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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H6

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: DEC 02 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 \$630. 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,

Perry Rhew
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director (“district director”), Mexico City. The matter 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 for more than one year and seeking readmission within 10 years of his last departure.¹ The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his wife and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated April 15, 2008.

On appeal, the applicant’s wife asserts that she, the applicant’s son, and the applicant’s mother are experiencing hardship due to the applicant’s absence. *Statement from the Applicant’s Wife*, dated May 7, 2008.

The record contains statements from the applicant’s wife, brothers-in-law, niece, friends, mother-in-law, sister, and mother; documentation regarding the applicant’s and his wife’s employment; a psychological evaluation for the applicant’s wife; birth certificates for the applicant, the applicant’s wife, and the applicant’s son; documentation in connection with the applicant’s criminal conviction; a copy of the applicant’s marriage certificate, and; tax records for the applicant and his wife. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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-

....

¹ In 2006 the applicant was convicted of petty theft under [REDACTED] Penal Code section 488, for which he was sentenced to five days of incarceration and probation. The AAO has analyzed whether the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. However, the applicant’s conviction meets the “petty offense exception” found in section 212(a)(2)(A)(ii)(II) of the Act, as he has only been convicted of one crime, the maximum penalty for a conviction under [REDACTED] Penal Code section 488 for petty theft is six months of imprisonment, and the applicant was not sentenced to a term of imprisonment in excess of six months. See section 212(a)(2)(A)(ii)(II) of the Act; California Penal Code §§ 488, 490.

(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.

The record shows that the applicant entered the United States without inspection on or about May 1, 2000, and he departed on November 9, 2006. Accordingly, the applicant accrued over six years of unlawful presence in the United States. He now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only shown 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-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. Arrieta 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.

On appeal, the applicant's wife asserts that she, the applicant's son, and the applicant's mother are experiencing hardship due to the applicant's absence. *Statement from the Applicant's Wife* at 1. She indicates that her son is enduring emotional difficulty due to separation from the applicant. *Id.* She notes that she provides economic support to the applicant's mother in Mexico, who depends on this assistance. *Id.* The applicant's wife adds that the applicant's mother is sick with diabetes and high blood pressure, and that she and the applicant are unable to afford proper medical care for her. *Id.* She explains that she works for a small trucking company yet her pay and hours were scheduled to be reduced by 50% on May 1, 2008. *Id.* at 2. She provides that the applicant will be able to work in the United States should he be permitted to return. *Id.* She indicates that her family would save \$450 per month in child care expenses should the applicant be available to care for their son. *Id.*

The applicant's wife previously stated that she and the applicant were married on July 23, 2005 and that their son was born on February 13, 2005. *Prior Statement from the Applicant's Wife*, dated July 17, 2007. She described their future employment and family goals. *Id.* at 1. She provided detail regarding her son's reaction to separation from the applicant and his emotional difficulty. *Id.* She explained that she works for a trucking company from 7:00am to 5:00pm Monday through Saturday, and a fast food restaurant from 5:30pm to 11:00pm Tuesday, Wednesday, Friday, Saturday, and Sunday in order to support herself and her son in the United States, as well as the applicant and his mother in Mexico. *Id.* She indicated that her costs have increased since the applicant relocated to Mexico, and that she has asked her brother and mother for loans in order to meet her family's needs. *Id.* at 2.

The applicant provided a psychological evaluation of his wife, conducted by a licensed marriage and family therapist, [REDACTED] recounted the applicant's and his wife's history and goals. *Report from [REDACTED]* dated July 14, 2007. [REDACTED] discussed the applicant's wife's medical history, including that she developed a rash which a doctor determined was precipitated by stress. *Id.* at 3. She made observations about the applicant's wife's emotional difficulty, including that she feels anxious and uptight, and is experiencing intense disorganization and stress. *Id.* at 5. [REDACTED] concluded that the applicant's wife has been overwhelmed by the personal, parental, social, and financial responsibilities she faces to the point that she has developed an adjustment disorder that is characterized by anxiety and depression. *Id.* at 6. [REDACTED] recommended that the applicant rejoin his wife in the United States so that they can resume their partnership of parental, economic, and family support obligations together. *Id.*

The applicant's mother stated that the applicant used to send her approximately \$200, yet he now lives in her house and they barely have enough resources to live. *Statement from the Applicant's Mother*, dated July 23, 2007. She added that the support that the applicant's wife provides is not enough. *Id.* at 1. She provided that she is 66 years old and unable to work, and that in [REDACTED] Mexico where they reside there are no job opportunities. *Id.*

The applicant submits numerous letters from relatives, friends, and coworkers who attest to the support that he offers his family, and the difficulty his wife and son are experiencing in his absence.

