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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

[Redacted]

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FILE: [Redacted]

Office: MONTERREY, MEXICO

Date: DEC 22 2010

IN RE: Applicant: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Tariq Syed
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Monterrey, 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; section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend a removal proceeding; and section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for departing the United States while an order of removal was outstanding. 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.

The Field Office 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 Field Office Director*, dated February 17, 2010.

On appeal, the applicant, through counsel, claims that the applicant and his wife have significant additional evidence in support of their claim of extreme hardship. *Form I-290B*, filed March 16, 2010.

The record includes, but is not limited to, counsel's appeal brief; statements from the applicant's wife; psychological evaluations for the applicant's wife and children; medical documents pertaining to the applicant's wife's medical conditions; a letter from the applicant's wife's employer; letters of support for the applicant and his wife; bank statements, insurance documents, utility bills, past due notices, and mortgage documents; a garnishment order and foreclosure notice; school documents for the applicant's children; and documents from the applicant's removal proceeding. The entire record was reviewed and considered in arriving at 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.

....

(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).

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- (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.

Section 212(a)(6)(B) of the Act provides, in pertinent part:

- (B) Failure to attend removal proceedings.—Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

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

- (A) Certain alien previously removed.-

.....

(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 [Secretary] has consented to the aliens' reapplying for admission.

In the present case, the record indicates that the applicant entered the United States on January 1, 1999 without inspection. On March 8, 2000, an immigration judge ordered the applicant removed from the United States. In July 2005, the applicant departed the United States.

The applicant accrued unlawful presence from October 21, 1999, the date the applicant turned eighteen (18) years old, until July 2005, when he departed the United States. The applicant is seeking admission into the United States within ten years of his July 2005 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.

The AAO notes that the Field Office Director additionally determined that the applicant was inadmissible to the United States under section 212(a)(6)(B) of the Act. The Immigration and Naturalization Service (United States Citizenship and Immigration Service (USCIS)) has provided the following guidance on this provision:

Aliens placed in proceedings on or after April 1, 1997, who can establish that failure to attend or remain in attendance at a removal proceeding was for reasonable cause are not inadmissible under section 212(a)(6)(B) of the Act. The alien would establish reasonable cause before the immigration judge, if seeking to reopen the proceeding; **to the consular officer, if applying for a visa**; to the inspecting officer, if applying for admission; or to the Service's adjudicating officer, if applying for adjustment of status before the Service. The burden rests with the alien to establish there was reasonable cause for not attending or remaining at the removal hearing. *INS Memo on Unlawful Presence, Subject: Additional Guidance for Implementing Sections 212(a)(6)(B) and 212(a)(9)(B) of the Immigration and Nationality Act (the Act)*, dated June 17, 1997 (emphasis added).

As there is no indication that a consular officer found the applicant inadmissible under this section or requested that he provide evidence of reasonable cause for failing to attend his removal hearing, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(B) of the Act.

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) (██████████ 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 a letter dated March 27, 2009, the applicant's wife states moving to Mexico would be the worst decision because of the "crime rate, medical and schooling." In an undated statement, the applicant's wife states due "to [her] language barrier and not being able to read or write Spanish it would be real difficult for [her] to find a job" in Mexico. She also claims that they would have nowhere to live. The applicant's wife states her children would have difficulty adjusting to the Mexican school system because of the "language barrier" and "it could take months if not years to be at the same level of their age group." She claims that she "would feel helpless in Mexico it would be a different culture and society." In a psychological evaluation dated April 12, 2010, [REDACTED] reports that the applicant's son, [REDACTED] would likely "experience difficulties should the family relocate to Mexico. [REDACTED] would necessarily leave all that is known and familiar to him to relocate to Mexico." The applicant's wife state her mother provides childcare services for her. The AAO acknowledges that the applicant's wife is a native and citizen of the United States and that she may experience hardship in relocating to Mexico.

In counsel's appeal brief dated April 13, 2010, counsel states the applicant's wife's health concerns include "a pattern of breast health anomalies, indicative of future malignancy" and she "is diligent about addressing the problems." He claims that the applicant's wife "relies upon the Colorado Indigent Care Program, because she does not earn enough on her own to afford the health insurance premiums available through her employer." The applicant's wife states "[f]or about six to seven months [she] [has] been having chest pain that makes it hard for [her] to breathe, and [she] get[s] dizzy spells." She also claims that she gets "urinary tract infections on a regular basis" and she has a kidney infection. The AAO notes that the record establishes that the applicant's wife has been seen by medical professionals for breast abscesses, cysts, urinary tract infections, dizziness, and chest pain.

The record establishes that the applicant resides in Huapalcalco, Hidalgo, which is in southern Mexico. *See Form I-601*, filed September 23, 2008. On September 10, 2010, the Department of State issued a travel warning to United States citizens thinking of traveling to Mexico. Although Hidalgo is not mentioned in the warning, the AAO notes the general safety conditions in Mexico.

