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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]

H6

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: NOV 0 1 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 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 her last departure from the United States. The applicant is married to a United States citizen and the mother of four United States citizen children and one Mexican citizen child. She 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 her United States citizen husband and children.

The Acting District Director found 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 Acting District Director*, dated April 23, 2008.

On appeal, the applicant, through counsel, states the United States Citizenship and Immigration Service (USCIS) erred in denying the applicant's waiver as the applicant's husband would "suffer extreme hardship in the event the waiver is not granted." *Form I-290B*, dated May 22, 2008.

The record includes, but is not limited to, a brief from applicant's previous counsel, statements from the applicant's husband in English and Spanish[1], a letter from the applicant's husband's employer, and pay stubs for the applicant's husband. The entire record was reviewed and considered, with the exception of the Spanish language statement, 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

[1] 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 a statement from the applicant's husband is in Spanish and is not accompanied by an English-language translation, the AAO will not consider it in this proceeding.

> 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 [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 on July 9, 1988 without inspection. On August 29, 1988, an immigration judge granted the applicant voluntary departure to depart the United States by February 28, 1989. On February 26, 1989, the applicant departed the United States. In April 1992, the applicant entered the United States without inspection. In December 2005, the applicant departed the United States.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until December 2005, the day she departed the United States. The applicant is seeking admission into the United States within ten years of her December 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.

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

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

avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (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.

The first prong of the analysis addresses hardship to the applicant's spouse if he relocates to Mexico. In applicant's previous counsel's brief dated May 15, 2006, prior counsel states the applicant "has lived in the United States for over 15 years," she and her husband "have close relatives in the United States," and they "do not have meaningful ties in Mexico." Prior counsel also states the applicant and her husband "have five young children, four of them U.S. born." The AAO notes that one of the applicant's children is an adult and another will be turning eighteen (18) years old on April 11, 2011.

Prior counsel states the wages in Mexico are low and the applicant's husband "would not be able to contribute enough financial support to provide [his family] with a good standard of living, medical care, and education." Prior counsel also states neither the applicant nor her husband "would be able to find a well paying job in Mexico." The record reflects that the applicant's spouse has been employed since July 25, 2000 at [redacted]. *Letter from* [redacted]. Prior counsel claims it "would be a great hardship for [the applicant's husband], [the applicant], and their U.S. born children to be forced to stay in Mexico, where they would not feel secure and safe, and where they will not be able to provide a safe environment, good education, good medical care, and good future to their five children." Prior counsel states "the responsibility of bringing up children in a country as dangerously unsafe and unsecure as Mexico would have an emotionally traumatic effect on [the family]" and "[t]hey would be constantly anxious and nervous as to the safety of the children and themselves." The AAO notes the applicant's and her spouse's concerns.

The AAO acknowledges that that the applicant's husband has been residing in the United States for many years and that he may experience hardship in relocating to Mexico. The AAO notes that the applicant is currently residing in the central Mexican state of Zacatecas. *See Form I-601*, filed August 23, 2007. 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. Since the applicant is from central Mexico, the AAO does not find the record to establish that the applicant's family would relocate to a part of Mexico where they would be subjected to violence. However, the AAO notes that the situation in parts of Mexico has become unstable and unsafe for United States citizens.

Based on applicant's spouse's lack of family ties to Mexico, leaving his employment in the United States, having to raise their five minor children in Mexico, and the general safety concerns in Mexico, the AAO finds that the applicant's husband would suffer extreme hardship if he were to relocate to Mexico to be with the applicant.

Regarding the hardship the applicant's husband would suffer if he were to remain in the United States without the applicant, counsel states the applicant's husband and children would suffer if the applicant cannot return to the United States. Prior counsel states the applicant's husband "wants their five children to have their father and mother in the U.S. to provide the necessary financial, and specially, emotional support and guidance, that young children need as they grow up." Prior counsel also states "it would be a tremendous hardship for [the applicant's husband]...to raise their children, on [his] own." Prior counsel claims the applicant's husband "would lose meaningful contact with his family and this would cause him extreme hardship. It would also cause [the applicant's husband] great sorrow

to be forced to have [the applicant] raise their five children in Mexico, away from their father." In an undated letter, [redacted], the applicant's employer, states the applicant's children are "suffering due to the fact that they are not being nurtured by [the applicant], and are not residing in a two-parent household." The AAO notes the applicant's and her husband's concerns for their children.

Prior counsel states "frequent travel to see [his family] would be disruptive for [the applicant's husband's] work and he would only be able to visit them from time to time." In a statement dated August 11, 2007, the applicant's husband states his "wages are suffering because of the many absences from work to handle the affairs of [their] children, doctor appointments, school enrollments and other activities requiring [his] supervision." [redacted] states the applicant's husband's "devotion to his children has begun to affect his work life. He has no choice but to miss work from time-to-time. This affects not only his livelihood, but also his reputation at work."

On appeal, applicant's current counsel claims the applicant's husband "suffers from acute low back injury as a result of multiple disc injuries to his lower back," his "injuries are permanent and leave him unable to work," he "requires assistance performing normal daily activities," and he "cannot support himself or his family given his medical condition." *Form I-290B, supra.* The AAO notes that there is no medical documentation in the record to support counsel's claims. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

However, based on the applicant's spouse's employment problems, his raising the five children without the applicant, his concern for his children and the normal effects of separation, the AAO finds that the applicant's husband would experience extreme hardship if the applicant's waiver request were to be denied and he remained 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 entries without inspection and her period of unlawful presence for which she now seeks a waiver. The favorable and mitigating factors are the applicant's United States citizen husband and children, and the extreme hardship to her husband if she were refused admission.

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.

ORDER: The appeal is sustained