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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

[REDACTED]

FILE: [REDACTED] Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: AUG 23 2010

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)

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,

Tariq Syed

for

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 sustained.

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 ten years of his last departure from the United States. The applicant is married to a United States citizen and the father of a United States citizen child and stepchild. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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), in order to reside in the United States with his United States citizen wife and children.

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated June 2, 2008.

On appeal, counsel asserts that the Acting District Director erroneously denied the applicant's waiver application. *Form I-290B*, filed June 26, 2008. Additionally, counsel claims that "[t]here are numerous hardship factors in this matter and when looked at in total, [the applicant's wife] would suffer unequivocally of extreme hardship." *Id.*

The record includes, but is not limited to, counsel's brief; statements from the applicant's wife; letters of support for the applicant and his wife; medical bills, household bills, and a wage statement for the applicant's wife; medical documents for the applicant's wife; a psychological evaluation of the applicant's wife; and articles on pollution in Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 [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.

In the present case, the record indicates that the applicant entered the United States in February 2000 without inspection. In June 2007, the applicant voluntarily departed the United States. On July 19, 2007, the applicant filed a Form I-601. On June 2, 2008, the Acting District Director denied the Form I-601, finding that the applicant had accrued more than a year of unlawful presence and had failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from February 2000, when he entered the United States without inspection, until June 2007, when he departed the United States. The applicant is seeking admission into the United States within ten years of his June 2007 departure. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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 the United States Citizenship and Immigration Service (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 (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*, 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. ██████ 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.

Extreme hardship to a qualifying relative must be established in the event of relocation to Mexico or if the qualifying relative remains in the United States, as the qualifying relative is not required to reside outside the United States based on the denial of the applicant’s waiver request.

In a statement dated July 17, 2008, the applicant’s wife states she is “suffering extreme hardship without [the applicant] here with [her] and [their] family and moving the entire family to Mexico would cause even greater hardship due to a lack of employment opportunities with economic issues, health concerns which would become worse in Mexico, and [her] family ties here in the U.S.” In a July 15, 2008 brief, counsel claims that the applicant’s wife cannot move to Mexico because she “has substantial family ties to the U.S.,” she would “have a difficult time finding employment in Mexico,” “she does not speak

Spanish,” and she “suffers from asthma, and living in Mexico, one of the most polluted countries in the world, would no doubt exacerbate her condition.” The AAO notes that the applicant’s wife states she does not speak Spanish “fluently.” In a psychological evaluation dated June 21, 2008, Dr. [REDACTED] states the applicant’s wife “works in the medical field as a technician and it is extremely unlikely that she would be able to find this type of work in Mexico.” The AAO notes that the record fails to demonstrate through country conditions reports on Mexico that the applicant’s wife would be unable to obtain employment if she relocated to Mexico. However, the AAO acknowledges that the applicant’s wife has been working as a radiology imaging assistant since February 15, 1999 and with her limited Spanish language skills, it would be difficult for her to obtain employment in her field in Mexico.

Medical documentation in the record establishes that the applicant’s wife suffers from asthma, and counsel provided articles regarding the air pollution in Mexico City. The AAO notes that in Clearing the Smog: Fighting Air Pollution in Mexico City, Mexico and Sao Paulo, Brazil, dated June 23, 2007, Ms. [REDACTED] states “Mexico City is the third largest urban area and has one of the worst air pollution problems in the world.” However, Ms. [REDACTED] reports that Mexico City has “made significant strides in reducing air pollution levels.” The AAO acknowledges that Mexico City has a high level of air pollution. However, the record does not establish that the applicant’s wife would be relocating to Mexico City or that she would be unable to receive medical treatment for her asthma in Mexico. Going on record without supporting documentation is not sufficient to meet the applicant’s burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The applicant’s wife states her job provides her family with health insurance.

The AAO notes that while on July 16, 2010, the Department of State issued a travel warning to United States citizens thinking of traveling to Mexico, this warning is primarily focused on northern Mexico, i.e., along the United States-Mexico border. The record establishes that the applicant is from the southern state of Ecatepec. Therefore, the AAO does not find the record to establish that the applicant’s family would relocate to a part of Mexico where they would be subjected to violence. The AAO acknowledges that the applicant’s wife is a native and citizen of the United States and that she may experience hardship in relocating to Mexico.

The applicant’s wife states all of her family resides “in Wisconsin where [she] was raised.” She claims that her United States citizen son could not move to Mexico with her because she would need to get permission from her son’s biological father. However, the AAO notes that the applicant’s wife states her son’s biological father has no contact with her son. The AAO notes that the record establishes that when the applicant’s wife dated her son’s father, he was emotionally and physically abusive towards her and she had to file a temporary restraining order against him. She claims that there is “no way [she] could leave [her son] behind to live with his biological father” because she would worry that he would become abusive towards her son. Based on the applicant’s spouse’s lack of ties to Mexico, her asthma, her lack of Spanish language skills which will affect her ability to work and settle into Mexican society, her close family ties in the United States and the emotional hardship of being separated from her son, the AAO finds that the applicant’s wife would suffer extreme hardship if she were to relocate to Mexico to be with the applicant.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States without the applicant, in a statement dated June 18, 2007, the applicant's wife states that the applicant "is the head of the household. The children and [her] rely on him tremendously as a father, a husband, and a financial provider." Counsel claims that the applicant's wife "is raising their two children alone." The applicant's wife states she is "watching [her] children suffer emotionally because [the applicant] is not with [them]." As previously discussed, hardship to a nonqualifying relative is not directly relevant to a determination of extreme hardship in section 212(a)(9)(B)(v) proceedings. The applicant's wife claims that without the applicant's financial contribution to the household, "the family money would be very tight" and she is paying outstanding medical bills from her daughter's birth. The AAO notes that the record establishes that a medical bill was referred to a collection agency. The applicant's wife states the applicant "tries to help and work while in Mexico, but his earnings are very minimal and he cannot contribute financially to [their] family."

After administering a series of standard psychological tests, Dr. [REDACTED] states the applicant's wife is depressed and diagnosed her with post-traumatic stress disorder from her previous relationship. Dr. [REDACTED] indicates that the applicant's wife suffered trauma through a previous relationship with a physically and verbally abusive man. The AAO notes that the record includes a copy of a temporary restraining order and injunction against the applicant's wife's son's father. Dr. [REDACTED] states that the applicant's wife's post-traumatic stress disorder has been exacerbated by her current separation from the applicant.

Based on its review of the evidence in record, the AAO finds that when the hardship factors in the record are considered in the aggregate, the applicant has established that his wife would experience extreme hardship if his waiver request were to be denied and she remained in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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).

The adverse factors in the present case are the applicant's period of unlawful presence and unauthorized employment. The favorable and mitigating factors are the applicant's United States citizen wife and children, and the extreme hardship to his wife if he were refused admission.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when 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.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.