

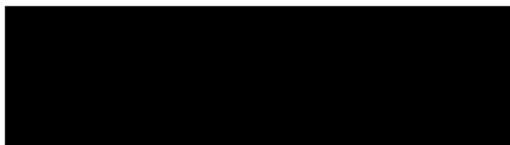
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date **NOV 01 2010**

IN RE: Applicant: [REDACTED]

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

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. 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 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 for more than one year and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and children.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated April 15, 2008.

On appeal, the applicant asserts that her husband and children will endure extreme hardship should the present waiver application be denied. *Brief in Support of Appeal*, submitted June 17, 2008.

The record contains a brief in support of the appeal; statements from the applicant's husband, the applicant's parents, and the applicant; articles on conditions in Mexico; copies of the applicant's parents' B-1/B-2 border crosser cards; documentation relating to the applicant's husband's academic activities; documentation regarding the applicant's husband's prescription medication and medical treatment; a letter from a pediatrician regarding the applicant's children; a certification that the applicant has no criminal record in the city of Tijuana; documentation regarding the applicant's husband's dental insurance, and; tax and income records for the applicant's husband. The applicant further provided documents in a foreign language. Because the applicant failed to submit translations of the documents, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated documents, the entire record was reviewed and considered in rendering this decision.

It is noted that the Form I-290B appeal indicates that the applicant is represented by counsel. However, the applicant has not provided a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, to show that the named attorney has been authorized to represent the applicant. On September 16, 2010, the AAO sent a facsimile to the attorney requesting that he provide a Form G-28 within five business days. As of the date of this decision, the AAO has received no further information or correspondence from the applicant or the attorney. Therefore, the attorney is not recognized in the present proceeding. However, all statements included with the filing will be considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

The record shows that the applicant entered the United States without inspection in or about March 2004, and she remained until August 2005. Accordingly, she accrued over one year of unlawful presence in the United States. She now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure. The applicant does not contest her inadmissibility on appeal.

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 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-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.

The applicant's husband states that he is enduring stress and emotional difficulty due to residing in Tijuana with the applicant. *Statement from the Applicant's Husband*, May 15, 2008. He asserts that he will face significant difficulty should the present waiver application be denied. *Id.* at 1. He explains that, for three years, he has traveled between Mexico and the United States five days each week in order to work in the United States. *Id.* at 2. He indicates that he must leave at 3:00 A.M. in order to cross the San Ysidro border, and that he does not return until 6:00 P.M. *Id.* He expressed that he has little time to spend with his children, and that the situation is affecting his health. *Id.*

The applicant's husband explains that it is no longer safe to live in Tijuana, and that he fears for his family's safety in the city. *Id.* He states that he has been robbed twice, and that he and his family fear the possibility of kidnapping that has occurred in Tijuana. *Id.*

The applicant's husband notes that he sought "special treatment" for the applicant due to her depression as a result of living alone in Tijuana. *Id.* He explains that some of the applicant's family members reside in Guadalajara, Mexico, and her parents reside in Central America. *Id.* He notes that all of his family members reside in the United States and they are U.S. citizens, including his parents in San Diego. *Id.* at 1-2. He explains that he has established a life in the United States and he wishes to continue his studies here. *Id.* at 2. He expresses that he wishes to remain in the United States because he does not wish to be away from his children. *Id.* He provides that his children are U.S. citizens and they would lack access to quality education should they depart the United States. *Id.* He asserts that his children need both parents, thus they need the applicant to return to the United States. *Id.*

The applicant's parents state that the applicant's residence in Tijuana is creating hardship for her children. *Statement from the Applicant's Parents*, dated May 5, 2008. They explain that the applicant's children are transported between the United States and Tijuana in order for the applicant to care for them, yet the traveling has created instability for the children. *Id.* at 1. They provide that the applicant's children have had their medical care and vaccination schedule interrupted, and that they are exposed to diseases in Mexico. *Id.*

The applicant submits a letter from a physician, [REDACTED], who states that the applicant's husband has been diagnosed with peptic ulcer, neurosenic colitis, and migraines. *Letter from [REDACTED]*, dated May 7, 2007. The applicant provides a letter from a pediatrician, [REDACTED], who states that the applicant's children are experiencing stress due to the absence of the applicant's husband. *Statement from [REDACTED]*, dated May 3, 2008.

The applicant provides a copy of her and her husband's 2007 IRS Form 1040, U.S. Individual Income Tax Return, that reflects that they earned the total income of \$34,588 for the year. The

applicant submits a copy of an earnings statement for her husband for April 2008 that reflects that he earned a net income of \$795.37 for a one week period.

The applicant previously stated that she and her husband met and married in Mexico, yet he continued to reside in the United States where he works. *Statement from the Applicant*, dated June 21, 2006. She explained that she relocated to Tijuana, yet her husband always complained about the long waits he experienced when crossing the border between the United States and Mexico. *Id.* at 1. She provided that she became lonely in Mexico, which prompted her to enter the United States without inspection despite her husband's disagreement with the decision. *Id.* She explained that she returned to Mexico voluntarily because they wished to follow proper procedures in order for her to obtain a legal immigration status in the United States. *Id.* She indicated that her husband is the main provider for their households, and that keeping both residences is difficult. *Id.* She noted that, although her parents reside in southern Mexico, she resides in Tijuana because she wishes to follow the immigration laws of the United States. *Id.*

A brief submitted with the appeal states that the applicant has two U.S. citizen children. *Brief in Support of Appeal* at 2. The brief provides that the applicant's parents reside in El Salvador, and that she will relocate there should the present waiver application be denied. *Id.* at 5. The brief notes that the applicant's husband is from Guadalajara, Mexico, and that he has few ties to Mexico other than distant relatives. *Id.* The brief indicates that the applicant's husband has fewer ties to El Salvador. *Id.* The brief explains that the applicant's husband has extensive family in the United States, including his parents and six siblings. *Id.* The brief cites reports from the U.S. Department of State regarding difficult conditions in Mexico and El Salvador. *Id.* at 5-6. The brief explains that the applicant's husband has strong employment in construction in the United States, yet he will earn little income in Mexico or El Salvador. *Id.* at 6.

