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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

H/6

FILE:



Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: DEC 13 2010

IN RE:

Applicant:



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

ON BEHALF OF APPLICANT:



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 Acting District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen and the father of two United States citizen children. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen wife and children.¹

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated April 15, 2008.

On appeal, the applicant, through counsel, claims that United States Citizenship and Immigration Services (USCIS) failed to “address and evaluate all the issues of the case and committed errors of law and grave abuse of discretion in denying the [waiver application].” *Form I-290B*, filed May 14, 2008. Additionally, counsel claims that USCIS failed to “consider all the facts of the case, specially the fact that the eldest U.S. citizen child is suffering from a deformity that requires him to wear special orthopedic shoes and that the U.S. citizen wife is suffering from postpartum depression.” *Id.*

The record includes, but is not limited to, counsel’s appeal brief, statements from the applicant’s wife in English and Spanish², letters of support for the applicant and his wife in English and Spanish, letters from the applicant’s wife’s employer, medical documents pertaining to the applicant’s wife’s depression, medical documents for the applicant’s son’s medical condition, household bills, and utility bills. The entire record was reviewed and considered, with the exception of the Spanish language statements, in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

¹ The AAO notes that there is no evidence in the record that the applicant is inadmissible under section 212(a)(9)(A) of the Act and as such, that he would need an approved Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal.

² Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), an applicant who submits a document in a foreign language must provide a certified English-language translation of that document. As statements from the applicant’s wife and letters of support are in Spanish and are not accompanied by English-language translations, the AAO will not consider them in this proceeding.

- (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.

....

- (iii) Exceptions.-

- (I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

....

- (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 [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 May 2002 without inspection. In August 2007, the applicant departed the United States.

The applicant accrued unlawful presence from November 15, 2002, the date the applicant turned eighteen (18) years old, until August 2007, when he departed the United States. The applicant is seeking admission into the United States within ten years of his August 2007 departure. 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.

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 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-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 (Board) stated in *Matter of Ige*:

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

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

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

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior

economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“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.

In counsel's appeal brief dated May 8, 2008, counsel states it would be difficult for the applicant's wife and children to join the applicant in Mexico, because she has no close relatives in Mexico, all of her immediate family resides in the United States, they "would have a serious cultural separation" in Mexico, it would be hard to find a job, she "will not be able to provide the needed medical attention and schooling for their children," and they would be exposed "to various criminal activities in the country." In a statement dated May 9, 2008, the applicant's wife states "Mexico is considered a highly undesirable country in which to live, due to its economic and financial conditions." Additionally, she states Mexico has a "soaring high crime rate," and she "would be constant[ly] anxious and nervous as to the safety" of her children, the applicant, and herself. The applicant's wife also states she has no emotional ties to Mexico. The applicant's wife states that separating her children "from this community by forcing them to live in Mexico would cause a great disruption in their young lives." Additionally, she states her parents would suffer "great grief," "as they would be deprived of their grandchildren." Counsel claims that if the applicant's wife joins the applicant in Mexico, she "will be forced to stop her treatment" for postpartum depression, and she "will most likely not get the treatment she needed in Mexico." The AAO notes that the record establishes that the applicant's wife is taking medication for depression, neck and back pain, and allergies. Additionally, the AAO notes the applicant's wife's concerns regarding the difficulties she would face in relocating to Mexico.

The applicant's wife states her son, [REDACTED] suffers from a foot disability and he "needs special orthopedic shoes for his condition." The AAO notes that medical documentation in the record establishes that the applicant's son was diagnosed with collapsing pes plano valgus hyperpronation syndrome bilateral feet. The applicant's wife claims that her "son will not have the special medical attention in another country." In a statement filed April 14, 2008, the applicant's wife states her son, [REDACTED] "suffers from ear infection, high fever, and he has a virus." The AAO notes that the record establishes that the applicant's son, [REDACTED], has been taken to the doctor for fevers, diarrhea, and he was prescribed a vaporizer. The applicant's wife states she worries "about [her] children's health and educational opportunities in Mexico" and there are no free medical programs in Mexico. The AAO notes the applicant's wife's concern for her sons' medical conditions and lack of free medical programs in Mexico.

The AAO acknowledges that although the applicant's wife is a native of Mexico, she has resided in the United States for many years. The AAO notes that the record establishes that the applicant is currently residing in Michoacán, Mexico. See *Application for Permission to Reapply for Admission into the United States after*

Deportation or Removal (Form I-212), filed October 3, 2006. On September 10, 2010, the U.S. Department of State issued a travel warning to United States citizens thinking of traveling to Mexico. The AAO notes that this warning is primarily focused on northern Mexico, i.e., along the United States-Mexico border; however, the warning also states “[r]ecent violent attacks and persistent security concerns have prompted the U.S. Embassy to urge U.S. citizens to defer unnecessary travel to Michoacán...and to advise U.S. citizens residing or traveling in those areas to exercise extreme caution.... If travel in Michoacán is unavoidable, U.S. citizens should exercise extreme caution, especially outside major tourist areas.” The AAO notes that the situation in parts of Mexico, including the central state of Michoacán, has become unstable and unsafe for United States citizens.

Based on the applicant’s wife’s lack of family and employment ties to Mexico, her family ties to the United States, her mental health issues, her sons’ medical issues, the disruption of medical treatment that her son is currently receiving, leaving her employment in the United States, the loss of educational opportunities for the applicant’s children, raising two children in Mexico, the emotional hardship of being separated from her family, and the increased violence in northern Mexico and travel warning issued to United States citizens, the AAO finds that the applicant’s wife would suffer extreme hardship if she were to relocate to Mexico to be with the applicant.

Regarding the hardship the applicant’s wife would suffer if she were to remain in the United States without the applicant, counsel states the applicant’s wife is suffering from postpartum depression. The applicant’s wife states she is taking medication “to manage [her] depression and anxiety symptoms.” The AAO notes that the record establishes that the applicant’s wife is taking medication for depression; however, the record is not clear as to the severity of her depression. Additionally, the AAO notes that the record establishes that the applicant’s sons’ are suffering from various medical conditions. The applicant’s wife claims that after the applicant departed the United States, she was “force[d] to move back with [her] parents in a small two-bedroom apartment” and she “currently sleep[s] on the floor with [her] children.”

In an undated statement, the applicant’s wife states she does not make enough money to support her two children by herself. Additionally, she claims she cannot afford the special treatment for her son’s foot deformity. She states her monthly bills are \$118.00 for car insurance, \$66.00 for storage, \$200.00 for rent, and about \$70-80.00 for food and children’s items. The AAO notes that the record establishes that the applicant’s wife made \$567.38 in a two-week period in February 2008. In a letter dated March 19, 2008, [REDACTED] states the applicant’s wife is a “pleasant and valued associate;” however, she has been having a problem with “attention to detail in her job.” [REDACTED] claims that the applicant’s wife “is having difficulty coping with the situation of [the applicant] being out of the country,” and she “gone home early various times to care for her youngest child who...is having some medical problems.” [REDACTED] indicates “that this situation might jeopardize her job.” The AAO notes the financial concerns of the applicant’s wife.

Considering the applicant’s spouse’s mental health issues, financial issues, employment problems, raising two children with medical issues without their father, and the normal effects of separation, the AAO finds the record to establish that the applicant’s wife would face extreme hardship if she remained in the United States in his absence.

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 entry into the United States without inspection, and periods of unauthorized employment and unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife and children, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, and letters of support.

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. Accordingly, the appeal will be sustained.

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. The waiver application is approved.