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



U.S. Citizenship  
and Immigration  
Services

H6



FILE:



Office: MEXICO CITY, MEXICO  
(CIUDAD JUAREZ)

Date: **DEC 20 2010**

IN RE:

Applicant:



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) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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.

Thank you,

*Tariq Syed*  
for

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Deputy District Director, Mexico City, Mexico. 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 his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their children.

The Acting Deputy District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Acting Deputy District Director*, dated April 28, 2008.

On appeal, the applicant's spouse asserts that she would suffer extreme hardship should the waiver application be denied. *Attachment to Form I-290B, Notice of Appeal or Motion*.

In support of these assertions the record includes, but is not limited to, statements from the applicant's spouse; bankruptcy court documentation; a high school grade report for the applicant's spouse; Mexican earnings statements for the applicant; medical records for the applicant's spouse; a travel itinerary; a medical statement for the applicant's child; bankruptcy documents for the parents of the applicant's spouse; a loan statement for the father of the applicant's spouse; medical prescriptions for the mother of the applicant's spouse; a statement from the father of the applicant's spouse; a statement from the mother of the applicant's spouse; a statement from the sister of the applicant's spouse; a statement from the teacher of the applicant's child; a memorandum in support of the Form I-601 waiver application; boarding passes; and criminal records for the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

.....

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

In the present case, the record indicates that the applicant entered the United States without inspection in June 1991 and departed in October 2004, returning to Mexico. *Consular Memorandum, American Consulate General, Ciudad Juarez, Mexico*, dated December 14, 2006. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States in October 2004. In applying for an immigrant visa, the applicant is seeking admission within ten years of his October 2004 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.<sup>1</sup>

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

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<sup>1</sup> The AAO notes that the Acting Deputy District Director found that the applicant admitted to the elements of forgery. *Decision of the Acting Deputy District Director*, dated April 28, 2008. The record indicates that on April 18, 2002 the applicant pled guilty to Possession of a Fictitious Identification Card in Illinois and received a 46 day sentence in the Winnebago County Jail. *Criminal records for the applicant*. The record indicates that the immigration judge did not find his conviction to be a crime involving moral turpitude. Regardless, the AAO will not analyze whether the applicant admitted to the elements of or committed a crime involving moral turpitude, which would render him inadmissible under section 212(a)(2)(A) of the Act. The AAO notes that the extreme hardship analysis for the applicant's spouse under section 212(a)(9)(B)(v) of the Act would be the same as that conducted under section 212(h). The AAO would find that a section 212(h) waiver would be met if a section 212(a)(9)(B)(v) waiver is met.

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

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

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

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

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

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors

considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

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

If the applicant’s spouse joins the applicant in Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant’s spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. Neither she nor her three children speak Spanish. *Statement from the applicant’s spouse*, dated November 23, 2006. She has lived in the United States her entire life. *Id.* Her parents, siblings, aunts and uncles live near the applicant’s spouse in the United States. *Id.* She notes that moving to Mexico would be a culture shock and that it would be extremely difficult for her and her family to adjust to life there. *Id.* She also notes that the applicant only makes \$200 every two weeks in Mexico and with three children to support, moving to Mexico is not an option. *Id.* The applicant’s spouse indicates that her children would be unable to attend school in Mexico due to the language barrier. *Statement from the applicant’s spouse*, dated May 10, 2008. She further notes that the applicant lives at home with his parents who also have nine other family members living in their three bedroom home. *Id.* The applicant’s spouse states that she would be unable to obtain a job in Mexico due to her lack of language abilities. *Id.* Counsel notes that the United States Department of State has issued a Travel Warning advising United States citizens of the risks of traveling to Mexico. *Counsel’s Memorandum*. The applicant’s spouse further notes that when she visited Mexico, she became sick with e-coli and fears what would happen to her children if they were to contract this disease. *Statement from the applicant’s spouse*, dated May 10, 2008. The record includes medical documentation for the applicant’s spouse showing her positive blood culture. *Medical records for the applicant’s spouse*, dated April 8, 2008. While the AAO acknowledges the documented health condition of the applicant’s spouse, it notes that the record fails to demonstrate whether adequate treatment was available to the applicant’s spouse in Mexico and whether she needs follow-up care. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nevertheless, when looking at the aforementioned factors, particularly the lack of familial and cultural ties of the applicant’s spouse to Mexico, her family ties to the United States, her raising three children in Mexico with language and education issues, general safety issues, her length of

time in the United States, and her lack of language abilities which would affect her ability to obtain employment as well as adjust to Mexico, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. She has lived in the United States her entire life. *Statement from the applicant's spouse*, dated November 23, 2006. Her parents, siblings, aunts and uncles live near the applicant's spouse in the United States. *Id.* The applicant's spouse notes that her parents have been financially supporting her and her three children since March 2002. *Statement from the applicant's spouse*, dated May 10, 2008. She states that her family has been borrowing money from credit cards, spending their life savings, and taking out loans to support her. *Id.* A statement from the father of the applicant's spouse notes that he cannot continue to care for his daughter much longer, as he has had to file for bankruptcy. *Statement from the father of the applicant's spouse*, dated May 11, 2008. The record includes bankruptcy documents for the parents of the applicant's spouse. *Bankruptcy documents*. The record further includes bankruptcy documentation showing the applicant's spouse is entitled to a bankruptcy discharge. *Bankruptcy documents*. The record also includes a loan statement for \$186,000.00 for the father of the applicant's spouse. *Loan statement*. The mother of the applicant's spouse states that helping her daughter with the expenses of attorneys, waivers, petitions, and visas have caused her to go through her entire life savings. *Statement from the mother of the applicant's spouse*, dated May 10, 2008. She notes that bankruptcy has affected her credit and she is having a hard time supporting herself and four other people. *Id.* The applicant's spouse states she only has a ninth grade education. *Statement from the applicant's spouse*, dated May 10, 2008. A grade report included in the record shows the applicant's spouse as having completed some of her high school education. *High school grade report for the applicant's spouse*. The record includes a medical statement for the applicant's child noting that she has been diagnosed as having congenital trigger thumb which may require surgery if treatment is not resolved by her third birthday. *Statement from* [REDACTED] [REDACTED] dated May 12, 2008. The applicant's spouse notes that her sister has three children of her own and cannot assist her if something were to happen to her parents. *Statement from the applicant's spouse*, dated May 10, 2008. The applicant's spouse further notes that the emotional burden of being forced to live separate from the applicant would also be difficult for her and the children, who would have to grow up without a father in their lives. *Statement from the applicant's spouse*, dated November 23, 2006. When looking at the aforementioned factors, particularly the documented financial hardships of the applicant's spouse, the difficulties of being a single parent of three children, one of who has a documented health condition in need of medical treatment, and the emotional difficulties of a separation, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she 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 1991 entry without inspection, his prior unlawful presence for which he now seeks a waiver, his unauthorized employment while in the United States, his conviction and his removal order. The favorable and mitigating factors are his United States citizen spouse and children, the extreme hardship to his spouse if he were refused admission and his supportive relationship with his spouse and family, as documented in the record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

The AAO notes that the Acting Deputy District Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the Acting Deputy District Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any

time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The applicant failed to depart the United States by October 6, 2004 pursuant to his voluntary departure order, therefore he had a removal order as of October 7, 2004 and he departed the United States on October 15, 2004. As such, he is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For similar reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

**ORDER:** The appeal is sustained.