

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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: CHICAGO, ILLINOIS

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,

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois. 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, child, and stepchildren.

The District 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 District Director*, dated March 6, 2008.

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, medical letters for the applicant's spouse; a psychological evaluation; a judgment on petition for order of protection; documentation for the applicant's spouse's business; an employment letter for the applicant's spouse; property tax statements; a home loan statement; a country condition report; and financial documentation. 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 was admitted to the United States on May 14, 2002 with a B1/B2 Visa/BCC card as a tourist with permission to stay for six months. *Record of Sworn Statement*, dated September 14, 2006; *B1/B2 Visa/BCC card*. The applicant remained in the United States until July 2005 when she returned to Mexico. *Record of Sworn Statement*, dated September 14, 2006. On August 29, 2005 the applicant was admitted to the United States in B2 status valid until February 27, 2006. *Form I-94, Departure Card*. The applicant has remained in the United States since that time. *Record of Sworn Statement*, dated September 14, 2006. The applicant, therefore, accrued unlawful presence from the date of the expiration of her legal status in November 2002 until she departed the United States in July 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of her July 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-Moralez*, 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-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] 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 Mexico. *Birth certificate*. The applicant’s spouse has lived in the United States since 1979. *Attorney’s brief*. He does not have

any strong ties to Mexico. *Id.* The AAO notes that his father is deceased and his mother resides in Mexico. *Form G-325A, Biographic Information sheet, for the applicant's spouse.* The applicant's spouse has been diagnosed as having diabetes mellitus, peripheral neuropathy of both extremities, and peripheral vascular disease. *Statement from [REDACTED]* Due to his conditions, his physician has advised him not to travel for any period of time or distance. *Id.* His physician further notes that he needs constant medical care and it is imperative that he stay near his home of residence and employment. *Id.* The applicant's spouse has also been treated for severe anxiety and insomnia that in turn, made his diabetes mellitus and diabetic neuropathy uncontrollable requiring insulin treatment. *Statement from [REDACTED]* dated [REDACTED]. The AAO acknowledges the health conditions of the applicant's spouse as documented by licensed healthcare professionals and recognizes the effect his conditions have upon a relocation to Mexico. In addition to having a child with the applicant, the applicant's spouse also has seven United States citizen children from previous relationships, all of whose biological mothers are now deceased. *Id.*; *Death certificate; Birth certificates.* Although children are not qualifying relatives for the purposes of this case, the AAO acknowledges the difficulties of relocating to Mexico as the sole parent of seven children. The applicant's spouse owns his own business, MN Construction Co., Inc. *Employment letter for the applicant's spouse, dated September 10, 2006.* It would be very difficult for the applicant's spouse to supervise his business from a distance. *Psychological evaluation from [REDACTED]* His work is central to his identity and the loss of an important element of his identity will also contribute to his risk for serious depression. *Id.* When looking at the aforementioned factors, particularly the documented health conditions of the applicant's spouse, the fact that he is the father to eight children, seven of whom do not have a living mother; and the potential job loss a relocation would cause and its psychological effect upon the applicant's spouse, 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. As previously noted, the applicant's spouse was born in Mexico. *Birth certificate.* The applicant's spouse has lived in the United States since 1979. *Attorney's brief.* His father is deceased and his mother resides in Mexico. *Form G-325A, Biographic Information sheet, for the applicant's spouse.* The applicant's first spouse died of cancer. *Psychological evaluation from [REDACTED]* few years later, the applicant's spouse suffered another loss with the death of his girlfriend due to complications related to the premature birth of their child. *Id.* The child lived for eight months and then also died due to an infection. *Id.* As a result of these losses, the applicant's spouse has a history of depression. *Id.* His depressions after these losses significantly increases the likelihood of his having major depression in response to being separated from the applicant. *Id.* Additionally, the applicant's spouse is the sole parent to seven children from his previous relationships as well as having another child with the applicant. *Id.* He does not know how he could care for so many children without the applicant. *Id.* The AAO notes that the record includes a Judgment on Petition for Order of Protection in which the court found that it is in the best interest of three of the applicant's spouse's children not to have any contact with their maternal grandmother and maternal uncles. *Petition for Order of Protection, Circuit Court of Cook County, Illinois, dated March 21, 2003.* As such, the AAO recognizes the responsibilities of being a single parent without assistance from these family members. The record includes documentation of various expenses for the applicant's spouse. *See property tax bills and a home loan statement.* The record also includes a tax statement from 2005

showing the applicant's spouse's earnings to be \$35,000.00 and to have five children living with him as dependents. *Tax statement.* The AAO acknowledges the documented financial difficulties of the applicant's spouse. Additionally, the applicant's spouse has been diagnosed as having diabetes mellitus, peripheral neuropathy of both extremities, and peripheral vascular disease. *Statement from [REDACTED]* He is in need of constant medical care and the applicant has helped him in the raising of his children and in controlling his illness. *Id.; Statement from [REDACTED]* The AAO acknowledges the documented physical health conditions of the applicant's spouse and the impact a separation from the applicant would have upon his health. When looking at the aforementioned factors, particularly the documented physical and psychological health conditions of the applicant's spouse, his documented financial difficulties, as well as the difficulties in being a single parent of eight children, seven of whose mother is deceased, 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, child, and stepchildren, 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)(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.