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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

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FILE:



Office: BALTIMORE, MARYLAND

Date:

NOV 09 2010

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Ground 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. The applicant is married to a Lawful Permanent Resident (LPR) of the United States. 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 LPR wife and two United States citizen children.

The director concluded that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 18, 2008.

On appeal, counsel asserts that the applicant's family will suffer extreme hardship as a result of the waiver denial and requests that the director's decision be reversed. *See Form I-290B*, filed February 2, 2008.

The record includes, but is not limited to, a statement from the applicant's wife, two letters from [REDACTED], Salisbury, Maryland, dated April 14, 2007 and February 4, 2008, copies of an Individualized Education Program (IEP) from Worcester County Public School, Newark Maryland, for the applicant's son, [REDACTED] dated April 2, 2007, a copy of a Speech and Language Assessment from Worcester County Board of Education for [REDACTED], dated November 2, 2007, and supportive letters from family and friends. The entire record was reviewed and considered in rendering this decision on 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.

....

(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 applicant stated the following: He entered the United States without inspection and remained in the country without status from August 1998 to June 2003. He returned to Mexico in the fall of 2003 to obtain a valid U.S. visa. On September 11, 2003, he was issued a valid H-2B non-immigrant visa by the U.S. Consulate in Monterey, Mexico, based on a petition by his employer, F & T Incorporated. He returned to the United States with the visa on September 14, 2003, and was admitted into the country through Houston, Texas, in an H-2B status. *See Undated Statement of [REDACTED] in Response to USCIS Request for Evidence.*

Based on the applicant's own testimony, he accumulated unlawful presence in the United States from August 1998 through June 2003. His departure from the United States in June 2003, triggered the bar to admission under section 212(a)(9)(B) of the Act. The fact that the applicant returned to the United States lawfully on September 14, 2003, did not cure his prior unlawful presence from August 1998 through June 2003. The applicant is seeking readmission into the United States within 10 years of June 2003. Thus, the AAO agrees with the district director that the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been 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 his 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 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 record reflects that the applicant’s wife, [REDACTED] is a 33-year-old native of Mexico and a Lawful Permanent Resident of the United States. The applicant and his wife were married in Snow Hill, Maryland, on July 21, 2006, and they have two children ([REDACTED] 8 years old, and [REDACTED], 6 years old). The applicant’s wife asserts that she is suffering extreme emotional and financial hardships as a result of the denial of the applicant’s waiver application.

Regarding the emotional hardship of separation, the applicant's wife states that she needs the applicant's moral and financial support and that her children need his presence and love. *See Statement from* [REDACTED] [REDACTED] dated April 17, 2007. The applicant's wife states that if the applicant is taken away from them, she would be forced to make some difficult decisions which involve separating the family. *Id.* The applicant's wife states that the applicant is a wonderful father and a great husband who provided for his family, and with his love and encouragement, she was able to complete college. *Id.* The applicant's wife also states that if the applicant is taken away, she and her children will suffer greatly emotionally and financially. *Id.* Counsel states that the applicant's son, [REDACTED], is diagnosed with speech and language delay problems and the family is working with the school district to provide [REDACTED] with treatment and all the help he needs including an IEP for him. *See Form I-290B*, filed on February 2, 2008.

The record includes a copy of an IEP evaluation for [REDACTED] from Worcester County Public Schools, Newark, Maryland, dated April 2, 2007, a copy of a speech and language assessment by [REDACTED] M.A., Speech and Language Pathologist, Worcester County Board of Education, dated November 2, 2007, stating that [REDACTED] appears to have no deficits in receptive and expressive language except in the use of plurals, answer what and where questions and verb + ing endings. [REDACTED] states that errors were noted in articulation, which appear to be developmental. [REDACTED] notes that the significance of the deficits and eligibility for services will be determined by the IEP planning team; a letter from [REDACTED] Outreach/Social Worker, Snow Hill Head Start, dated February 4, 2008, stating that [REDACTED] was enrolled in their Head Start Program with a speech and language delay, that [REDACTED] began receiving services at the center provided by Worcester County Health Department, and later he began receiving mental health services through the Health Department due to his inappropriate behavior in the classroom. [REDACTED] also states "since involvement in these two programs we have seen a great improvement in [REDACTED] speech and language development and his social skills." [REDACTED] recommends that [REDACTED] continue receiving the services. In a supportive letter on behalf of the applicant dated April 14, 2007, [REDACTED] states that the applicant is an active father and role model to the children in her program, that the applicant has shared his time with his daughter and other children enrolled in her program. [REDACTED] concludes "it is my belief that if [the applicant] is taken from his family, that his family especially his children will suffer financially, but more importantly they will suffer emotionally." *See Letter from* [REDACTED] Outreach/Social Worker, Snow Hill Head Start Program in Worcester County, Maryland, dated April 14, 2007.