The brief explains that the applicant's husband has engaged in academic study in the United States, yet he will lack access to adult education in Mexico or El Salvador. *Id.* at 7. The brief indicates that the applicant's husband and children have experienced stress and related problems due to their family's circumstances. *Id.*

Upon review, the applicant has shown that a qualifying relative will endure extreme hardship should the present waiver application be denied. The applicant has established that her husband will face extreme hardship should he reside with her and their children in Mexico.

The record shows that the applicant and her children currently reside in Tijuana, Mexico. The applicant has provided articles regarding crime and drug-related violence in and around the border area in which she resides. The applicant's husband expressed his concern for his family's safety in Mexico, and he noted that he has been robbed there on two occasions. The AAO takes notice that the U.S. Department of State has issued travel warnings for Mexico, reporting that crime and violence have escalated throughout the country in all cities and that U.S. citizens should take precautions and remain in well-known tourist areas. *United States Department of State Travel Warning: Mexico*, dated September 10, 2010. The Department of State has particularly identified Tijuana as a troubled

city, noting the prevalence of narcotics-related violence and the fact that more than half of reported deaths of Americans in 2009 occurred in either Tijuana or Ciudad Juárez. *Id.*

The AAO finds ample evidence that the applicant, her husband, and their children face a heightened risk of harm in Tijuana due to deteriorating conditions there. The current dangerous conditions in Tijuana constitute an unusual circumstance not commonly faced when an individual relocates to another country due to the inadmissibility of spouse. It is evident that the applicant's husband would face extreme emotional difficulty should he and his family reside in Tijuana.

The AAO recognizes that the applicant's husband faces other elements of hardship should he reside in Mexico to maintain family unity. He would endure arduous travel circumstances on a daily basis due to his need to enter the United States for his employment. He would lose access to adult educational services in the United States. He would face psychological difficulty due to his children's lack of access to the U.S. education system.

Dr. Hernandez states that the applicant's husband has been diagnosed with peptic ulcer, colitis, and migraines. While the applicant's husband has received treatment for these health problems in Tijuana, it is evident that that his stress due to his family's circumstances is having a negative impact on his physical health.

The brief in support of the appeal asserts that the applicant's husband would endure hardship should he relocate to El Salvador. However, the applicant and her husband have not indicated that they have access to residence in El Salvador or that either one of them is a Salvadoran citizen. A notation on the applicant's parents' statement indicates that they provided the statement in El Salvador, suggesting that they reside there. However, the copies of their B-1/B-2 border crosser cards reflect that they are both nationals of Mexico. The record does not support that the applicant's husband would reside in El Salvador should he relocate outside the United States due to the applicant's inadmissibility.

The AAO has considered all elements of hardship to the applicant's husband, should he relocate to Mexico, in aggregate. Based on the foregoing, he will face extreme hardship should he join the applicant and their children in Mexico to maintain family unity.

The applicant has established that her husband will experience extreme hardship should he remain in the United States for the duration of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. As discussed above, the applicant and her children face harsh and dangerous conditions in Tijuana. The applicant's husband expressed concern for his family's safety and security in Mexico. In light of reports on deteriorating conditions in the border regions of Mexico, the record supports that, should the applicant's husband remain in the United States, his psychological difficulty regarding his family's well-being will rise to an extreme level.

It is noted that many of the concerns expressed by the applicant's husband would persist regardless of whether he resides in Mexico or the United States. Specifically, he would continue to experience emotional hardship regarding his children's lack of access to health care and academic institutions in

the United States. He would continue to face the challenge of frequent travel across the United States-Mexico border. The record supports that the applicant's husband would continue to face physical health challenges.

The applicant's husband expressed that he is close with the applicant, and his effort to remain with her in Mexico despite difficult circumstances supports that he would endure substantial emotional hardship should he reside apart from her and their children. The separation of spouses often results in significant psychological suffering. Such separation is a common consequence when individuals reside apart due to admissibility. However, the applicant's husband's circumstances are distinguished from those typically faced due to his emotional hardship as a result of his wife and children residing in a dangerous area.

All stated elements of hardship to the applicant's husband, should he remain in the United States, have been considered in aggregate. The AAO finds that the sum of his difficulty rises to the level of extreme hardship.

Accordingly, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to her husband, as required by section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for approximately 17 months.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen husband would experience extreme hardship if she is prohibited from residing in the United States; the applicant's children will face extreme circumstances should they remain in Mexico with the applicant, and; the applicant has expressed credible remorse for her violation of U.S. immigration law.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factor.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See*

Matter of Mendez-Morales, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met her burden that she is eligible for a waiver and she merits approval of her application.

ORDER: The appeal is sustained.