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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**

H/6

[REDACTED]

FILE:

[REDACTED]

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: **AUG 25 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 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. He is the beneficiary of an approved Petition for Alien Fiancé(e) (Form I-129F). 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 child.

The District Director found that the applicant had 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. *Decision of the District Director*, dated September 20, 2007. On October 22, 2007, the applicant, through counsel, filed a motion to reconsider/reopen, which the District Director denied on November 28, 2007.

On appeal, the applicant, through counsel, claims that his motion to reopen was denied in error "and constitutes an abuse of discretion, and denial of due process rights to a neutral objective evaluation of evidence of extreme hardship, similar to others similarly situated." *Form I-290B*, dated December 21, 2007.

The record includes, but is not limited to, statements from the applicant's wife; letters of support for the applicant and his wife; utility bills, credit card statements, and mortgage documents; medical documents for the applicant's son; and a mental health evaluation for the applicant's wife. The entire record was reviewed and considered in arriving at a decision on the appeal. The AAO notes that on appeal counsel requested 30 days to submit a brief and/or evidence to the AAO. *Form I-290B, supra*. The record contains no evidence that a brief or additional evidence has been filed. Therefore, the record is considered complete.

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.
.....

(iii) Exceptions.-

.....
(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

.....
(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 on January 28, 1997 without inspection. On August 23, 2000, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On November 14, 2001, an immigration judge granted the applicant voluntary departure, to depart the United States by March 14, 2002. On December 22, 2001, the applicant voluntarily departed the United States. On May 8, 2006, the applicant filed a Form I-601. On September 20, 2007, the 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. On October 22, 2007, the applicant filed a motion to reconsider/reopen the District Director's decision. On November 28, 2007, the District Director denied the applicant's motion to reconsider/reopen.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until August 23, 2000, the date the applicant filed his Form I-589. The applicant is seeking admission into the United States within ten years of his December 22, 2001 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 or his child 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 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 August 27, 2007, the applicant's wife states they "have talked about going to live in Mexico until [the applicant] can come home, but [they] do not have a home of [their] own there." She claims that her son "has been sick with multiple ear infections and developed some breathing problems." She states that in the United States her son "can see his doctor on a regular basis and maintain his health and health insurance" and in Mexico, "health insurance would be an issue." The applicant's wife claims that her son would not receive adequate medical care for his medical conditions, and "[t]he changes in daily diet and untreated drinking water could be enough to cause him more health risks." The AAO notes that in a July 3, 2007 letter from Dr. [REDACTED], he states that the applicant's son is currently on medication for a respiratory condition. The AAO notes that the record contains no country conditions reports that establish that conditions in Mexico are such that the applicant's son could not receive adequate medical care for his medical conditions. However, the AAO notes the applicant's spouse's concerns for her son's health.

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 currently living in the Mexican state of Guanajuato. 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 notes, however, the general safety issues in the warning.

The applicant's wife states "[w]ork is hard to find" in Mexico and "[s]eparation from the support of [her] family here in Oklahoma would be extremely hard." She also states if they moved to Mexico "[they] would be put in the middle of a completely different country, culture, language, and environment." 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. However, the record has not established that she does not speak Spanish or that she has no family ties to Mexico. Additionally, the AAO notes the record fails to contain documentary evidence, e.g., country conditions reports on Mexico, that demonstrate that the applicant's wife would be unable to obtain employment upon

relocation. However, based on the applicant's wife's unfamiliarity with the Mexican culture and language, the AAO notes that it would be difficult for her to obtain employment in Mexico.

The applicant's wife states "[s]eparation from the support of [her] family here in Oklahoma would be extremely hard.... [They] are a very close family and it would be unbearable to be separated from them." Based on the applicant's spouse's lack of ties to Mexico, general safety issues, her lack of Spanish language skills which will affect her ability to work and settle into Mexican society, her concern for her son's medical conditions, and the emotional hardship of being separated from her family, 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, the applicant's wife states her son misses the applicant. In a letter dated September 17, 2007, Rev. [REDACTED] states the applicant's son "is both physically and emotionally hurt by [the applicant's] absence." The applicant's wife states her son's doctor "has stated that these health concerns could all be linked to a weakened immune system due to the stress induced from the separation from [the applicant] at such a young age and not yet being reunited." The AAO acknowledges that the applicant's son may be suffering some hardship through his separation from the applicant. However, as previously noted, the applicant's son is not a qualifying relative for the purposes of this proceeding.

The applicant's wife states her "financial hardships have been extreme." She claims that she works but she has "had to turn to family and friends for financial help during this time." The record establishes that the applicant's wife's year-to-date income in July 2007 was \$5,432.00. Rev. [REDACTED] states the applicant's wife "has had to seek out assistance for the most basic of necessities. [The applicant's wife] has had to rely on her church and family to help her with groceries, utilities, mortgage payments, and all of the other sundries that are part of life." In a letter dated December 20, 2007, the applicant's father-in-law states he has been helping his daughter "with her expenses each month"; however, he was laid off from his job and his "ability to offer continued financial support has been eliminated." In a letter dated May 15, 2006, the applicant's wife claims the applicant provides the "primary income for [their] home" and when he returns to the United States, he has a job offer as a crew leader with [REDACTED].
[REDACTED] See letter from [REDACTED], dated May 16, 2006.

The applicant's wife states she has developed "health issues," including insomnia and overeating. She states she does "not have the energy to function as [she] did before and [does] not feel good about [herself]." In a letter dated August 28, 2007, the applicant's parents-in-law state their daughter "doesn't sleep well throughout the night; [they] are concerned for her health and well being." Rev. [REDACTED] states the applicant's wife's "has become mired in depression" and her "depression has rendered her incapable of living a normal life." In a letter dated August 30, 2007, therapist [REDACTED] states the applicant's wife "is suffering from an Adjustment Disorder with Anxiety." Ms. [REDACTED] claims that the applicant's wife's "reduced state of functioning impairs her ability to function optimally as a parent."

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 record establishes that the applicant's wife's income is insufficient to support herself and a child with medical problems. Additionally, her psychological problems have been exacerbated since she has been separated from the applicant. When these factors are added to the normal hardships that would be experienced by any single parent assuming all the responsibilities of a household, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she remained in the United States in his absence.

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 factor in the present case is the applicant's period of unlawful presence for which he now seeks a waiver. The favorable and mitigating factors are the applicant's United States citizen wife and child, and the extreme hardship to his wife if he were refused admission.

The AAO finds that, although the immigration violation committed by the applicant is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factor, 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