurred mostly in northern Mexico, including Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Nuevo Laredo, Piedras Negras, Reynosa, Matamoros and Monterrey. Firefights have also occurred in Nayarit, Jalisco and Colima. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area.
>
> The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted. U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in those areas specifically mentioned in this Travel Warning. . . . *U.S. Department of State, Bureau of Consular Affairs, Travel Warning for Mexico* dated September 10, 2010.

The emotional hardship that would result from separation from her family and having to adjust to conditions in Mexico as well as the possible risk of harm if she relocated to Chihuahua with the applicant would amount to extreme hardship to the applicant's wife if she relocated to Mexico.

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 a waiver 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).

In evaluating whether section 212(a)(9)(B)(v) 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 adverse factors in the present case are the applicant's immigration violations, entering without inspection and remaining unlawfully in the United States, as well as his arrests in 2001 for driving under the influence and for other traffic violations in 2002 and 2003. The favorable factors are the hardship to the applicant's wife and children if they remain separated from him and the applicant's lack of additional criminal convictions.

The AAO finds that applicant's violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.