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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office
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**U.S. Citizenship
and Immigration
Services**

H2

[REDACTED]

FILE: [REDACTED]

Office: SACRAMENTO, CA

Date: **FEB 02 2011**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Sacramento, California, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO will be affirmed. The application will be denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Acting Field Office Director found that the applicant had failed to establish that the bar to his admission would impose extreme hardship on his U.S. citizen spouse, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Acting Field Office Director's decision*, dated August 13, 2007. The AAO also concluded that the record failed to establish that the applicant's inadmissibility would result in extreme hardship for his spouse and dismissed the appeal filed by the applicant on September 11, 2007. *AAO Chief's decision*, dated April 19, 2010.

On motion, counsel states there are new circumstances in the applicant's case, circumstances that have a bearing on the hardship his spouse would experience if the waiver application is denied. Counsel further asserts that the AAO misapplied relevant law in our April 19, 2010 dismissal of the appeal. *Form I-290B, Notice of Appeal or Motion*, dated May 14, 2010.

In support of the waiver application, the record contains the following new evidence: counsel's brief, dated May 16, 2010, and a birth certificate for a daughter born to the applicant and his spouse on May 13, 2009. Prior to reaching a decision in this matter, the AAO has reviewed the entire record and has considered all relevant evidence, including that previously submitted in support of the applicant's waiver application.

The AAO turns first to counsel's assertion regarding our misapplication of law in the April 19, 2010 decision that dismissed the applicant's appeal. While we note the concern expressed by counsel on the Form I-290B, we find neither it nor counsel's brief to indicate which provisions of law he believes to have been misapplied or the manner in which he believes they were misapplied. Accordingly, we will not address this issue in the present proceeding.

The AAO also finds no need to address the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act as he does not contest this finding and the AAO discussed this issue fully in our April 19, 2010 decision. Instead, we will limit our consideration of the record to whether the evidence submitted by counsel on motion, when considered in the aggregate with the other hardships previously claimed by the applicant, satisfies the extreme hardship requirement set forth in section 212(h) of the Act.

Section 212(h) of the Act states, in pertinent part:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is no longer the only qualifying relative in this case as she and the applicant now have a daughter whose hardship may also be considered. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 (BIA) 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 BIA 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 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 BIA 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 BIA 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 AAO now turns to a consideration of whether the enhanced record in the present matter establishes that the applicant’s spouse and/or child would experience extreme hardship if his waiver application is denied.

On motion, counsel submits a birth certificate for the daughter born to the applicant and his spouse on May 13, 2009 and asserts that as a result of her birth, the family's hardship has increased accordingly. He states that the applicant's spouse is "unemployed, cannot secure employment and therefore has no way of supporting herself without her husband's income." All other facts, counsel reports, "remain the same." *Counsel's brief*, dated May 16, 2010.

Although the AAO acknowledges the birth of the applicant's daughter and counsel's assertion that her birth would mean increased hardship for the applicant's family, we do not find the record to establish that the applicant's daughter would negatively affect her mother's ability to reside in Mexico. We note that counsel fails to indicate that the applicant's daughter would have any impact on her mother's ability to relocate. We further note that without clear assertions from the applicant, we will not speculate as to what additional hardships the applicant's spouse would encounter if she returns to Mexico with a young child. In the absence of any new evidence concerning hardship in Mexico, the AAO therefore incorporates by reference our April 19, 2010 hardship analysis relating to the applicant's spouse's relocation, as well as our conclusion that the record does not establish that she would experience extreme hardship if she moved to Mexico with the applicant.

On motion, counsel appears to contend that the birth of the applicant's daughter precludes his spouse from obtaining employment and, therefore, from being able to support herself and their daughter in his absence. The record, however, fails to demonstrate that this would be the case. No evidence establishes that the applicant's spouse's parental responsibilities regarding her daughter are such that she would be unable to work. There is no evidence that the applicant's child suffers from medical, developmental or other problems that would require additional care from the applicant's spouse on a full-time basis. Moreover, as noted in our April 19, 2010 decision, no evidence in the record establishes that the applicant's spouse who is currently unemployed because she provides full-time care for her parents would be required to continue as their full-time caregiver in the applicant's absence. The applicant's spouse has previously indicated that her siblings provide some level of financial assistance to their parents and the record fails to demonstrate they are unable or unwilling to assist with the actual care of their parents or to hire nursing assistance. Accordingly, the record does not establish that the applicant's spouse's current responsibilities, whether parental or filial, would prevent her from seeking employment if the applicant is removed from the United States. Further, no evidence in the record, e.g., published country conditions reports, establishes that the applicant would not be able to use the skills he has gained working in the United States to obtain employment in Mexico and financially assist his family from outside the United States. Therefore, the AAO cannot conclude that the applicant's spouse would suffer financial hardship if the applicant's waiver application is denied and she remains in the United States.

The AAO notes that counsel's brief on motion incorporates the language of the hardship claims made in the July 22, 2007 brief he submitted in support of the applicant's waiver application. We find, however, that he has made no connection between these hardships and the birth of the applicant's daughter that would require their reconsideration. Therefore, having found the record to contain insufficient evidence to demonstrate that the birth of the applicant's daughter would result in financial hardship for his spouse, we again conclude that the applicant has failed to

establish that his spouse would experience extreme hardship if the waiver application is denied and she remains in the United States.

As the record does not contain sufficient evidence to demonstrate that the hardships faced by the applicant's spouse, even when considered in the aggregate, rise beyond the common results of removal or inadmissibility, the AAO finds that the applicant has failed to establish that his spouse would suffer extreme hardship as a result of his inadmissibility. We also note that, although the applicant's daughter is a qualifying relative for the purposes of a 212(h) waiver proceeding, the applicant does not claim that she would experience extreme hardship whether she is taken to Mexico or remains in the United States with her mother. Therefore, the AAO finds that the applicant has failed to establish extreme hardship to a qualifying relative under section 212(h) of the Act.

However, even were we to find that the applicant has satisfied the extreme hardship requirement of section 212(h) of the Act, the AAO would not grant his waiver application as he does not merit a favorable exercise of discretion under section 212(h)(2) of the Act. As indicated in our April 1, 2010 decision, the applicant has been convicted of two violent crimes, which require him to establish that a qualifying relative would suffer exceptional and extreme hardship, a heightened standard of hardship required by the regulation at 8 C.F.R. § 212.7(d).

The applicant has failed to establish eligibility for a waiver under section 212(h) of the Act. Having found him 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(h) of the Act, the burden of establishing that the application merits approval 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 prior decision of the AAO will be affirmed and the application will be denied.

ORDER: The prior decision of the AAO is affirmed. The application is denied.