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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

H6

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: NOV 29 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,
Tariq Syed for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. 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. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure. She is married to a United States citizen and has two U.S. citizen children. She 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).

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on April 23, 2008.

On appeal, counsel for the applicant asserts the District Director's denial was in error, and that the evidence in the record establishes the applicant's spouse will experience extreme hardship. *Form I-290B*, received June 3, 2008.

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

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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 establishes that the applicant entered the United States without inspection in March 2002 and remained until she departed in July 2007. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record includes, but is not limited to, counsel's brief; statements from the applicant's spouse and father-in-law; Psychological Evaluations of [redacted] dated June 11, 2008 and September 19, 2007; a translated copy of a psychological report on the applicant by Pablo Rodriguez Barranco; statement from [redacted] tements from the applicant's spouse's employer, dated August 30, 2007 and June 18, 2008; Internet periodicals and other materials on country conditions in Mexico, including the U.S. State Department's Country Report on Human

Rights Practices, Section on Mexico - 2007, published by the Bureau of Democracy, Human Rights and Labor; copies of birth and naturalization certificates for the applicant and her family; and photographs of the applicant, her spouse and their children.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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 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-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals 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 1419, 1422 (9th Cir. 1987).

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 spouse has submitted a statement in which he asserts that he would be unable to reside in Mexico because he would lose his U.S. job and would be unable to find employment in his trade (carpentry) sufficient to support his family in Mexico. *Statement of the applicant's spouse*, June 18, 2008.

The record includes several periodicals printed from the Internet, and a human rights report published by the U.S. State Department. These materials discuss the unemployment rates in Mexico and mention that, in some cases, there is significant unemployment among in the trades industry. *Unemployment statistics don't tell the real story in Mexico*, [redacted]

The applicant's spouse further asserts that when his young son lived in Mexico he was constantly sick, and because of this they had to bring him back to the United States. While the record does not contain any medical records relating to his son's illness, there is testimony in the record which corroborates his assertion.

The record also contains a psychological assessment of the applicant's spouse by [redacted] Ph.D., dated September 19, 2007. In the examination [redacted] relays the applicant's spouse's concerns over his personal safety and the safety of his children, discussing incidences of vandalism and kidnapping and his desires for his children to learn English and enjoy the educational opportunities provided in the United States. The AAO would also note that the U.S. State Department's Travel Warning for Mexico specifically mentions the state of Michoacan and warns of the dangers to U.S. citizens in that area. *Travel Warning*, U.S. Department of State, Bureau of Consular Affairs, Mexico, September 10, 2010.

The applicant's spouse also asserts that he has lived in the United States from a very young age, he is not familiar with the language or culture of Mexico, and that it would constitute a hardship for him to relocate there.

When examined in an aggregate context, the hardship factors impacting the applicant's spouse upon relocation rise above the common impacts associated with the relocation of a family member, and as such would constitute an extreme hardship for the applicant's spouse.

With regard to hardship upon separation, counsel for the applicant asserts the applicant's spouse is experiencing extreme emotional hardship. He refers to the psychological evaluations submitted by [redacted], and a statement by [redacted]

[redacted]he applicant's spouse's primary care physician, asserts the applicant's spouse is suffering from depression and anxiety, having twice been treated in a hospital emergency room due to severe anxiety and has been prescribed medications to help him cope with his condition.

In [redacted] first psychological examination, dated September 19, 2007, he concludes the applicant's spouse was suffering from depression in the moderate range. In his second examination, dated June 11, 2008, [redacted] discusses the applicant's spouse's previous two hospital visits for panic attacks, as well as the factors creating his depression, and concludes that the applicant's spouse is suffering from Generalized Anxiety Disorder. He notes that the applicant's spouse is suffering a psychological impact from concern over his spouse's safety in Mexico, the psychological impact on his children from not having their mother present and concern that his spouse will be unable to obtain treatment for her own mental health issues in Mexico. The AAO would also note that the

U.S. State Department's Travel Warning for Mexico specifically mentions the state of Michoacan and warns of the dangers to U.S. citizens in that area. *Travel Warning*, U.S. Department of State, Bureau of Consular Affairs, Mexico, September 10, 2010.

The applicant's spouse also describes the emotional and physical impact of the applicant's departure, explaining that he has had to assume additional parenting duties and rely on family members and friends to help him care for his children. *Statement of the applicant's spouse*, dated June 18, 2008. He further asserts that he has twice been hospitalized for panic attacks. The applicant's spouse's father also submits a statement attesting to the emotional impact of separation on his son and explaining that he will not be able to assist his son in caring for his children indefinitely. *Statement of Salvador Calderon*, June 18, 2008. There are two statements from the applicant's employer stating that he is a good employee, but that the applicant's inadmissibility has preoccupied him and disrupts his work performance. *Statement of Amador R. Torres*, June 18, 2008. The examination by Dr. Vazquez notes that the applicant's spouse is sometimes unable to work due to his condition. *Statement of Dr. Vazquez*, dated October 1, 2007.

The applicant's spouse has also asserted that he is experiencing financial hardship, and that he has had to loan money from family and friends. An examination of the record indicates that there is no documentary evidence to support this assertion.

When examined in an aggregate context, the hardship factors impacting the applicant's spouse upon remaining in the United States rise above the common impacts experienced by family members of inadmissible aliens, and as such constitute extreme hardship. Given that the applicant has established extreme hardship to a qualifying relative upon relocation and separation, the AAO may now consider whether the applicant warrants a waiver as a matter of discretion.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the

alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The AAO finds that the unfavorable factor in this case includes the applicant's unlawful presence. The favorable factors in this case include the presence of the applicant's spouse, children and other family members and the lack of any criminal record in the United States. The favorable factors in this case outweigh the negative factor, therefore favorable discretion will be exercised. The director's decision will withdrawn and the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.