The applicant submitted a letter from his wife's employer who stated that her gross monthly income was \$3,500 as of July 25, 2007. *Statement from the Applicant's Wife's Employer*, dated July 25, 2007.

Upon review, the applicant has not shown that a qualifying relative will suffer extreme hardship if the present waiver application is denied. It is first noted that the record contains references to hardships experienced by the applicant's mother in Mexico. Yet, the applicant has not asserted or shown that his mother is a lawful permanent resident or citizen of the United States, such that direct hardship to her may serve as a basis for a waiver under section 212(a)(9)(B)(v) of the Act. As noted above, the only qualifying relative in the present matter is the applicant's wife.

The applicant has not established that his wife will endure extreme hardship should she and their son join him in Mexico for the duration of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant's mother stated that she is facing economic hardship in Mexico due to her inability to work and poor economic conditions. However, the applicant has not described in detail his experience there such to show the conditions his wife may encounter should she join him.

The AAO recognizes that the applicant's wife would be compelled to relinquish her employment in the United States should she relocate to Mexico, and that this would have an emotional and economic impact on her. Yet, this is a common challenge faced by individuals who relocate abroad due to the inadmissibility of a spouse.

The report from [REDACTED] supports that the applicant's wife is experiencing emotional hardship due to separation from the applicant. However, she did not express an opinion regarding whether the applicant's wife's symptoms would likely abate should she become reunited with the applicant in Mexico.

[REDACTED] referenced physical health problems that the applicant's wife has encountered. Yet, the applicant has not provided any medical documentation for his wife such to show that she currently faces problems with her physical health that may create hardship for her in Mexico.

All presented elements of hardship to the applicant's wife, should she relocate to Mexico, have been considered in aggregate. Based on the foregoing, the applicant has not shown that his wife will suffer extreme hardship should she and their son reside in Mexico for the duration of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

The applicant has not shown that his wife will suffer extreme hardship should she remain in the United States until he is permitted to return. The applicant's wife indicated that she is facing economic difficulty in the United States without the applicant's assistance. However, the applicant has not provided evidence of his wife's expenses. The applicant's employer reported that she earned a gross income of \$3,500 per month as of July 25, 2007. While the applicant's wife asserted that her hours and income were scheduled to be reduced by 50 percent, the applicant has not provided any evidence to support that this change in fact occurred. Accordingly, the applicant has not shown by a preponderance of the evidence that his wife lacks sufficient income to meet her needs in his absence.

As discussed above, ██████████ referenced the applicant's wife's physical health and medical treatment. ██████████ listed the documents she reviewed when generating her report, yet she did not identify any medical records. The applicant has not provided medical documentation for his wife, thus he has not shown that she is facing physical health problems that create hardship for her.

The AAO acknowledges that the separation of spouses often results in significant psychological hardship. The report from ██████████ supports that the applicant's wife is facing emotional difficulty due to residing apart from the applicant. However, it is noted that ██████████ created her report for the purpose of this proceeding based on two interviews, testing, and a review of documentation that was submitted with the initial Form I-601 filing. The report does not represent an ongoing relationship with a mental health professional or treatment for a mental health disorder. ██████████ report is helpful for showing the applicant's wife's background and challenges, yet it is not deemed sufficient evidence to show that the applicant's wife is experiencing emotional hardship that rises to an extreme level.

The applicant's wife expressed that their son is suffering emotional difficulty due to residing apart from the applicant. It is evident that the separation of a child from a parent creates significant psychological hardship. However, the applicant has not distinguished his son's circumstances from those commonly experienced when a parent relocates abroad due to inadmissibility. The applicant has not established that his son's hardship is elevating his wife's emotional challenges to an extreme level.

The AAO has examined the many letters from individuals who attest to the applicant's good character, his strong role in his family, and the challenges his wife and son are facing in his absence. It is evident that the applicant would be of benefit to his wife and son should he return to the United States, and that his family and community members support his return. However, in order to show eligibility for a waiver, the applicant must first show that his wife will suffer extreme hardship. Section 212(a)(9)(B)(v) of the Act. The letters of support are of a general nature and do not establish that the applicant's wife's challenges rise to an extreme level.

All elements of hardship to the applicant's wife, should she remain in the United States, have been considered in aggregate. Based on the foregoing, the applicant has not shown that his wife will suffer extreme hardship should she reside in the United States for the duration of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Accordingly, the applicant has not established that denial of the present waiver application "would result in extreme hardship" to his wife, as required for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings regarding a 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.