While the AAO acknowledges the claims made by the applicant's wife, it does not find the evidence in the record is sufficient to demonstrate that the challenges encountered by the applicant's wife, considered cumulatively, meet the extreme hardship standard. While the emotional hardship of separation is apparent from the applicant's wife's statement, the applicant does not provide medical records, detailed testimony, or other evidence to show that the emotional hardships she faces are unusual or beyond what would be expected upon family separation due to one member's inadmissibility. The AAO notes that while the applicant's wife claims extreme financial hardship to her family as a result of separation, the record does not contain information about the family's income and expenses. Without such documentation, the AAO cannot make a determination that the applicant's wife will suffer extreme financial hardship as a result of separation. The applicant's children are not qualifying relatives and hardship faced by them as a result of family separation are not considered in the extreme hardship analysis, except to the extent that these hardships impact the applicant's wife. The applicant through

counsel expressed concerns regarding his son, [REDACTED] speech and language delays as well as his behavioral problems. The letter from [REDACTED], dated February 4, 2008, confirms that [REDACTED] has speech and language delay, that he is receiving services through Worcester County Public Schools and that there has been great improvements in his speech and language developments as well as his social skills. The speech and language assessment by [REDACTED] indicates that [REDACTED] has no problems with receptive and expressive language skills except in the use of plurals, answer what and where questions and verb + ing endings. See *Speech and Language Assessment by [REDACTED], Speech Language Pathologist, Worcester County Board of Education*, dated November 2, 2007. The documentation from these two professionals shows that [REDACTED] problems have improved with treatment and do not demonstrate that the challenges faced by [REDACTED] has caused or would cause extreme hardship to the applicant's wife. Thus, the AAO notes that the evidence in the record is insufficient to demonstrate that the challenges the applicant would face as a result of family separation rises to the level of extreme hardship.

Regarding relocation, the applicant's wife states that she does not want to relocate to Mexico to live with the applicant because she has all her family members here in the United States, she has no one in Mexico and separation from her family "would hurt me very much because we are very close." The applicant's wife states that her children are United States citizens, that they will miss out on all the wonderful opportunities the U.S. can offer, and that they will miss their relationship with their grandparents, aunts, uncles and cousins. See *Statement from [REDACTED]* dated April 17, 2007. The applicant's wife also states that she recently obtained her U.S. residency and if she relocates to Mexico, she will lose the privilege of being a U.S. resident. *Id.*

The AAO acknowledges that the evidence in the record shows that the applicant's wife has been residing in the United States since 1996, that she has significant family ties in the United States, and that she is a Lawful Permanent Resident of the United States. Additionally, although the applicant's wife was born in Mexico and understands the language, she has been away from the country for an extended period of time and would have difficulties adjusting to conditions there. Thus, given the length of her residence in the United States, her legal status in the United States, and her significant family ties in the United States, the applicant's wife would suffer extreme hardship if she is forced to relocate to Mexico to be with the applicant.

In this case, although the applicant's wife has established hardship if forced to relocate to Mexico, the evidence in the record does not support a finding that the challenges she faces as a result of the applicant's inadmissibility when considered in the aggregate, rises beyond the common results of removal or inadmissibility to the level of extreme hardship. See *Perez*, 96 F. 3d at 392; *Matter of Pilch*, 21 I&N Dec. at 631. Although the distress caused by separation from one's family is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal. See *id.* The AAO therefore finds that the applicant has failed to establish extreme hardship to his LPR wife as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.