Based on the applicant's spouse's lack of Spanish language skills which will affect her ability to work and settle into Mexico society, the loss of educational opportunities and childcare for the applicant's children, raising her two children in Mexico, her medical problems, the loss of her state-sponsored health insurance, the loss of medical treatment that she is currently receiving, and the general safety concerns in Mexico, 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, the applicant's wife states since the applicant "has been living in Mexico, [she] [has] been the sole provider of [their] family and raising [their] children alone." The AAO notes that although her mother

helps watch the two children, the applicant's wife is raising two children without their father. The applicant's wife states the applicant "is struggling in Mexico, and [she] [is] struggling in the United States with [their] [c]hildren." Counsel states the applicant's wife "is fully extended, and in this case, it's just not enough to rescue this family." In a letter dated February 3, 2009, the applicant's wife states "[t]he home that was once owned by [the applicant] and [her] has recently gone into foreclosure." The AAO notes that documentation in the record establishes that the applicant's and his wife's home was foreclosed. In a letter dated December 23, 2008, the applicant's wife states she "had to sell just about everything including [their] family pets, to use the money to relocate to a rental property that is located in a bad part of town. This decision was based solely on [her] income alone." In a letter dated October 13, 2008, the applicant's wife states she "currently cannot [pay] her utilities on time" and she "had to apply for medical assistance for [their] children and [herself]." The AAO notes that the record establishes the applicant's wife's income and some of her expenses, including utility bills and some bills that were past due.

In a letter dated October 24, 2008, [REDACTED] states the applicant's wife is being followed by her office for anxiety and depression, and she has been treated with medication. Additionally, the [REDACTED] notes that the applicant's wife has been treated for breast abscesses, cysts, urinary tract infections, dizziness, and chest pain. In an undated psychological evaluation, [REDACTED] diagnosed the applicant's wife with major depressive disorder with salient symptoms of anxiety. [REDACTED] reports that the applicant's wife's symptoms include sadness, crying, lack of motivation, concentration problems, sleep disturbance, low self-esteem and self worth, loss of appetite, "feelings of hopelessness and helplessness, dissociative episodes, low frustration tolerance and suicidal ideation without a plan for harming herself." The applicant's wife also states she worries about the applicant being in Mexico "with the drug lords and crimes taking place."

Counsel states the applicant's wife's "job performance puts her future employability in doubt." In a letter dated March 24, 2010, [REDACTED] the applicant's wife's supervisor, states the applicant's wife's received a "Needs Improvement" rating for a her last performance evaluation because she has "sub-standard performance in the area of attendance." [REDACTED] states that he has "consistently observed that [the applicant's wife] has progressively become more easily upset and emotional when discussing job performance issues with her, and in [his] opinion more withdrawn and introverted during [his] interactions with her."

The applicant's wife states her children "are exhibiting behaviors that are not normal for them such as nightmares, bed wetting, not wanting to sleep alone, suppressed appetite and also inappropriate anger." Counsel states the applicant's son, [REDACTED], "has a troubling history of behavioral problems" and "[h]is school records reflect manifestations of the stress from the family separation." Additionally, counsel states that at nine (9) years old, the applicant's son "has been suspended from school, and has been identified as requiring special attention for his behavioral problems." The [REDACTED] notes that the record establishes that the applicant's son, [REDACTED], has been suspended from school. In a psychological evaluation dated April 11, 2010, [REDACTED] reports that the applicant's son, [REDACTED], "has had numerous incidents of acting out behaviors, some of which have involved aggression towards others," he "is constantly fighting with his younger brother," he "displays fearful behaviors," he has been suspended from school on three separate occasions, and he is struggling academically. [REDACTED] reports that [REDACTED] stated to her that "he really misses [the applicant]" and he is sad. The applicant's wife states [REDACTED] constantly asks for [the applicant]." [REDACTED] states the applicant's son, [REDACTED] "is experiencing a significant level of depression that is impacted by the long-term separation from [the

applicant], an important figure in his life,” and she diagnosed him with major depressive disorder. [REDACTED] states “it has been difficult [for the applicant’s wife] to support her children, both emotionally and financially through the long separation.” The [REDACTED] acknowledges that the applicant’s children are suffering some hardship through their separation from the applicant.

Considering the applicant’s spouse’s mental health issues, her medical issues, financial issues, employment problems, her older son’s mental health issues and discipline problems, her raising two children without their father, her concern for the applicant’s safety in Mexico, 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, period of unauthorized employment and unlawful presence, failure to attend his removal proceeding, the removal order and his legal violations. 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, and the letters of support.

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. 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.

The [REDACTED] notes that since the applicant is also inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, he will need to file an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The Field Office Director incorrectly states that the applicant has to be outside of the United States for ten year before he can file the Form I-212. However, the applicant is presently eligible to file the Form I-212.

ORDER: The appeal is sustained.