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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: SAN JOSE, CALIFORNIA Date: DEC 02 2010

IN RE: Applicant: [Redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to 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 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 Field Office Director, San Jose, California. 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 under section 212(a)(9)(B)(i)(II) of 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 her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and child.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated October 5, 2009.

On appeal, counsel for the applicant states that the applicant has shown that her qualifying relative would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from counsel; statements from the applicant's spouse; employment letters for the applicant's spouse; a statement from the father of the applicant's spouse; a medical statement and records for the father of the applicant's spouse; a W-2 Form for the mother of the applicant's spouse; a psychological evaluation for the applicant's spouse; medical records and death certificate for the applicant's child; publications on United States statistics; published country conditions reports; car insurance statements; an apartment lease; bank statements; a tax statement; and a W-2 Form for the applicant's spouse. The entire record was reviewed and considered in rendering 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 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.

In the present case, the record indicates that the applicant entered the United States in December 2001 without inspection, remaining until May 2005. *Form I-601, Application for Waiver of Grounds of Inadmissibility*. On December 8, 2005, the applicant was paroled to the United States. *Form I-94*. The applicant, therefore, accrued unlawful presence December 2001 until she departed the United States in May 2005. In applying for lawful permanent residence, the applicant is seeking admission within ten years of her May 2005 departure from the United States. 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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme

hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996)

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-I-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] 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.

If the applicant’s spouse joins the applicant in Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant’s spouse was born in the United States. *Birth certificate*. The record reflects that he resides in Salinas, California. *Form I-601*, received

September 30, 2009. The applicant's spouse states that his four siblings and parents reside in the town of Salinas, he sees them every day, their bond has grown strong in the wake of his daughter's death and it would be impossible to continue this close relationship from Mexico. *Statement from the applicant's spouse*, dated September, 2009. The applicant and her spouse's first-born child died at the age of two. *Death certificate*. The applicant's spouse states that he has no close relatives in Mexico and no property there. *Statement from the applicant's spouse*, dated September, 2009.

The father of the applicant's spouse has diabetes and is insulin dependent. *Statement from the applicant's spouse*, dated October 7, 2010. He is virtually blind in one eye. *Id.* He has had three operations to correct his vision, but his vision has not improved. *Id.* In July 2010, he was hospitalized with severe chest pain. *Id.* Medical documentation included in the record note that the father of the applicant's spouse was treated for severe proliferative disability retinopathy, but he continues to have uncontrolled diabetic eye disease. *Statement from [REDACTED]* dated September 16, 2010. He was also diagnosed with unstable angina, hyperlipidemia, and diabetes. *Medical records for the father of the applicant's spouse*. Counsel states that the applicant's spouse would no longer be able to provide medical care for his father and a home for both of his parents. *Attorney's statement*, dated September 4, 2009. The applicant's spouse notes that he never completed his basic education in Mexico and thus would not be able to support his family. *Statement from the applicant's spouse*, dated September 2009. Published country conditions reports included in the record note that the minimum wage in Mexico did not provide a decent standard of living for a worker and family. *2008 Human Rights Report: Mexico, U.S. Department of State*, dated February 25, 2009. As such, the AAO recognizes the difficulties the applicant's spouse would have in assisting his father, be it financial or physical, if the applicant's spouse were to relocate to Mexico. The applicant's spouse states that he fears for his and his family's safety in Mexico. *Statement from the applicant's spouse*, dated September 2009. The AAO notes the safety issue in Mexico. *Travel Warning for Mexico*, dated September 10, 2010. When looking at the aforementioned factors, particularly the applicant's spouse's family ties in the United States and his close bond to them, the lack of familial or other ties to Mexico, the length of time the applicant's spouse has resided in the United States, and his care for his father in the United States who has documented health conditions and the effect a relocation would have upon such care, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant and her spouse's first-born child died at the age of two. *Death certificate*. According to a psychological evaluation, the applicant's spouse continues to be affected by his tragic loss. *Statement from [REDACTED]* dated October 21, 2009. After the death of his child, the applicant's spouse contemplated suicide several times. *Id.* Through a series of psychological tests, he has been diagnosed as having Major Depressive Disorder, Recurrent, Severe without Psychotic Features and a Generalized Anxiety Disorder. *Id.* The applicant's spouse has a history of trauma as well as severe complicated bereavement that continues to this day. *Id.* His psychologist notes that without the applicant and their child, he will decompensate again and will not be able to function effectively. *Id.* Moreover, he is at high risk of returning to suicidal thoughts and plans. *Id.* The applicant's spouse provides for his family, including his father with documented health conditions. *Statement from the applicant's spouse*, dated October 7, 2010; *Medical records for the father of the applicant's spouse*. The applicant's spouse notes that his father depends upon the applicant every day to provide his father

with his insulin injections and proper medication. *Statement from the applicant's spouse*, dated October 7, 2010. The AAO recognizes the difficulties in having to provide for a sick family member. The AAO also notes the applicant and her spouse have a child. *Birth certificate*. The applicant's spouse states that his daughter would have to return with the applicant to Mexico as the applicant is the primary caregiver and their daughter could not cope without her. *Statement from the applicant's spouse*, dated October 28, 2009. The record includes documentation of various expenses of the applicant's spouse. *See car insurance statements and an apartment lease*. The record also includes a tax statement for 2008 showing the applicant's spouse to have earned \$25,151.00 and having two dependents. *Tax statement*. When looking at the aforementioned factors, particularly the psychological conditions of the applicant's spouse as documented by a licensed health care professional, the difficulties in caring for a sick family member, separation from his daughter, as well as the financial difficulties of the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to remain 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 prior unlawful presence for which she now seeks a waiver and periods of unauthorized employment. The favorable and mitigating factors are her United States citizen spouse and child, the extreme hardship to her spouse if she were refused admission, and her lack of a criminal record.

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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.