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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

H6

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: JAN 24 2011

IN RE: Applicant: [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 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 $630. 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,

Perry Rhew
Chief, Administrative Appeals Office

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 dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found to be inadmissible 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 10 years of his last departure from the United States. The director stated that the applicant had submitted a frivolous asylum application on July 21, 1997, and had accrued over one year unlawful presence until May 2004 when the applicant voluntarily departed the United States. The record indicates that the applicant is the husband of a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 reside in the United States with his United States citizen spouse and United States citizen children.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated February 8, 2008.

On appeal, the applicant, through counsel, asserts that the director erred in determining that the applicant was inadmissible on account of having accrued unlawful presence, and that the applicant established extreme hardship to his U.S. citizen spouse. Counsel submits additional evidence. *See Form I-290, and attachments.*

The record includes a declaration from the applicant's spouse detailing the hardship claim, and medical documentation. *See declaration from* [redacted] *medical letters from* [redacted] *of Advanced Dermatology; and, a medical report from* [redacted] *M.D., dated November 21, 2005.* The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States, without inspection, in September 1981. The applicant filed an asylum application on July 21, 1997. The applicant was referred to an immigration judge on September 5, 1997, and he was placed in removal proceedings. At his hearing before an Immigration Judge on November 12, 1997, the applicant abandoned the asylum claim, and requested cancellation of removal or in the alternative voluntary departure. On August 31, 1998, the Immigration Judge denied the applicant's application for cancellation of removal and granted the applicant voluntary departure within 60 days. The applicant timely appealed the decision of the Immigration Judge to the Board of Immigration Appeals (BIA). On May 31, 2002, the BIA upheld the decision of the immigration judge to deny the application for cancellation of removal, and granted the applicant 30 days from the date of the BIA's decision to voluntarily depart from the United States. On June 21, 2002, the applicant filed a Petition for Review and Stay of Deportation with the United States Court of Appeals for the Ninth Circuit. Also, on June 21, 2002, the applicant's U.S. citizen spouse filed a Form I-130, Petition for Alien Relative, on behalf of the applicant. On October 15, 2002, the Ninth Circuit Court of Appeals denied the applicant's request for a stay of removal. The Form I-130 was approved on March 9, 2003. On March 19, 2004, counsel for the applicant motioned the Court to withdraw the Petition for Review. On March 23, 2004, the Court granted the motion to withdraw the petition for review. The applicant voluntarily departed the United

States in May 2004. On October 6, 2006, the applicant filed a Form I-601. On February 8, 2008, the Director denied the Form I-601, finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to his United States citizen spouse.

The director's determination that the applicant had accrued over one year of unlawful presence was based, in part, on a finding that the applicant had filed a frivolous asylum application. The record however, does not support the director's finding that the application for asylum was frivolous. As noted above, after the asylum officer referred the applicant to an immigration judge and placed him in removal proceedings, the applicant abandoned his asylum application, and, instead, he sought cancellation of removal or in the alternative, voluntary departure. The abandonment of an application for asylum does not mean that the application was not bona fide. *See Memorandum by [redacted] Acting Associate [redacted] Associate Director, Refugee, Asylum and International Operations Directorate; [redacted] and Strategy, dated May 6, 2009, at page 29.*

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.

The record reflects that before the applicant filed his asylum application, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, until he filed his asylum application on July 31, 1997, a total of 121 days. In addition, the applicant accrued unlawful presence from June 30, 2002, 30 days after the voluntary departure was granted by the BIA pursuant to the May 31, 2002 decision of the BIA to uphold the decision of the immigration judge to deny the application for cancellation of removal, until May 2004 when the applicant departed the United States.

Contrary to counsel's assertion, the applicant accrued over a year of unlawful presence. Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

It is noted that the record also reflects that on December 22, 2005, the applicant filed a Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, which was approved on March 15, 2006. Therefore, the director's determination that the applicant did not submit a Form I-212 application is hereby withdrawn.

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 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.

The applicant's spouse states that her family has experienced "physical, emotional, financial, and psychological" hardships as a result of separation form the applicant. She states that she suffers with carpal tunnel which is worsened by her work, but she has had to work two jobs to be able to keep their home and pay household bills, and she needs her "husband to help alleviate this financial burden;" that her health is threatened and if the situation continues it could result in "irreparable damage that will leave [her] with crippled hands and an impaired ability to walk and stand;" that she experiences pain daily; that she has been losing her hair, which she states her doctor attributes to "excessive stress," and she has had to get "cortisone shots in [her] scalp to stop her from going bald." A letter, dated October 2, 2006, from [redacted] of Advanced Dermatology states that "Maria Salas was treated in [their] office for hairloss on 1-14-05." A letter from Dr. [redacted], dated November 21, 2005, discusses an evaluation of the applicant's spouse's hands. These letters, however, do not indicate the reasons for the applicant's spouse's hair loss and hand conditions. Also, the record does not include updated medical reports, nor a report of how the condition impacts the applicant's spouse and details and supporting evidence of how she needs the applicant's assistance and support. Without this evidence the AAO cannot make an assessment of the nature and extent of any hardships that would result to the applicant's spouse due to her medical conditions.

The applicant's spouse submits a "Declaration of Expenses" dated October 5, 2006, which shows $3,247.58 in household expenses. However, the applicant does not provide evidence of the family's income and an updated list of expenses. The applicant does not specify the household bills for their home in the United States, and the expenses he will incur to maintain a separate household in Mexico. Without details of the family's expenses, the AAO is unable to assess the nature and extent of financial hardship, if any, the family will face. It is noted that the record fails to demonstrate that the applicant will be unable to contribute to his family's financial wellbeing from a location outside of the United

States. Furthermore, it has not been established that any financial hardship the applicant's spouse would suffer is beyond that which would normally be experienced as a result of separation.

The applicant's spouse states that due to the absence of her husband, "emotionally there is a lot of sadness in [their] home; ... holidays are very difficult; birthdays and Christmas are especially sad; ... [she is] very depressed." The applicant's spouse states that she and the children are emotionally attached to her husband and she does not want to be separated from him; that the applicant "shared her burden and made it lighter." Letters from the applicant's spouse's children state how they miss the applicant. The AAO notes that the applicant's spouse will suffer some hardship as a result of separation. However, it has not been established that these hardships are beyond that which would normally be experienced by families as a result of separation.

The AAO finds, therefore, that the applicant has failed to establish that the hardships his U.S. citizen spouse will suffer in the United States as a result of separation are extreme.

Regarding hardship she will suffer in Mexico if she joins the applicant there, the applicant's spouse states that "moving to Mexico is out of the question;" that, she and the children would have to obtain visas, and that "[she is physically impaired and the pay [there] would be next to nothing;" that "[her] husband and his parents are already suffering from the economic impact of the Mexican economy;" and, that "[her] husband's health has been affected since [he returned] to Mexico due to kidney stones." However, the record does not include evidence of the family's income and details of their expenses, including their household expenses in Mexico. Also, the record does not contain medical evidence to establish that the applicant suffers from kidney stones and a medical report on whether, and to what extent, the applicant's kidney stone condition impacts the applicant. Without such information, the AAO is unable to assess the extent of hardship his U.S. citizen spouse would experience in Mexico if she joins the applicant there.

The AAO, finds, therefore, the applicant has failed to establish that any hardships the applicant's spouse may suffer in Mexico will be beyond that which would normally be experienced as a result of 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)(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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.