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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

DATE: MAR 26 2012 Office: MEXICO CITY, MEXICO FILE: [redacted]

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 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a 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 admission within 10 years of his last departure. The applicant is the spouse of a U.S. citizen. He seeks a waiver under 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.

The Field Office Director (FOD) concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Field Office Director's Decision,* dated September 3, 2009.

On appeal, the applicant's spouse asserts that the FOD erred in concluding that the applicant has not established extreme hardship to his qualifying relative. The applicant's spouse contends that the FOD did not properly consider all of the relevant hardship factors. *See Form I-290B, Notice of Appeal or Motion*, dated September 30, 2009.

The record includes, but is not limited to, the following evidence: statements from the applicant spouse; a psychological evaluation of the applicant's spouse; a medical statement concerning the applicant's spouse; statements of support from friends; financial documents; school and health records for the applicant's children; and family photographs. The entire record was reviewed and all relevant evidence was considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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 the applicant entered the United States in July 1998 without inspection and remained in the United States until his departure on February 20, 2008. The AAO finds that he accrued unlawful presence from July 1998 until February 2008. As the applicant accrued

unlawful presence of more than one year and is seeking admission within 10 years of his 2008 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility.

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 other family members can be considered only insofar as it results in hardship to a qualifying relative. 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).

In the present case, the record reflects that the applicant is married to a U.S. citizen. The applicant also has two children who are U.S. citizens. The applicant's spouse meets the definition of a qualifying relative. The applicant's children are not qualifying relatives for purposes of the waiver sought and, therefore, any hardship they might experience as a result of the applicant's inadmissibility will be considered only to the extent it results in hardship to the applicant's spouse.

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 BIA has also held that the common or typical results of 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. 627, 631-32 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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, "[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.*

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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 [quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)]; but *see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, the applicant's spouse contends that she has been struggling to survive apart from the applicant. She states that the applicant is her "greatest support" emotionally, financially, and in raising their two children. She further states that without the applicant, she is depressed, unable to sleep, and cannot properly care for her children. [redacted] states that the applicant is a very attentive father and that their sons miss him very much. [redacted] expresses concern about her eldest son's physical and mental health. She states that in the applicant's absence, her son doesn't eat well, has become rebellious, and is doing poorly in school. The school record for her eldest son

reflects that he is at "less than acceptable performance" levels in writing, mathematics, and art, and is exceeding the standard only in physical education. The record also contains outpatient surgery instructions and a notice for an appointment in the Ear, Nose, and Throat Clinic at Mount Sinai Hospital for the applicant's eldest son.

Statements from friends of the applicant and his spouse also attest to a strong family bond in the [redacted] household and to the applicant's spouse's emotional hardship in the absence of the applicant. A colleague of the applicant, [redacted] indicates that on numerous occasions, [redacted] has expressed her concern about [redacted] her elder son, who has refused to sleep alone since his father went back to Mexico. [redacted], another of [redacted] colleagues, has submitted a letter stating that he noticed how strong the family is when the applicant and his wife are together. The record also contains drawings from the applicant's sons displaying their love for the applicant and stating that they miss him.

As evidence of his wife's psychological condition, the applicant has submitted a September 16, 2009 report from [redacted] Licensed Clinical Professional Counselor, who states that the applicant's spouse is very anxious, depressed, and on the verge of a nervous breakdown due to her separation from the applicant. [redacted] reports that the Burns Depression Checklist and the Burns Anxiety Inventory, which she utilized to assess [redacted] emotional state, indicate that [redacted] is experiencing "severe depression" and "extreme anxiety or panic." [redacted] further reports that [redacted] presents as fragile, weak, desperate, and unable to cope with future challenges alone. [redacted] also finds [redacted] survival skills to be running low and that separation from the applicant will take a toll on her mental health. The record also contains a September 8, 2008 document from Access Community Health Network indicating that [redacted] is taking medications for insomnia, anxiety, and stress.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse would experience extreme hardship if the waiver application is denied and she remains in the United States. In reaching this conclusion, we have noted that the applicant's wife has significant difficulty coping with separation. The AAO finds the psychological report by [redacted] demonstrates the applicant's spouse has inadequate coping skills and stressful situations negatively contribute to [redacted]s mental and emotional well-being. The record allows us to find that her separation from the applicant has pushed her into a mental state in which she cannot function well and care for her children. Additionally, the difficulties the applicant's elder son is having both at school and at home have placed an additional burden on the applicant's spouse, a single parent who is struggling emotionally. Accordingly, the AAO concludes that the applicant's spouse would experience extreme hardship on separation.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if she relocates to Mexico. The applicant's spouse states that she was born and raised in the United States and that she has no family in Mexico. She further states that she has strong family and community ties in the United States. Evidence in the record also establishes that the applicant's spouse has been working for the same employer for at least six years. According to her psychological evaluation, she expressed the following concerns about relocating to Mexico: a

lack of job opportunities, a lack of health insurance options for her children, a lower quality of available educational and health-care options, and that she generally would not be able to adjust to life there. At the time of her psychological evaluation, the applicant's spouse also reported to [redacted] that she was worried about the violence and crime in Mexico. The record indicates that the applicant lives in the state of [redacted]. The U.S. Department of State (DOS) has issued a travel warning, last updated on February 8, 2012, which indicates that the state of [redacted] has seen an increase in violence among rival criminal organizations and a dramatic increase in the murder rate in Acapulco.

When the hardship factors are considered in the aggregate, the AAO finds that the applicant has established that his spouse would face extreme hardship if his waiver request is denied. The applicant has established statutory eligibility for a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act.

In that the applicant has established that the bar to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 . . . 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, 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 unlawful presence in the United States for which he now seeks a waiver; his unauthorized employment during his unlawful presence, and his conviction for Driving Under the Influence in 2004. The mitigating factors include the

applicant's U.S. citizen spouse; the extreme hardship to his spouse if the waiver application is denied; the applicant's U.S. citizen children; the applicant's spouse's family and community ties in the United States; and his good moral character and the important role he plays in the life of his family, as described in the letters from his spouse's friends.

The AAO finds the immigration violation committed by the applicant to be serious in nature and does not condone it. Nevertheless, we conclude that taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.