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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

#6

[redacted]

Date: MAY 06 2011 Office: PHOENIX, ARIZONA FILE: [redacted]

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:

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.

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 Field Office Director, Phoenix, Arizona, 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 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 her last departure from the United States. The applicant is married to a United States citizen and the mother of three children. She 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 her United States citizen spouse and children.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated June 4, 2009.

On appeal, the applicant's husband claims he will suffer extreme hardship if the applicant returns to Mexico. *See statement from the applicant's husband, attached to Form I-290B*, dated July 2, 2009.

The record includes, but is not limited to, statements from the applicant's husband and son; letters of support for the applicant and her husband; medical documents for the applicant's husband, son, and father; wage statements and employment verification documents for the applicant's husband; and tax documents. The entire record was reviewed and considered in arriving at a decision on the appeal.

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.
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> . . . .
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> (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 [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 on July 12, 1991, the applicant entered the United States on a border crossing card (BCC). She was issued an Arrival/Departure Record (Form I-94), which authorized her period of stay until July 11, 1992. On April 10, 2001, the applicant departed the United States to attend her interview to receive the new biometric, machine-readable border crossing card (DSP-150). On or about April 12, 2001, the applicant entered the United States on her new BCC. On January 16, 2008, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On or about August 20, 2008, the applicant departed the United States. On or about August 26, 2008, the applicant entered the United States. On or about January 3, 2009, the applicant departed the United States. On or about January 4, 2009, the applicant entered the United States.

Section 212(a)(9)(B)(i)(II) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is present after the expiration of the period of stay authorized by the Secretary or present without being admitted or paroled.[1] When nonimmigrants are admitted to the United States, the period of stay authorized is generally noted on the Form I-94.[2]

Forms I-186 and I-568, Nonresident Alien Border Crossing Card, were the cards issued by the legacy Immigration and Naturalization Service (INS) through March 31, 1998, to Mexican nationals residing in Mexico at time of application. On October 1, 2001, the INS began implementing the legal requirements for the new biometric Mexican BCCs. Holders of the old BCCs, Form I-186 or Form I-586, were required to replace them with DSP-150's. The new card, issued by the Department of State (DOS), is both a BCC and a B-1/B-2 visitor's visa (B-1/B-2 NIV/BCC). *See* 22 C.F.R. § 41.32.

Aliens admitted with the previously issued Mexican BCC (Form I-186 or I-586) are considered "non-controlled nonimmigrants." Such aliens, who were not issued a Form I-94 upon entry, are treated as nonimmigrants admitted for duration of status (D/S) for purposes of determining unlawful presence.[3] For aliens admitted as D/S, the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.[4] If U.S. Citizenship and Immigration Services (USCIS) finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied.[5] If an immigration

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[redacted]

Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act 11 (May 6, 2009).

[2] *Id.*

[3] Memo. from Donald Neufeld at 25.

[4] *Id.*

[5] *Id.*

judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order.[6] A consular or immigration officer may revoke a BCC issued on Form I-186 or Form I-586 if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a resident and/or citizen of Mexico. 22 C.F.R. § 41.32(c).

The record reflects that the applicant was issued a Form I-94 when she entered on July 12, 1991. She was authorized to remain in the United States until July 11, 1992. Therefore, the applicant began accruing unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until April 10, 2001, the day she departed the United States. As noted above, on or about April 12, 2001, the applicant entered the United States on her new combination B-1/B-2 NIV/BCC. She then began accruing unlawful presence from on or about October 13, 2001, the day after her authorization to remain in the United States expired, until January 16, 2008, the day she filed a Form I-485. The applicant is seeking admission into the United States within ten years of her departure on or about August 20, 2008. 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.

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 her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband 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 (Board) stated in *Matter of Ige*:

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[6] *Id.*

> [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 a qualifying relative, 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 first prong of the analysis addresses hardship to the applicant's husband if he relocates to Mexico. In a statement dated April 20, 2009, the applicant's husband claims he is "suffering extreme hardship because [his] marriage and [his] family are getting destroyed." In a statement dated July 2, 2009, the applicant's husband states "the option to moving to Mexico to keep [their] family united would not exist

due to the lack of medical coverage in Mexico." Additionally, he states living in Mexico "is not an option for [him] due to...the frequency of going to see [his] doctor." The AAO notes that the record establishes that the applicant's husband has been diagnosed with diabetes, hypertension, and gastro esophageal reflux disease. In a statement dated April 20, 2009, the applicant's youngest son states he "was born with a genetic disorder called Osteogenesis Imperfecta known as 'crystal baby'." He claims that he has "had 11 bones fractured" and suffers pain. The AAO notes that the record establishes that the applicant's son was diagnosed with osteogenesis imperfecta at birth. *See letter from* [redacted] dated March 13, 2009. The applicant's husband claims that medical expenses for him and his son "would have to be paid out of pocket and there is just no way that [he] would be able to afford it." Additionally, he states there are no job opportunities in Mexico, and the future of his children would be limited in Mexico. The AAO notes the claims made regarding the difficulties the applicant's husband and children would face in relocating to Mexico.

