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



**U.S. Citizenship
and Immigration
Services**

H6

[Redacted]

FILE: [Redacted]

Office: [Redacted]

Date:

AUG 27 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); and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

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 \$585. 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,

[Redacted]

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 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 under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen, and the father of U.S. citizen children. The applicant sought 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 section 212(h) of the Act, 8 U.S.C. § 1182(h), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

Counsel contends on appeal that the applicant is the primary care provider for his wife and children, and that his wife will not be able to support and care for their children without him. Counsel maintains that the applicant's absence will impact the growth and development of his children, which will cause extreme hardship to his wife.

The AAO will first address the finding of inadmissibility. Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

. . . .

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant's husband entered the United States at or near San Ysidro, California, on or about June 5, 1997, using his Border Crossing Card for a temporary period not to exceed 72 hours and to visit the area within 25 miles of the United States border with Mexico. He was apprehended on August 20, 2002 at or near

[REDACTED], issued a Notice to Appear and placed in removal proceedings. On August 20, 2002, he was ordered to appear at a master hearing on September 13, 2002, which was rescheduled for February 10, 2003, for June 17, 2003, and then for October 8, 2003. On October 8, 2003, the immigration judge ordered that the applicant's application for voluntary departure be granted until February 5, 2004. On February 1, 2004, the applicant voluntarily departed from the United States.

Forms I-186 and I-586, Nonresident Alien Border Crossing Card, were the cards issued by the legacy Immigration and Naturalization Service through March 31, 1998, to Mexican nationals residing in Mexico at time of application. On October 1, 2001, the INS began implementing the legal requirements for the new biometric Mexican BCCs. Holders of the old BCCs, Form I-186 or I-586, were required to replace them with the new biometric, machine-readable cards (DSP-150). The new card, issued by the Department of State (DOS), is both a BCC and a B-1/B-2 visitor's visa (B-1/B-2 NIV/BCC). See 22 C.F.R. § 41.32.

Section 222(g) of the Act provides, in pertinent part:

- (1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

The Immigration and Naturalization Service, in cooperation with the Department of State, adopted essentially the same interpretation of "remain in the United States beyond the period of stay authorized by the Attorney General" for unlawful presence under section 212(a)(9)(B) of the Act and the automatic voidance of nonimmigrant visas under section 222(g) of the Act.¹

Section 41.112 Note 7.2-2 of Chapter 9 of the Foreign Affairs Manual (FAM), provides, in pertinent part:

Classes of Aliens not Subject to INA 222(g)

a. Section 222(g) has no relevance in immigrant visa cases, nor does it apply to previous overstays relating to an alien who entered the United States without a visa. Specifically, Section 222(g) does not apply to the following:

- (1) Aliens who entered the United States without inspection;
- (2) Aliens who remain in the United States beyond the period of parole authorization;
- (3) Aliens who were admitted with an Form I-865, Sponsor's Notice of Change of

¹ Memo. from Michael A. Pearson, Exec. Assoc. Commr., Office of Field Ops., Immigration and Naturalization Serv., to Reg. Dirs., Dep. Exec. Assoc. Commr., Immigration Serv. Div., Act. Exec., Office of Int. Aff., *Section 222(g) of the Immigration and Nationality Act (Act)* 1 (March 3, 2000).

Address or Form I-586, Nonresident Alien Border Crossing Card (Canadian or Mexican Border Crossing Card (BCC)), and remain in the United States beyond the authorized period of admission;

NOTE: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by the Department are subject to INA 222(g) if they remain in the United States beyond the authorized admission

Similarly, Chapter 15 of the Inspector's Field Manual provides, in pertinent part:

15.15 Cancellation of nonimmigrant visas under section 222(g) of the Act.

(c) General Applicability. Section 222(g) of the Act applies to aliens who were "... admitted on the basis of a nonimmigrant visa(Emphasis added.) Section 222(g) does not apply to:

(1) Aliens not admitted on the basis of a nonimmigrant visa.

(A) Aliens who enter the United States without inspection;

(B) Aliens who remain in the United States beyond the period of parole authorization;

(C) Aliens who were admitted with an I-186 or I-586, Canadian or Mexican Border Crossing Card (BCC) and remain in the United States beyond the authorized period of admission. (Note: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are subject to section 222(g) of the Act if they remain in the United States beyond the authorized admission, including those who were not issued a Form I-94. However, the overstay should be documented through a sworn statement or other credible evidence.)

The AAO notes that while violating section 222(g) of the Act by remaining in the United States beyond the period of stay authorized by the Secretary of the Department of Homeland Security triggers unlawful presence under section 212(a)(9)(B) of the Act, the inverse is not true. That is, an alien's exemption from section 222(g) of the Act does not automatically render him or her immune from accruing unlawful presence. For example, aliens who enter the United States without inspection or who remain in the United States beyond the period of parole authorization are not subject to section 222(g) of the Act as this section relates only to aliens who have been admitted on the basis of a nonimmigrant visa. However, they are subject to section 212(a)(9)(B) of the Act for accruing unlawful presence.² Therefore, a finding that an alien is not subject to section 222(g) of the Act is not dispositive of whether an alien has accrued unlawful presence.

As stated, aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are considered to have entered with visitor visas, and are subject to section 222(g) of the Act. They therefore accrue unlawful presence under section 212(a)(9)(B) of the Act if they remain in the United States beyond the period of authorized admission even if they were not issued a Form I-94.³ A Form I-94 is not required for Mexican nationals admitted as nonimmigrant visitors who have a DSP-150 (B-1/B-2

² Memo. from Donald Neufeld at 11.

