

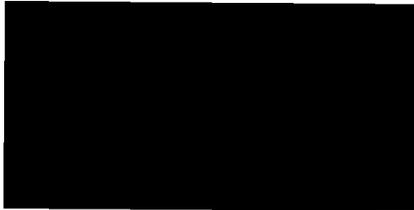
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H6

FILE: [REDACTED]

Office: MEXICO CITY

Date:

DEC 28 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:



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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, and 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 resided in the United States from May 1999, when he entered without inspection, until January 2007, when he returned to Mexico. He was found to be inadmissible under 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 a period of one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. He 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 return to the United States and reside with his wife and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director* dated December 1, 2007.

On appeal, counsel for the applicant asserts that the applicant's wife would suffer extreme hardship if the applicant is removed from the United States. Specifically, counsel states that the applicant's wife is suffering extreme hardship, including emotional, financial, medical, and psychological hardships, due to separation from the applicant and having to support their three children on her own. *Counsel's Letter in Support of Appeal* at 1. Counsel states that the effects of hardship to the applicant's children on his wife also contributes to her emotional and psychological hardship. *Counsel's Letter* at 1-2. The applicant's wife further states that she would not be able to accompany the applicant to Mexico because she would not have access to adequate medical care for her and her children and would suffer emotional hardship if she were separated from her family members in the United States. *Letter from Amy Rosas dated December 19, 2006*. In support of the appeal and waiver application counsel submitted the following documentation: Letters and affidavits from the applicant's wife, letters from relatives and coworkers of the applicant's wife, a letter from the applicant's wife's doctor, medical records for the applicant's wife and daughters, copies of medical bills, a note from a psychologist who evaluated the applicant's wife, and copies of family photographs. 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:

- (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.

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- (v) Waiver. – The Attorney General [now Secretary, 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s stepfather 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).

Although 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 the 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) (“[redacted] 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 the present case, the record reflects that the applicant is a thirty-one year-old native and citizen of Mexico who resided in the United States from May 1999, when he entered without inspection, until January 2007, when he returned to Mexico. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. The applicant’s wife is a twenty-four year-old native and citizen of the United States. The applicant currently resides in Mexico and his wife resides in Wichita, Kansas with their three daughters.

The applicant's wife states that she would suffer extreme hardship in Mexico because she would be separated from her family members in the United States, where she has lived her entire life, and would lose her employment in the United States, and have difficulty finding work or obtaining adequate medical care in Mexico. *Affidavit of [REDACTED]* dated December 19, 2006. The evidence on the record includes a letter from the applicant's wife's mother and letters from her employer and coworkers indicating that she has been employed with Kansas Legal Services for over two years and is a great asset to the organization. When considered in the aggregate, the emotional hardship that would result from severing her ties to the United States, losing her home and employment, and having to adjust to conditions in Mexico, combined with financial hardship and a reduction in standard of living in Mexico, would amount to extreme hardship for the applicant's wife if the family relocated to Mexico to reside with the applicant.

Counsel asserts that the applicant's wife would suffer financial hardship if the applicant is denied admission to the United States because she does not earn enough on her own to meet the family's expenses and needs the applicant's financial support. *Counsel's Letter in Support of Appeal* at 1. The applicant's wife states that she earns about \$18,000 per year but without the applicant's income cannot pay all of their bills, including medical expenses that are not covered by her insurance. *Affidavit of [REDACTED]* dated [REDACTED]. Letters from her employer state that she earns \$18,100 per year and has had to take leave without pay for doctor's appointments and school functions and other matters related to her three children as well as for gall bladder surgery shortly after the birth of her third child. A letter from one co-worker states,

A common reason for termination with our organization is missing too much work. . . . Amy has the burden of taking all the children to every doctor visit, dental appointment and eye exam. She is also the only one available to leave work in cases of illness and to attend school functions. *Letter from [REDACTED], Kansas Legal Services*, dated December 18, 2006.

Copies of bills submitted with the waiver application indicate that the applicant's wife was placed on a payment plan for medical expenses not covered by her insurance and had another debt of approximately \$1000 that was sent to a collection agent for lack of payment. *See Statements from Via Christi Regional Medical Center and from Recheck, Inc.*

The applicant's wife states that she is struggling emotionally and physically without the applicant and further states,

My daughters miss their dad. They don't understand why he can't be here and it hurts my heart to try and explain it to them. They see me struggling through even the simplest of tasks and it causes a strain on our family time together. *Letter from [REDACTED] in Support of Appeal.*

In a previous letter the applicant's wife stated that the applicant has helped her take on adult responsibilities very early in life and she has been depressed and anxious about her future since the applicant departed the United States. *Affidavit of [REDACTED]* dated December 19, 2006. A

letter from her physician states that while she was pregnant with her third child the applicant's wife was distraught over the possible deportation of the applicant and further states that she was having trouble sleeping and difficulty concentrating, she cried incessantly, and she was unable to eat or drink well, resulting in a bladder infection. *Log Note from [REDACTED] M.D.* dated December 19, 2006.

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that his wife is experiencing extreme hardship due to separation from the applicant, including emotional hardship due to the stress of raising three children alone and financial hardship due to loss of the applicant's financial support. The evidence on the record indicates that the applicant's wife must work full-time and also raise three small children, and has had difficulty dealing with the emotional and physical stress. As noted above, separation from close family members is a primary concern in assessing extreme hardship, and the record establishes that the applicant's wife would continue to suffer emotional hardship if she remained in the United States without the applicant. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998). The evidence on the record further indicates that the applicant's wife, despite working full-time, is having difficulty paying the family's expenses and she has to take time off from work without pay on a frequent basis to take care of her children and attend school functions. The applicant's wife became a mother at a very young age and is now raising three children on her own, and although she works full time, it appears that her income is insufficient to meet all of the family's expenses. The record further indicates that since she does not have the assistance of the applicant or other family members, she must take leave without pay when her children are sick or have a doctor's appointment and could lose her job if she misses too much work. This financial hardship, when combined with the emotional hardship resulting from separation from her spouse and the effects of the separation on her children, amounts to hardship beyond the common results of removal or inadmissibility.

Based on the forgoing, the AAO finds that the applicant's wife would face extreme hardship if the applicant's waiver application is denied. Thus, the applicant has shown that a qualifying relative would suffer extreme hardship if he is denied admission to the United States. The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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 Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence

indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The negative factor in this case is the fact that the applicant entered the United States without inspection and unlawfully remained and worked in the United States. The positive factors in this case include the applicant's length of residence and family ties to the United States, including a U.S. Citizen spouse and three U.S. Citizen children; the extreme hardship to the applicant's wife if he is denied admission to the United States; hardship to the applicant's children; and the applicant's lack of a criminal record.

The AAO finds that applicant's violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.