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



U.S. Citizenship
and Immigration
Services

115



FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: FEB 02 2011

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), and under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:



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 Acting District Director, Mexico City, Mexico, 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 10 years of his last departure from the United States; and, pursuant to section 212(a)(6)(C)(i) of the Act for having sought to procure a visa by misrepresenting a material fact. The record indicates that the applicant is married to a United States permanent resident and he is the derivative beneficiary of an approved Immigrant Petition for Alien Worker, Form I-140. 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), and under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his United States permanent resident wife.

The Acting District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The director determined that the applicant misrepresented a material fact at his immigrant visa interview on March 21, 2007 by denying that he had a March 4, 2000 DUI arrest. *Decision of the Acting District Director*, dated June 9, 2008.

On appeal, counsel states that the director did not consider all the evidence of hardship; that the applicant did not misrepresent his criminal record; and, that the applicant has an approved Form I-212 application which gives him permission to re-enter the United States. Counsel submits a brief and additional evidence. *See, Form I-290B and attachments.*

The record includes statements from the applicant, and the applicant's spouse describing the hardship claimed; three medical reports; letters from the applicant's children; a psychological assessment of the applicant's two daughters from [REDACTED]; a Confidential Psychological Report from Prince George's County Public Schools discussing the applicant's daughter's educational progress; various documents, including bills, school records, and court disposition records; and, counsel's briefs and attachments. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant sought entry into the United States on December 22, 1995, by presenting a border crossing card belonging to another person. The applicant was placed in Exclusion Proceedings; the applicant was ordered excluded and deported by Immigration Judge; and, he was deported to Mexico on December 28, 1995. On July 4, 1996, the applicant attempted to enter the United States by presenting a Form I-551 belonging to another person. The applicant was charged with attempted reentry. He was placed in proceedings and paroled on July 15, 1996 to attend his immigration court hearing. The applicant returned to Mexico, and subsequently at an unknown date in 1996 re-entered the United States without inspection. The applicant resided in the United States in unlawful status from his entry without inspection in 1996 until 2007 when he departed the United States. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and section 212(a)(6)(C)(i) of the Act for having sought to gain entry by misrepresenting a material fact.

The also reflects that on October 25, 2001, the applicant filed a Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), which was approved on January 14, 2003. Counsel states that the applicant has permission to re-renter the United States as he has an approved Form I-212 application. However, as discussed above, the matter in this proceeding is the applicant's inadmissibility for having accrued over one year of unlawful presence in the United States, and also because he twice sought to gain entry into the United States by presenting a border crossing card belonging to another person and a Form I-551 belonging to another person.

Section 212(a)(9)(B) of the Act provides, 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.

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.

As discussed above, the applicant is also inadmissible under Section 212(a)(6)(C) of the Act for having procured, and having twice attempted entry into the United States by misrepresenting a material fact.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

.....
(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, and under section 212(i) 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-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 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.

The applicant’s spouse states that the family needs the applicant’s financial and emotional support. She states that she cannot support the family on her income alone; that since the applicant departed for Mexico the “economic situation of [the] family has deteriorated;” that “with [her] salary [she is] barely able to pay the mortgage on the house and maintain [her] children;” that she “had to ask for public assistance for the first time; that, “[she] have been accepted for food stamps. [Her] application for medical assistance is still pending;” and, she will have to sell their home to get rental assistance. The record includes a Food Stamp card in the name of the applicant’s spouse, and an application (in Spanish) for medical assistance. The record also includes copies of household bills and a breakdown (in Spanish) of the household expenses.

Given the financial burden the applicant’s spouse has to carry alone, and that she has been forced to seek public assistance, the AAO finds that the financial stress described is beyond what would normally be expected as a result of separation.

Regarding emotional hardship, the applicant’s spouse states that their children have “greatly suffered from the absence of their father;” that, the school grades have suffered and they have become “more rebellious, acting out in school;” that, “[she has been trying to get counseling for them and [she] have recently sent them to a psychologist for an evaluation. They may need on-going therapy;” that “[her husband’s] absence has been extremely difficult for [her];” that although she works full-time she has to play the role of both parents, and she does not know how long she can continue. In her psychological assessment of the applicant’s two daughters,

██████████ concludes that “both children exhibited symptoms of depression, possibly related to their father’s prolonged absence from the home.” A Confidential Psychological Report from Prince George’s County Public Schools pertaining to the applicant’s daughter’s educational development indicates that the child has repeated third grade and is not progressing satisfactorily and has difficulty reading and writing English. Letters from relatives and family acquaintances, and from the applicant’s daughter indicate that the applicant has a close relationship with his wife and children, and their close bond has been broken due to his separation.

The AAO notes that the applicant’s spouse is the only qualifying relative, and normally hardship children experience will not be considered. In this case, however, the applicant’s spouse is left alone to care for the children both of whom, according to the psychological assessment, exhibit symptoms of depression, and one of the children is having developmental learning difficulties. The AAO finds that the emotional impact described results in emotional hardship in the United States beyond what would normally be expected as a result of separation.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his spouse would suffer extreme emotional and financial hardship in the United States as a result of his inadmissibility.

It is noted, however, that the applicant does not claim hardship to his spouse if she joins him in Mexico. Also, the record does not include evidence of hardship to the applicant’s spouse in Mexico. The AAO finds, therefore, that the applicant has failed to establish that his spouse would suffer extreme hardship in Mexico if she joins him there.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s spouse caused by the applicant’s inadmissibility to the United States. 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) and under section 212(i) 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.