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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

H6

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FILE:

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Office:

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Date:

AUG 19 2010

CDJ 2004 759 790

IN RE:

[Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)
of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the *revised* decision of the Administrative Appeals Office in your case. In our prior decision dated July 9, 2010, we erroneously stated in the first paragraph that the appeal was dismissed, whereas the rest of the decision clearly indicated that the appeal was sustained. 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,

[Redacted]

Chief, Administrative Appeals Office

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

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 ten years of his last departure from the United States. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated October 24, 2007, the district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and did not warrant the favorable exercise of the Secretary's discretion. The application was denied accordingly.

In a Notice of Appeal to the AAO dated November 14, 2007, counsel states that the district director erred in finding that the applicant's spouse would not experience extreme hardship as a result of separation. Counsel submits a brief and additional evidence.

The record indicates that the applicant entered the United States without inspection in February 1996. The applicant remained in the United States until August 21, 2006. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted to August 21, 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of his August 2006 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 to the satisfaction of the Attorney General [Secretary] 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.

The AAO notes that section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66

(BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

The record of hardship includes counsel's brief, four statements from the applicant's spouse, a statement from the applicant's mother-in-law, a letter from the applicant's spouse's employer, a

letter from the applicant's spouse's doctor, photographs of life in Mexico, and a report on the Mexican government's treatment of foreign nationals and naturalized citizens in Mexico.

The applicant's spouse has submitted four statements of hardship. In her first statement, dated December 8, 2007, she states that she has lived in the United States her entire life and that she has only been to Mexico on vacation and to see the applicant. She states that she is submitting photographs of where the applicant is living in Mexico to show that she would be forced to live in poor conditions. She states that she is a registered nurse in the United States, that she enjoys her work, and that she has full benefits and retirement through her employer. She states that if she had to relocate to Mexico she would be leaving her entire family behind. She states that her family counts on each other for moral, emotional, and financial support. She states that because she is a nurse whenever a family member has a health problem they turn to her for support. She states, as an example, that when her grandfather had cancer she was the one who took him to all of his appointments and spoke with doctors about his treatment.

The applicant's spouse also states that since the applicant's departure she had to move from their apartment for her safety and her health. She states that her apartment was located in a violent neighborhood and that she was becoming depressed. She also states that she has severe premenstrual cramps which cause her to vomit and take all of her energy. She states that for these reasons she moved in with her parents and now shares a bedroom with her four sisters. She states that the situation at her parents' house is financially unstable because she and her mother are the only family members working fulltime to support everyone. She states that her father has been unemployed since he had heart surgery, her sister and brother attend school, and her other sister works part time while attending school part time. She states that if she relocates to Mexico she will be worried about who is helping her family financially.

The applicant's spouse states further that she could try to find employment in Mexico, but she would have to retake nursing classes in Spanish, pass the boards in Mexico, and find a position that pays enough for her to survive and for her to pay off her \$58,000 student loan.

In her second statement, dated April 29, 2008, the applicant's spouse relates that she is pregnant and fearful about her pregnancy and delivery. She states that she sometimes feels depressed, that her happiness has decreased, and that she works forty hours a week in 12 hour shifts, from 7 a.m. to 7 p.m. She states that her family is not in a position to help her because her mother works fulltime and her sisters are in school and work. She also states that she will visit the applicant in Mexico, but she is fearful due to health and safety concerns.

In her third statement, dated November 20, 2008, the applicant describes having to deliver her baby by cesarean section and then care for her newborn daughter on her own without the applicant. She states that her family was not able to help her and that the only way she was able to communicate with the applicant was by webcam.

In her fourth statement, dated February 12, 2010 the applicant states that she is suffering emotional and financial hardship caring for her one year old daughter on her own. She states that she is more reserved, quiet, and moody and does not want to go out with friends. She states that her change in emotions has affected her at work in that she no longer has a positive attitude and cannot handle conflict situations as patiently as she used to. She also states that it takes her longer to complete tasks at work. She states that she is a registered nurse and, as she stated above, she works 12 hour shifts. The applicant's spouse also states that she is suffering hardship in relation to caring for her daughter. She states that her sister cares for her daughter while she is at work and that she is not able to see her daughter that often. She states that if the applicant were in the United States, she could work less, and when she was at work he could care for their daughter.

The AAO notes that pictures of the applicant in Mexico living in very poor conditions, including no running water, what appears to be a dirt floor with a tarp covering, and tent-like walls, were submitted as part of the record. The record also contains a letter from the applicant's spouse's doctor, dated March 1, 2008, stating that the applicant's spouse was pregnant and in need of the applicant's support during that difficult time in her life. In support of her daughter's assertions, the applicant's mother-in-law states that her daughter was and continues to be depressed because of being separated from the applicant. She states that her daughter used to be happy, but now does not have the willpower to do anything. The AAO also notes that the record contains numerous letters from the applicant's spouse's co-workers at Arrowhead Regional Medical Center attesting to the applicant's spouse's professionalism in performing her duties as a nurse. All of the letters express concern over losing such a valuable employee if the applicant's spouse relocates. Many of the letters also expressed concern over the stress that the applicant's spouse is experiencing due to the applicant's immigration problems and that she is thinking of leaving her career to be with her spouse in Mexico.

The AAO finds that the applicant has established that his spouse is suffering extreme emotional hardship as a result of the applicant's inadmissibility. The record contains four detailed statements from the applicant's spouse concerning her emotional state, her current living situation, and her difficulties at work. The applicant's spouse's problems were then and are compounded by her past pregnancy and continued care for her infant daughter with little help from family.

The AAO also finds that the applicant's spouse would suffer extreme hardship upon relocation to Mexico. In addition to the pictures of the living conditions of the applicant, the record includes a report from the Center for Security Policy entitled, " [REDACTED] constitution treats foreign residents, workers, and naturalized citizens." This report states that the rights of immigrants and foreigners are severely restricted by the Mexican constitution. The applicant's spouse was born in the United States and all of her family is in the United States. The AAO notes that when considering the cumulative effect of the hardship factors to the applicant's spouse in the event that she relocates, a finding of extreme hardship is appropriate. The applicant's spouse has substantial family ties in the United States, she has a good job in the

United States, photos submitted show the applicant to be currently living in extremely poor circumstances, and the applicant's spouse would be relocating with a very young child.

The AAO additionally finds that 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 section 212(h)(1)(B) 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 applicant's case is his unlawful presence in the United States. The favorable factors in the present case are the extreme hardship to her U.S. citizen spouse if he were to be denied a waiver of inadmissibility; the applicant's U.S. citizen child, the applicant's lack of a criminal record or offense; and, as indicated by affidavits from his spouse the applicant's attributes as a good husband.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.