³ Memo. from Michael A. Pearson at 3.

NIV/BCC) and are admitted for a period not to exceed 30 days to visit within 25 miles of the border or who are admitted at the Mexican border port-of-entries in Arizona at Sasabe, Nogales, Mariposa, Naco or Douglas to visit within 75 miles of the border for a period not to exceed 30 days. 8 C.F.R. § 235.1(h)(1)(v).

However, aliens admitted with the previously issued Mexican BCC (Form I-186 or I-586) are considered "non-controlled nonimmigrants." Such aliens, who were not issued a Form I-94 upon entry, are treated as nonimmigrants admitted for duration of status (D/S) for purposes of determining unlawful presence.⁴ For aliens admitted as D/S, the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated.⁵ If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied.⁶ If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order.⁷ If a person is granted voluntary departure pursuant to section 240B of the Act after commencement of removal proceedings, unlawful presence ceases to accrue with the grant of voluntary departure and resumes after the expiration of the voluntary departure period. Memo. from Donald Neufeld, Acting Assoc. Director, Domestic Operations Directorate; Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate; and Pearl Chang, Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; 40 (May 6, 2009). A consular or immigration officer may revoke a BCC issued on Form I-186 or Form I-586 if the consular or immigration officer determines that the alien to whom any such document was issued has ceased to be a resident and/or citizen of Mexico. 22 C.F.R. § 41.32(c).

As previously stated, the applicant in the instant case was admitted to the United States with the Form I-586 on or about June 5, 1997, and an immigration judge made a determination of the applicant's nonimmigrant status violation in removal proceedings on October 8, 2003, which determination was to order that the applicant's application for voluntary departure be granted until February 5, 2004. In view of those facts as well as the applicant's voluntary departure from the United States on February 1, 2004, we find that the applicant did not accrue any unlawful presence under section 212(a)(9)(B) of the Act. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

However, the record reflects that the applicant is inadmissible under section 212(a)(2) of the Act, for having been convicted of committing a crime involving moral turpitude. Section 212(a)(2) of the Act states that:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

⁴ Memo. from Donald Neufeld at 25.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The record reflects that on July 11, 2002 the applicant was convicted of forged instrument - possession in violation of [REDACTED] probation and 36 days [REDACTED]

Col. Rev. Stat. § 18-5-105, Criminal Possession of a Forged Instrument, provides:

A person commits a class 6 felony when, with knowledge that it is forged and with intent to use to defraud, such person possesses any forged instrument of a kind described in section 18-5-102.

The statute convicts a person who possesses a forged instrument with knowledge that it is forged “and with intent to use [it] to defraud.” Cal. Rev. Stat. § 18-5-101(5) defines a “forged instrument” as “a written instrument which has been falsely made, completed, or altered.” Cal. Rev. Stat. § 18-5-102 covers many different types of forged instruments such as money, stamps, securities, or other valuable instruments issued by a government or government agency; a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant; a written instrument officially issued or created by a public office, public servant, or government agency; and [a] document-making implement that may be used or is used in the production of a false identification document. A class 6 felony carries the maximum penalty of 18 months imprisonment. *See* Col. Rev. Stat. § 18-1.3-401.

Courts in Colorado state that the offense requires not only possession of the forged or counterfeit instruments with knowledge that they were counterfeit, but also the intent to utter and pass the instruments with intent to defraud. *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972) (decided under former § 40-6-4, C.R.S. 1963). Simply handing a forged resident alien card to a police officer upon demand was insufficient to establish an intent to defraud. *People v. Miralda*, 981 P.2d 676 (Colo. App. 1999).

In *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), the Board held that “possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any

intent to use it unlawfully, is not a crime involving moral turpitude.” Furthermore, in *Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980), the Board held that uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element. We note that Col. Rev. Stat. § 18-5-105 applies to possession of written instruments that have been falsely made, completed, or altered, and that a conviction under this statute requires that a person have knowledge that the instrument is forged and requires that the person must intend to use the instrument to defraud. Therefore, in view of *Serna* and *Flores*, we find that because Col. Rev. Stat. § 18-5-105 requires the specific intent to defraud, a conviction under this statute categorically involves moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(B) of the Act.

Section 212(h) of the Act provides a waiver for inadmissibility under section 212(a)(2)(B) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if—

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) 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 relatives that qualify are the applicant's U.S. citizen spouse and his two U.S. citizen children. Hardship to the applicant is not considered under the statute unless it is shown that hardship to the applicant will result in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative would 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 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) [redacted] 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 [redacted] 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 [redacted] 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 the applicant’s wife remaining in the United States without him, the applicant’s wife contended [redacted] provider an [redacted]

She conveyed that while the applicant is at work she takes care of the children and that it would be an extreme hardship for her to work full time and take care of the children. In view of the substantial weight that is given to this type of family separation, which is the separation of minor children from their father and the separation of spouses who have been married and living together

for several years, in the hardship analysis, we find the applicant has demonstrated that the hardship that his wife and two minor sons will experience as a result of separation is extreme.

There is no claim of extreme hardship to a qualifying relative if he or she joined the applicant to live in Mexico.

Because the applicant is statutorily ineligible for relief, no purpose is 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(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.