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

U.S. Citizenship
and Immigration
Services

[redacted]

H6

DATE: AUG 29 2012 Office: MEXICO CITY, MEXICO [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:

[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.

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 her last departure. The applicant is the spouse of a U.S. citizen. She 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 with her spouse and children.

The director concluded that the applicant had failed to establish that the bar to her 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 August 9, 2010.

On appeal, counsel asserts that the director failed to consider all of the evidence presented, in particular, the director failed to address the impact of children's hardship on the qualifying relative. Counsel also submits new evidence for consideration. *See Counsel's Brief*, dated October 6, 2010.

The evidence of record includes, but is not limited to: counsel's briefs; statements from the applicant, his spouse, their family, pastor, and friends; medical documentation; a psychological evaluation of the applicant's spouse and children; financial documents; and copies of relationship and identification documents. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.
> >
> > (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is

> present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
>
> (iii) Exceptions.-
>
> > (I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

The record reflects that the applicant entered the United States in April 1989 without inspection and remained in the United States until October 2009 when she voluntarily departed. At the time of her entry, the applicant was 15 years old. She became 18 years old on March 14, 1992; however, she did not begin accruing unlawful presence until April 1, 1997.[1] The AAO finds that the applicant accrued over one year of unlawful presence from April 1, 1997 until October 2009. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her 2009 departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's 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*, 21 I&N Dec. 296, 301 (BIA 1996).

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[1] No period of unlawful presence prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as factors to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardships to the applicant's children will not be separately considered, except as they may affect 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 Board 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 Tsai 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 states that in Mexico, she lives with her mother-in-law and her youngest child in substandard conditions. Their house is small, has a leaky roof and a toilet that often does not work, and they are without water for long periods of time. Initially, all their children were with the applicant in Mexico; however, the two older children returned to the United States because the applicant's spouse was having emotional difficulties, they were concerned for their safety, and the children needed to resume their schooling. The youngest child lives with the applicant. The applicant is concerned about their safety, because at least one drug cartel is very active in the area. She states that their children were traumatized when armed military personnel came in to their house looking for drugs. Their youngest child has been having nightmares and cries a lot since the incident. They are afraid of leaving their home; she feels "incarcerated."

The applicant's spouse states that being separated from the applicant has caused him both financial and emotional hardship. The record demonstrates that the applicant's spouse lost his job in July 2010. Their house has been in foreclosure process since 2009; the applicant's spouse and their children are renting a room from his cousin. The applicant's spouse was financially assisting the applicant and their son in Mexico, but now he is concerned that he no longer would be able to financially support two households. He states that his savings have been exhausted. He is concerned about expenses for a babysitter that his children would need when he starts working. He is also concerned that he would be unable to obtain employment if he relocates because he does not possess the necessary education and license for a trade in Mexico.

With respect to the applicant's spouse's emotional and medical hardship, the record indicates that he was hospitalized for chest pain in March 2010 and was prescribed medication for anxiety and depression. However, the psychological report indicates that the applicant's spouse is "not making the expected mental and emotional progress." [redacted] believes that the absence of his father during his formative years is contributing to the applicant's spouse's despair, depression,

and feeling of lack of control over keeping his family together. According to [redacted], the applicant's spouse is "particularly worried" about his financial responsibilities and the applicant's and their son's safety and well-being in Mexico. He is unable to visit them because of "his fragile emotional state," the distance, and financial constraints.

The record indicates that the applicant's older two children are not proficient in Spanish and did not attend school, except religious classes, while they were in Mexico; they are behind in their schooling. The applicant's spouse is concerned about their children's education in Mexico.

Letters from family and friends attest to the loving relationship between the applicant and her spouse and the emotional and financial hardship that the applicant's spouse is experiencing resulting from his separation from the applicant. The letters also refer to the applicant's good character.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant. In reaching this conclusion, we note the applicant's spouse's medical and emotional condition, and his financial status. Documentary evidence and statements from family and friends corroborate the applicant's spouse's claims of emotional hardship and financial concerns. The applicant's spouse also is concerned about his children's education and childcare expenses. Furthermore, the record demonstrates that stress caused by their separation, coupled with the applicant's spouse's concerns for his family's safety in Mexico and the loss of his employment, have negatively affected his mental and physical health. The record indicates that the applicant's spouse was hospitalized for chest pains. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if he were to relocate to Mexico. The applicant's spouse's safety concerns about living in Mexico appear to be justified, given the family's direct experience with violence between the drug cartels and government forces. The AAO further notes that the U.S. Department of State has issued a travel warning for Mexico, updated on February 8, 2012, reporting an increase in incidents of roadblocks by transnational criminal organizations in various parts of Mexico in which both local and expatriate communities have been victimized. In addition, local police have been implicated in some of these incidents. The report also indicates that non-essential travel to Zacatecas, where the applicant lives, should be deferred. Furthermore, the applicant's spouse is concerned about their children's education in Mexico because they are not proficient in Spanish. The record also demonstrates that the applicant's spouse has strong family ties in the United States and cannot benefit from their support in Mexico. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to Mexico to be with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has

established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(a)(9)(v) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to her 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 factor in the present case is the applicant's unlawful presence in the United States, for which she now seeks a waiver. The mitigating factors include the applicant's U.S. citizen spouse and children, the extreme hardship she and their youngest child are currently experiencing, the extreme hardship to her spouse if the waiver application is denied, the applicant's age when she entered the United States, the applicant's length of stay in the United States, the lack of a criminal record for the applicant, and letters from family and friends attesting to the applicant's good character.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factor, 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.