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

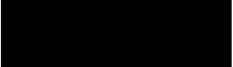


U.S. Citizenship
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Services

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FILE:  Office: MEXICO CITY, MEXICO Date: **NOV 15 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:

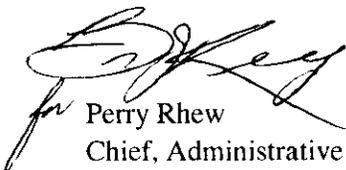


INSTRUCTIONS:

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 Acting District Director, Mexico City, Mexico, 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 her last departure from the United States. The applicant is married to a United States citizen (USC) and 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 USC husband and son.

The acting district director found that the applicant failed to establish extreme hardship to her spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated May 19, 2008. On appeal, the applicant through counsel states that her family will suffer extreme hardship if her waiver application is denied. *See Form I-290B, Notice of Appeal*, filed June 24, 2008, and the accompanying brief from counsel, dated July 17, 2008.

The record includes, but is not limited to, counsel's brief in support of the appeal, a declaration of hardship by the applicant's husband, dated November 25, 2006, two letters from the applicant's daughter, one letter from the applicant's son, supportive letters from friends, copies of medical records, doctors' reports, diagnostic imaging and information on medications for the applicant's husband pertaining to the injury he sustained at work in 2004, and a copy of the applicant's medical record from Mexico, dated September 28, 2009. 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 claims that she entered the United States without being inspected and admitted or paroled in September 1989. On January 21, 1997, the applicant filed an Application for Asylum and for Withholding of Deportation (Form I-589). The Form I-589 was denied and on July 27, 1998, the immigration judge granted the applicant voluntary departure from the United States by September 25, 1998, with an alternate order of removal to Mexico. The applicant failed to voluntarily depart the United States as ordered and on January 22, 2004, the applicant was removed from the United States. On April 17, 2004, the applicant was married to her USC husband in Mexico. On April 30, 2004, the applicant's USC husband filed a Form I-130 on the applicant's behalf. On April 25, 2005, the Form I-130 was approved. On December 12, 2006, the applicant filed a Form I-601 and a Form I-212 (Application for Permission to Reapply for Admission into the United States after Deportation or Removal). On May 19, 2008, the Acting District Director denied the Form I-601 and the Form I-212, finding that the applicant failed to establish extreme hardship to her spouse. The applicant accrued unlawful presence from September 25, 1998, the termination of her voluntary departure order until January 22, 2004, when she was removed from the United States. The applicant's unlawful presence for more than one year and removal from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006). Thus, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

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 child 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 record reflects that the applicant's spouse, [REDACTED], is a 55-year-old native of Mexico and citizen of the United States. The applicant and her husband were married in Mexico, on April 17, 2004, and have one child. The applicant's spouse asserts that he is suffering extreme emotional and financial hardships as a result of the denial of the waiver.

Regarding the emotional hardship of separation, Mr. [REDACTED] states that the separation from the applicant presents him with the very difficult choice of either abandoning his life in the United States to reunite with the applicant in Mexico or remain in the United States without his wife. Mr. [REDACTED] states that it will be extremely difficult for him to live by himself, separated from the applicant because he has never been separated from the applicant since they began living together in 1996. *See Declaration from [REDACTED]*, November 25, 2006. Counsel states that the applicant and her husband have been together for more than twelve years, that they have a son together and that it is a hardship for Mr. [REDACTED] to care for their son by himself without the applicant. *See Counsel's Brief in Support of the Appeal*, dated July 17, 2008. The record includes letters from the applicant's daughter, her son, and friends stating how difficult it has been for the applicant's husband and son to reside in the United States without the applicant.

Regarding the financial hardship of separation, Mr. [REDACTED] states that it is extremely difficult for him to maintain two households, one in the United States and one in Mexico. Mr. [REDACTED] states that he earns \$12.75 per hour, that he pays \$600 to support his wife in Mexico, and that he pays a babysitter to care for his son, [REDACTED], when he is at work. *See Declaration from [REDACTED]*, November 25, 2006. [REDACTED] also states that he sustained an injury to his right shoulder at work in 2004, that the shoulder could only be partially repaired, and that he is partially disabled. Mr. [REDACTED] states that the injury may impact on his ability to continue to work full time as he gets older and that "it will be harder and harder for me to support [the applicant] in Mexico as I grow older and less and less able to work because of my medical problems and disability." *Id.* The record contains copies of Mr. [REDACTED] medical records dating back to 2005 – three years before the appeal was filed. The record does not contain Mr. [REDACTED] current medical records showing his current medical condition and the level of disability. The record contains the applicant's medical record from Mexico, dated September 28, 2009, indicating that the applicant has colon cancer and is receiving treatment in Mexico.

While the AAO acknowledges that separation from the applicant may have caused emotional hardship to Mr. [REDACTED], the evidence in this record, however, is not sufficient to demonstrate that the challenges encountered by Mr. [REDACTED] meet the extreme hardship standard. While the emotional hardship of separation is apparent from the declaration by Mr. [REDACTED], the applicant does not provide medical records, detailed testimony, or other evidence to show that any emotional or psychological hardships her husband faces are unusual or beyond what would be expected upon family separation due to one member's inadmissibility. The record does not contain evidence of the family's income and expenses, thus, the AAO cannot conclude that family separation has caused extreme financial hardship to Mr. [REDACTED]. The AAO notes that Mr. [REDACTED] would be

concerned about the applicant's current illness, however, there is no evidence in the record to demonstrate that the applicant is not receiving proper treatment in Mexico, and no evidence on the emotional or financial impact her illness is having on Mr. [REDACTED]. Finally, hardship to the applicant's son, [REDACTED], as a result of family separation is not considered in the extreme hardship analysis, except to the extent that it may cause hardship to the applicant's husband, the qualifying relative. In an undated letter, [REDACTED] states that he misses the applicant and feels sad that she is living in Mexico, that he needs her love every day and wishes that she will come back to live with them here in the United States. [REDACTED] also states that his father works long hours, comes home from work late and takes care of him, and that his father looks sad and tired every day. This letter is insufficient to establish that the hardship that [REDACTED] is suffering as a result of family separation has caused extreme hardship to Mr. [REDACTED]. Accordingly, the applicant has failed to establish that the challenges her husband faces rise to the level of extreme hardship.

Regarding relocation, no claim was made that the applicant's husband would suffer extreme hardship if he relocated to Mexico to be with the applicant. Therefore, the AAO cannot make a determination of whether the applicant's husband would suffer extreme hardship if he moved to Mexico.

In sum, although the applicant's spouse claims hardships based on family separation, the record does not support a finding that the difficulties, considered in the aggregate, would rise 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 her spouse, as required for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.