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

U.S. Citizenship and Immigration Services

[redacted]

HLY

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: DEC 02 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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 be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen. He 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).

The Acting District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 9, 2008.

On appeal, counsel for the applicant asserts the director erred in denying the applicant's waiver. *Form I-290B.*

The record includes documents related to the applicant's previous removal proceedings as well as documents related to his Form I-130 and I-485. With regard to his Form I-601, the record includes, but is not limited to, counsel's brief; a statement from the applicant's spouse; a statement from the applicant; an employment letter for the applicant's spouse; copies of pay stubs for the applicant's spouse; copies of tax returns for the applicant's spouse; a copy of a divorce decree from a previous marriage of the applicant's spouse; photographs of the applicant, his spouse and her daughters; copies of birth certificates for the applicant's daughters; a copy of a marriage certificate for the applicant and his spouse; a letter from the applicant's employer, tax records and pay stubs for the applicant's spouse.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (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.
>
> . . . .

The record indicates that the applicant entered the United States without inspection on or around July 20, 1989. The applicant was arrested, entered into deportation proceedings and granted voluntary departure through May 27, 1990. The applicant claims that he departed the United States on May 18, 1990, and counsel asserts that the applicant had his voluntary departure form stamped when he departed, however, the record does not contain any evidence that the applicant departed on or before May 27, 1990. The record indicates that the applicant re-entered the United States in January 1991. The applicant was removed to Mexico on March 1, 2005. In denying the applicant's waiver the Acting District Director referenced 212(a)(9)(B)(i)(II), 212(a)(9)(A)(ii)(II) and 212(a)(9)(C)(i)(I) of the Act. The applicant asserts, and the record supports, that he re-entered the country prior to April 1, 1997. An applicant who re-entered the United States after a previous deportation or removal order prior to April 1, 1997, is not inadmissible under § 212(a)(9)(C) of the Act. *Memorandum, Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act, Paul W. Virtue, Acting Associate Executive Commisioner, June 17, 1997.* As such, the applicant is not inadmissible under § 212(a)(9)(C)(i)(I) of the Act. However, he is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until January 31, 2001, the date he filed his Form I-485. The applicant accrued a second period of unlawful presence from May 23, 2003, the date his Form I-485 was denied, until March 1, 2005. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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.

With regard to hardship upon relocation, the applicant's spouse has submitted a statement detailing the hardship impacts she would experience upon relocation. *Statement of the applicant's spouse*, October 31, 2006. She states that her daughter cannot relocate because she is currently enrolled in college. She also asserts that she would lose her stable income and health insurance which covers her and her daughter if she were to relocate, that she does not speak Spanish and would fear for her safety if she had to reside in Nuevo Laredo, Mexico. She notes that she was born and raised in the United States, has no family in Mexico, and all of her immediate family in the United States is located close to her. She also asserts that the father of her children would not allow them to relocate to Mexico with her, and that she helps care for her elderly parents. Counsel has also asserted that the applicant's spouse helps care for her elderly parents.

An examination of the record indicates that the applicant's spouse's previous spouse has some custody rights over her children. *Final Divorce Decree*, February 10, 1998. However, both of the applicant's children are now adults, and are able to decide where to reside without parental restriction. Nonetheless, the AAO finds it reasonable to accept that the applicant's spouse would be separated from her children, and her immediate family upon relocation. It can also reasonably determine that she would lose her income and the health insurance that derives from it, as well as any property the applicant's spouse might own, representing a significant financial impact upon relocation. The AAO also notes that Nuevo Laredo has been noted for its incidences of violence by the U.S. State Department. *Travel Warning*, U.S. Department of State, Bureau of Consular Affairs, Mexico, September 10, 2010. When these factors are considered in the aggregate, the family separation, financial impact of departure, and the applicant's spouse's lack of family ties or familiarity with the culture they rise to the level of extreme hardship.

Although the applicant has established that a qualifying relative would experience extreme hardship upon relocation, the record must still demonstrate that a qualifying relative would experience extreme hardship upon separation if they were to remain in the United States. Counsel for the applicant asserts the applicant's spouse and her children were dependent on the applicant's income and that without his income his spouse's daughter has had to rely on loans to complete school, and his spouse has had to ask him for financial support from Mexico.

The applicant's spouse has submitted a statement in which she asserts that without the applicant's income she is unable to pay her bills, afford yearly doctor's visits or visit the applicant in Mexico.

She also states that her house is in need of repairs. *Statement of the applicant's spouse*, October 31, 2006.

The record contains copies of tax records for the applicant's spouse. While the record contains some documentation for the applicant, the record does not support that his spouse and her children were dependent on him financially. An employment letter for the applicant indicates that she earns $30,000 annually, far above the federal poverty guidelines for her household. *Statement,* [redacted] dated November 22, 2006. The applicant's spouse has asserted that she cares for her niece as well, but there is no evidence of this in the record, or of any financial impact it would have on the applicant's spouse. In addition, the AAO would note that the applicant's daughters are both considered adults under immigration law. There is insufficient documentation to establish that the applicant's spouse's income does not cover her financial obligations, such as termination notices, late notices, evidence of significant debt or cancellation of services, etc.

The applicant's spouse has submitted a lengthy statement describing her background with the applicant and expressing the emotional hardship that has impacted her due to his inadmissibility. She states that she helps care for her elderly parents. The record is no clear as to how she assists her parents. She also discusses the hardships that the applicant has experienced while residing in Mexico, briefly mention her fear for the applicant's safety in Mexico, and hardship impacts on her daughters due to his inadmissibility.

The record reflects that the applicant's spouse will experience difficulty without the applicant, but the record does not include sufficient evidence to establish that she would experience extreme hardship in the event that she remains in the United States.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's spouse faces extreme hardship if her spouse is found inadmissible as the record fails to establish extreme hardship to a qualifying relative, as the second prong of the analysis has not been met. 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 rests 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.

The AAO notes that the District Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. *Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under

section 212(a)(9)(B)(i)(II) of the Act no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.