

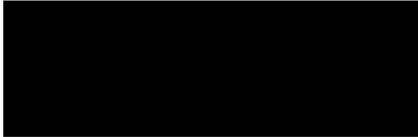
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



H6

FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ)

Date:

NOV 15 2010

IN RE: [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.

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City (Ciudad Juarez), Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 the spouse of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated February 21, 2008, the district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and did not warrant the favorable exercise of the Secretary's discretion. The application was denied accordingly.

In a Notice of Appeal to the AAO dated March 12, 2008, the applicant states that his wife is suffering extreme physical, mental, and psychological hardship. He states that since their separation she has undergone fertility treatment and treatment for depression. He states that she has been on the verge of losing her job and that her condition continues to deteriorate. He submits additional evidence to support his appeal.

The AAO notes that the record indicates that on April 25, 1999, in Los Angeles County, California, the applicant was arrested and charged with: driving under the influence of alcohol or drugs under California Vehicle Code (C.V.C.) § 23152(A), driving with a blood alcohol level of .08% or above under C.V.C. § 23152(B), driving without a license under C.V.C. § 12500(A), and driving with no proof of insurance under C.V.C. § 16028(A). On May 17, 1999 the applicant was convicted of all charges, placed on probation for three years, made to pay a fine, and had his license suspended for ninety days. The AAO also notes that on March 25, 2000 the applicant was arrested for driving while intoxicated, but the record does not indicate that this charge resulted in a conviction.

In *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), the Board of Immigration Appeals (BIA) held that a simple DUI conviction is not a crime involving moral turpitude unless the alien is convicted under a state statute that requires a culpable mental state. *In re Lopez-Meza*, 22 I.&N. Dec. 1188 (BIA 1999) and *Marmolejo-Campos v. Holder*, 558 F.3rd 903 (9th Cir. 2009), the BIA and Ninth Circuit Court of Appeals found that a conviction under an Arizona statute for aggravated DUI was a conviction for a crime involving moral turpitude. In those cases the Arizona statute required a showing that the offender was "knowingly" driving with a suspended, canceled, revoked, or refused license while driving under the influence of alcohol or drugs.

In determining whether a crime involves moral turpitude, the specific statute under which the conviction occurred is controlling. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997),

Matter of Franklin, 20 I&N Dec. 867 (BIA 1994). If the statute defines a crime in which turpitude necessarily inheres, then, for immigration purposes, the offense is a crime involving moral turpitude. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989).

At the time of the applicant's conviction C.V.C. § 23152 stated, in pertinent part:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

At the time of the applicant's conviction C.V.C. § 12500(A) stated, in pertinent part:

(a) No person shall drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.

At the time of the applicant's conviction C.V.C. § 16028(A) stated, in pertinent part:

(a) Upon demand of a peace officer pursuant to subdivision (b) or (c), every person who drives upon a highway a motor vehicle required to be registered in this state shall provide evidence of financial responsibility for the vehicle. However, a peace officer shall not stop a vehicle for the sole purpose of determining whether the vehicle is being driven in violation of this subdivision.

In the applicant's case, he was convicted under three separate statutes, neither of which required the culpable mental state discussed in the Board and Ninth Circuit decisions cited herein. As stated above, the specific statute under which the conviction occurred is controlling and the AAO will not combine the applicant's convictions under three different statutes for a finding that the applicant committed acts which constitute a crime involving moral turpitude. Thus, the AAO finds that the applicant's convictions do not constitute crimes involving moral turpitude and he is thus not subject to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The record also indicates that the applicant entered the United States without inspection in June 2000. The applicant remained in the United States until December 2004. Therefore, the applicant accrued unlawful presence from June 2000 until December 2004. In applying for an immigrant visa, the applicant is seeking admission within ten years of his December 2004 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(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 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.

The AAO notes that section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse 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 of hardship includes: two statements from the applicant's spouse, a psychological evaluation for the applicant's spouse, and two medical notes.

In her statement submitted with the applicant's initial waiver application, the applicant's spouse states that she has been separated from the applicant for two years and that she has only been able to visit him in Mexico twice. She states that before the applicant left for Mexico she was able to work part time and attend college full time, but now she must work full time and sometimes overtime just to pay her rent and utility bills.

In a statement on appeal, the applicant's spouse states again that she is having trouble supporting herself in California without the applicant. She states that her relationship with her father was very distant and that in the applicant she found the love and care that her father did not provide. She states further that the separation from the applicant has been difficult, that she has trouble falling asleep, and that every other day she has nightmares. She states that before the applicant left for Mexico she was in fertility treatment, but had to interrupt it. The applicant's spouse also states that she is very stressed at her work and has a hard time dealing with customers. She states that one time at work she hurt her leg and could not work for a week. She states that she was very worried because of her bills and rent. She states that the stress she is experiencing has caused her to lose vision in her left eye so that she is now taking pills for her stress and vitamins to recover her vision. The applicant's spouse states that she is nervous and experiences anxiety two to three times a day. She states that because of these symptoms she is on medication for her stress.

The applicant's spouse also states that she cannot relocate to Mexico to be with the applicant because she helps to care for her mother, who suffers from asthma and diabetes.

The AAO notes that the record contains a psychological evaluation from a marriage and family therapist, Ms. [REDACTED] found that the applicant was suffering from major depressive disorder and generalized anxiety. She recommended that the applicant be able to reunite with her husband. The record also contains a medical note supporting the applicant's claim that she was in fertility treatments and a prescription for the antibiotic cephalexin.

Based on the current record, the AAO cannot find that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The applicant's spouse states that she is suffering financially without the applicant's support and that her stress is so severe that she is on medication for anxiety and has lost vision in her eye, but submits no documentation to support these statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO recognizes that the psychological report submitted by the applicant diagnoses the applicant with depressive disorder and anxiety, but notes that this diagnosis was made after one meeting with the applicant's spouse and does not contain details about any further treatment for her, thus diminishing the report's probative value.

Furthermore, except for a few statements regarding the applicant's spouse's ties to the United States and the care she provides her mother, the applicant's spouse did not provide any further indications of the hardship she would suffer if she relocated to Mexico. The record does not contain any information concerning the conditions she would face in Mexico. The AAO finds that the applicant did not show that his spouse would suffer extreme hardship upon relocation because he failed to submit supporting documentation. The record does not contain any documentation to establish that the applicant's spouse's mother requires care or that there is no one else to provide this care in the applicant's spouse's absence. Therefore, the AAO finds that the applicant has failed to show that his spouse would suffer extreme hardship as a result of his inadmissibility.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.