The AAO acknowledges that the applicant's husband has resided in the United States for many years and that he may experience some hardship in relocating to Mexico. However, he is a native of Mexico, and it has not been established that he does not speak Spanish or lack family ties to Mexico. In fact, the AAO notes that the record establishes that the applicant's husband's mother resides in Mexico. *See Biographic Information* (Form G-325A), dated December 28, 2007. The AAO notes that the applicant's husband is suffering from various medical conditions; however, there is no evidence in the record that he cannot receive treatment for his medical conditions in Mexico, that he has to remain in the United States to receive treatment, or that his medical conditions would affect his ability to relocate. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in 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)). The AAO acknowledges that the applicant's son may suffer some hardship in joining the applicant in Mexico; however, the record establishes that the applicant's son attended school in Mexico and he does not speak any English. *See medical document from* [redacted], dated February 6, 2008. Additionally, the AAO notes the applicant's son's medical condition; however, there is nothing in the record establishing that when he resided in Mexico he was unable to be treated for his medical condition in Mexico or that he has to remain in the United States to receive treatment. Further, the AAO finds that the applicant has not shown that hardship to her son will elevate her husband's challenges to an extreme level. The AAO notes that the record does not contain documentary evidence, e.g., country conditions reports on Mexico, that demonstrate that the applicant's husband would be unable to obtain employment upon relocation that would allow him to use the skills he has acquired in the United States. Based on the record before it, the AAO finds that the applicant has failed to establish that her husband would suffer extreme hardship if he relocated to Mexico.

The second prong addresses hardship to the applicant's husband upon remaining in the United States. The applicant's husband states he will "suffer extreme hardship because of health considerations." He states he is "a very ill person" and he needs the applicant's "support emotionally." The applicant's husband states he "cannot live apart from [the applicant]." He claims that the applicant's immigration issues will "cause [him] severe stress and anxiety." The AAO notes that the record establishes that the applicant's husband is attending individual therapy. *See letter from* [redacted], dated June 29, 2008.

However, the submitted letter does not establish that the applicant's husband's emotional hardships go beyond the typical effects of separation or relocating to another country. The AAO notes the applicant's husband's mental health issues.

The applicant's husband states he has diabetes and takes insulin daily. As noted above, the applicant's husband has been diagnosed with diabetes, hypertension, and gastro esophageal reflux disease. The applicant's husband claims that the "diabetes will often cause [him] to experience fainting spells, rapid heartbeat, nausea, distorted vision and extreme fatigue when uncontrolled." He states the applicant takes care of him, accompanies him to his doctor's appointments, and prepares a special diet for him. The applicant's husband states that "[d]ue to the side affects [sic] of [his] diabetes [he] [is] unable to drive so [he] depend[s] on [the applicant] to drive [him] to all [his] doctor's appointment[s] and she also picks up [his] medication." In a statement dated April 20, 2009, the applicant's father states the applicant "is very dedicated to her husband and son. Her husband is a very ill man and very much needs the presence of [the applicant] to be able to take care of him and help him with his every day needs." The applicant's husband states the applicant "is an essential part of [their] lives" since he suffers from diabetes and his son suffers from osteogenesis imperfecta. He states his youngest son "cannot live a normal life like any other 13 year old would.... He lives in constant pain." The applicant's son states that he gets good grades in school and depends on the applicant. He also states that someday he "might not be able to walk or possibly loose [sic] [his] ability to see and hear with [his] condition." The applicant's husband states he and his son "depend on [the applicant] to help [them] make life a little bit tolerable." In a letter dated March 31, 2009, Dr. Robert Yang states the applicant's father "suffers from neck, back and leg pain due to osteoarthritis," and he has "uncontrolled hypertension." The AAO notes the medical concerns of the applicant's husband, son, and father. However, there is no evidence in the record establishing the severity of the applicant's husband's medical issues, the amount of care that he needs, the amount of care provided to him by the applicant, or the unavailability of others, such as adult children, to assist in providing needed care.

The applicant's husband states he will suffer financial hardship if he is separated from the applicant. He claims that his medical conditions "have limited [his] ability to work." He states that he is "barely able to maintain [their] household expenses" and he cannot "imagine being able to maintain 2 household[s]." The applicant's husband claims that in 2008 he "only earned $6532 in income and $3993 in unemployment." The AAO notes that U.S. Individual Income Tax Returns (Form 1040A's) establish that the applicant and her husband claimed $12,210 in 2004, $10,181 in 2005, $11,525 in 2006, and $9,676 in 2007. The applicant's husband states "[d]ue to [his] health and lack of financial stability [he] wouldn't be able to visit [the applicant] in Mexico often." He also states that he needs the applicant's "help to face [their] daily expenses, like rent and bills." The AAO notes that the record does not establish that the applicant has any income and/or that she contributes financially to the household. However, the AAO notes the applicant's husband's financial concerns.

The AAO acknowledges that the applicant's husband may experience some financial hardship in being separated from the applicant; however, the AAO notes that the applicant has not provided sufficient documentation to establish her husband's financial situation. Additionally, the AAO notes that the applicant has submitted no evidence to establish that she will be unable to obtain employment in Mexico

and, thereby, financially assist her husband from outside the United States. Further, the record supports that the applicant and her husband have two adult children in the United States, yet the applicant has not identified whether her children would be available to assist their father in her absence. Based on the record before it, the AAO finds that the applicant has failed to establish that her husband would suffer extreme hardship if her waiver application is denied and he remains in the United States.

As the record does not establish that the applicant's husband would experience extreme hardship as a result of her inadmissibility, she is not eligible for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds no purpose would be served in discussing whether she 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.