identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

#6

[redacted]

FILE: [redacted] Office: CHICAGO Date: DEC 07 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:

[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 $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
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago. 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and daughter.

The field office 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 Field Office Director,* dated September 10, 2007.

On appeal, the applicant's wife asserts that she will experience extreme hardship should the present waiver application be denied. *Statement from the Applicant's Wife*, dated February 5, 2008.

The record contains statements from the applicant's wife and mother-in-law; a psychological evaluation for the applicant's wife; documentation on conditions in Mexico; an estimated budget of the applicant's wife's expenses and copies of bills; documentation of the applicant's wife's income; information regarding the applicant's wife's ineligibility for state childcare assistance or food stamps; a letter from the applicant's wife's employer; birth records for the applicant, the applicant's daughter, and the applicant's wife; tax records for the applicant's family; documentation in connection with the applicant's wife's academic activities, and; a copy of a marriage record 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-
> >
> > . . . .
> >
> > (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 in or about April 2003, and he remained until approximately July 2005. He reentered the United States on September 21, 2005 using an H2B visa. Accordingly, the applicant accrued over two years of unlawful

presence in the United States. He now seeks admission as an immigrant pursuant to a Form I-485 application to adjust his status to lawful permanent resident. 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 daughter can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and 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) ("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 will experience extreme hardship should the present waiver application be denied. *Statement from the Applicant's Wife* at 1. She provides that she and the applicant had been a couple for over three years as of the date of her statement, and that they have a daughter, a home, and many common family members and friends. *Id.* She provides that they wish to continue to reside in their community where she has a satisfying job in a university research lab and the applicant has many well-paying employment options. *Id.*

The applicant's wife explains that the applicant's immigration status has been extremely stressful for her due to the uncertainty it creates for their future. *Id.* She states that she has no ties to Mexico and

she does not wish to live there. *Id.* She asserts that she will experience extreme hardship whether she remains in the United States without the applicant or relocates to Mexico. *Id.* She explains that, should she relocate to Mexico, she would leave her mother behind who is a source of social and emotional support for her. *Id.* She adds that she is close with her three siblings who all reside within two hours of her. *Id.*

The applicant's wife explains that she will leave behind her successful career should she reside in Mexico. *Id.* at 2. She asserts that she would be unable to pursue her present work in Mexico, and she is unaware of any research labs engaged in similar investigation. *Id.*

The applicant's wife indicates that she has a family history of major depressive disorder, and that her mother, aunt, and oldest sister have been treated for depression in the past. *Id.* She provides that she has felt the need to receive more continuous counseling and treatment for her stress and anxiety, which has been primarily induced by the applicant's immigration situation. *Id.* She states that she has been unable to afford counseling due to the expense and lack of coverage by her insurance plan. *Id.*

The applicant's wife states that she will experience significant economic difficulty in Mexico, as reports support that conditions are poor there, and the applicant does not have the academic preparation for employment that is sufficient to support her and her family. *Id.* She explains that she has visited the applicant's relatives in Mexico, and that their lifestyle sharply contrasts with the way she is accustomed to living. *Id.* She adds that her opportunities for education and career activities in Mexico are unlikely, as she does not have sufficient Spanish-language skills to attend graduate school or hold a job. *Id.*

The applicant's wife expresses concern for crime and violence in Mexico, and she asserts that she would be unable to live a normal life under the present conditions there. *Id.* at 2-3.

The applicant's wife expresses that she will face emotional hardship should she become separated from the applicant. *Id.* at 3. She provides that she would be compelled to act as a single parent for their daughter. *Id.* She explains that her parents divorced when she was three years old, and that her mother struggled to support her family alone. *Id.* She states that her mother began suffering from major depressive disorder and that they relocated frequently. *Id.* She provides that she regrets not knowing her father throughout her childhood, and she does not wish for her daughter to have a similar experience. *Id.*

The applicant's wife asserts that she will face financial ruin without the applicant. *Id.* She notes that their daughter would have to move from part-time to full-time daycare, which would impact the quality of their time together. *Id.* at 4. She explains that she earns too much income to qualify for state childcare or food aid, yet she lacks sufficient income to meet her needs without the applicant. *Id.* She expresses concern for losing their home, and lacking the opportunity to return to graduate school. *Id.*

The applicant's mother-in-law attests to the applicant's and his wife's closeness and hard work to support their family. *Statement from the Applicant's Mother-in-law*, undated. She states that she is

unable to assist the applicant's wife with child care or financial support due to the fact that she works two part-time jobs and is the sole caretaker for her disabled father. *Id.* at 1-2. She expresses that the applicant is a good father to his daughter and that their family will suffer significantly should he be compelled to reside outside the United States. *Id.* at 3.

The applicant submits a psychological evaluation of his wife from a licensed clinical psychologist, [redacted] indicates that he evaluated the applicant's wife in a 60-minute session. *Report from* [redacted] dated January 25, 2008. [redacted] states that the applicant's wife has begun to experience deep levels of stress-related anxiety and depression, with symptoms including disrupted sleep, difficulty focusing, and agitation. *Id.* at 1. [redacted] posits that, given the applicant's wife's family history of anxiety and depression, the likelihood of her experiencing a full-blown stress-induced depression under her current circumstances is significant, whether she relocates to Mexico or remains in the United States. *Id.* at 2.

Upon review, the applicant has shown that his wife will face extreme hardship should she relocate to Mexico. Reports support the applicant's wife's concern regarding conditions in Mexico. The AAO takes notice that economic and employment conditions are less favorable in Mexico than they are in the United States, and that the applicant and his wife would likely face financial challenges there. *United States Central Intelligence Agency World Factbook: Mexico*, updated April 21, 2010 (estimating that in 2009 unemployment in Mexico was 5.6 percent, underemployment was as high as 25 percent, and in 2008 more than 47 percent of the population lived under the asset-based poverty line). The AAO observes that the United States Department of State issued a Travel Warning for Mexico, warning that crime and violence has escalated throughout the country in all cities and that U.S. citizens should take precautions and remain in well-known tourist areas. *United States Department of State Travel Warning: Mexico*, dated September 10, 2010. The applicant's wife and daughter face a risk of crime or violence in Mexico, and it is evident that the applicant's wife would endure additional psychological hardship due to concern for their safety.

The record shows that applicant's wife would face the loss of her consistent and satisfying employment in the United States, and her access to academic study in the country. She would endure separation from her family members, culture, residence, and community in the United States. The applicant's wife would further share in any hardships encountered by her daughter as a result of residing in Mexico, which would create emotional consequences for her.

All stated 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 established that his wife will endure extreme hardship should she reside in Mexico to maintain family unity.

However, the applicant has not presented sufficient evidence or explanation to establish that his wife will suffer extreme hardship should she remain in the United States for the duration of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant's wife asserts that she will face economic hardship should she lose the applicant's contribution to their household. However, the applicant has not provided any evidence of his employment or income. It is noted that the 2005 federal income tax documentation provided by the applicant shows that he and his wife filed jointly, yet there is no indication that a portion of the reported income was earned by him. The applicant's

wife's income and some expenses are documented in the record, and the AAO has examined the estimated account of his wife's income and expenses should he depart the United States. However, without clear documentation that the applicant in fact contributes financially to his household, the AAO is unable to adequately assess the impact his departure would have on his wife. It is evident that acting as a single parent often involves significant economic, emotional, and physical challenges. Yet, caring for a child alone is a common consequence when an individual's spouse must reside abroad due to inadmissibility. While the AAO recognizes that the applicant's wife will encounter significant difficulty, the applicant has not distinguished his wife's financial hardship from that which is ordinarily encountered.

The applicant's wife expressed that she is close with the applicant and that she does not wish to be separated from. The AAO has carefully examined the report from [redacted] indicated that his report was based on a single 60-minute interview with the applicant's wife, thus it does not represent an ongoing relationship with a mental health professional or treatment for a mental health disorder. It is noted that [redacted] recounts many facts of the applicant's wife's history, including her family history of struggles with depression and anxiety. However, he does not reference any medical records or other documentation that serve as the basis of his statements. Nor has the applicant provided such documentation to support that his wife's family has been treated for mental health problems in the past. While [redacted] indicated a significant likelihood that the applicant's wife may develop stress-induced depression, he did not diagnose her with a mental health disorder or prescribe a course of treatment. It is evident that the applicant's wife will endure significant psychological difficulty should she reside apart from the applicant, yet the applicant has not sufficiently supported that his wife will encounter emotional hardship that is greater than that commonly encountered when spouses live apart due to inadmissibility.

The record supports that the applicant is close with his daughter, and that he takes an active role in her care. The applicant's daughter will likely face emotional hardship should she be separated from the applicant, and such difficulty will impact the applicant's wife. The AAO gives due consideration to this additional emotional burden, yet notes that this situation is a common unfortunate circumstance when a parent resides abroad due to inadmissibility.

All stated elements of hardship to the applicant's wife, should she reside in the United States, have been considered in aggregate. Based on the foregoing, the applicant has not established that his wife will suffer extreme hardship should she remain separated from him 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.