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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

[redacted]

FILE: [redacted] Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) Date: OCT 01 2010

IN RE: Applicant: [redacted]

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

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 Acting 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 who was found to be inadmissible to the United States under 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 more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their child.

The Acting District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Acting District Director,* dated March 4, 2008.

On appeal, counsel for the applicant asserts that the applicant's spouse would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*; *Attorney's brief.*

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; a statement from [redacted] Licensed Clinical Professional Counselor; statements from family members; a statement from the teacher of the applicant's spouse; a Morton College psychology course schedule; publications on family relationships; published country conditions reports and travel warnings; credit card statements; a tuition bill; W-2 Forms for the applicant's spouse; a tax statement; a statement from the applicant's church; a published article on depression; a grade report card; a statement from the applicant; bank statements; and an employment letter for the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

In the present case, the record indicates that the applicant entered the United States without inspection in February 2000 and departed in June 2007, returning to Mexico. *Consular Memorandum, American Consulate General, Ciudad Juarez, Mexico*, dated July 9, 2007. The applicant was born on April 26, 1982. *Birth certificate*.

Section 212(a)(9)(B)(iii) of the Act states:

> (iii) Exceptions
>
> (I) Minors
>
> No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

The applicant, therefore, accrued unlawful presence from April 26, 2000, the day of his eighteenth birthday, until he departed the United States in June 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of his June 2007 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(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)(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 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 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.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. She has never lived outside of the United States and her entire family resides in the United States. *Attorney's brief.* Her Spanish language abilities are limited and as a result, she believes she would be unable to find a job in Mexico. *Statement from the applicant's spouse*, undated. She notes that the applicant's hometown is poor and the crime rate is high. *Id.* Published country conditions reports included in the record note that within Amatepec, the applicant's hometown, there have been hijackings of policemen, commanding officers of the municipality and the state's security agency, as well as executions of entire families and hijackings. *"Violence in the south sets 'Code Red,'" El Universal*, dated September 19, 2007. The article further notes that the entire country presently is going through a difficult time in matters of insecurity, particularly in southern Mexico, where the phenomenon of the extermination of entire families in ingrained. *Id.* The record also includes two Travel Alerts, dated October 24, 2007 and April 14, 2008, issued by the United States Department of State warning United States citizens about the dangers of traveling to Mexico. *Travel Alerts, Mexico, U.S. Department of State*, dated October 24, 2007 and April 14, 2008. The AAO observes that on September 10, 2010 the United States Department of State issued a Travel Warning to United States citizens traveling to Mexico. *Travel Warning, Mexico, U.S. Department of State*, dated September 10, 2010. In addition to warning of the dangers and criminal activity in Mexico, the Travel Warning notes that U.S. citizens traveling to towns and villages with large indigenous communities located predominantly but not exclusively in southern Mexico, should be aware that land disputes between residents and between residents and local authorities have led to violence, and that in April 2010, two members of a non-governmental aid organization, one of whom was a foreign citizen, were murdered near the village of San Juan Capola in Oaxaca. *Id.* The AAO notes that the applicant's hometown of Amatepec is located within the state of Oaxaca. The AAO also notes that the applicant's spouse is going to school in the United States and is concerned about the loss of educational opportunities for herself and daughter should they relocate to Mexico. *Attorney's brief; Statement from* [redacted], dated April 8, 2008; *Morton College Psychology Course Schedule*, dated Spring 2008. The applicant's spouse notes that her United

States citizen child will be denied educational opportunities if they were to relocate to Mexico. *Statement from the applicant's spouse*, undated. The AAO acknowledges these statements and notes that relocation would disrupt the studies of the applicant's spouse. When looking at the aforementioned factors, particularly the applicant's spouse's lack of family ties in Mexico, the length of time she has resided in the United States, her lack of language abilities and its impact upon her adjustment to Mexico, her family ties in the United States, her and her daughter's loss of educational opportunities, and the security risk to United States citizens traveling to Mexico as documented by published country conditions reports, travel alerts and warnings, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *Birth certificate*. She has never lived outside of the United States and her entire family resides in the United States. *Attorney's brief.* The applicant's spouse has been diagnosed as suffering from extreme anxiety and depression due to her separation from the applicant. *Statement from* [redacted] dated March 21, 2008. She is unable to sleep at night, her appetite has diminished, she has been forgetful, and she is lacking in concentration. *Id.* Family members have also observed changes in the personality of the applicant's spouse, noting that she is always tired and is no longer joyful. *Statements from the mother and father of the applicant's spouse*, dated April 4, 2008; *a statement from the brother of the applicant's spouse*, undated; *and a statement from the brother of the applicant*, dated April 2, 2008. As noted previously, the AAO acknowledges the published country conditions reports, travel alerts, and warnings included in the record warning United States citizens of the dangers of travel to Mexico. *"Violence in the south sets 'Code Red,'" El Universal*, dated September 19, 2007; *Travel Alerts, Mexico, U.S. Department of State*, dated October 24, 2007 and April 14, 2008; *Travel Warning, Mexico, U.S. Department of State*, dated September 10, 2010. The applicant's spouse notes that she fears for her family in Mexico. *Statement from the applicant's spouse*, undated. The applicant's spouse asserts she needs the applicant in the United States to raise their child and that their child is suffering on an emotional level. *Id.* The applicant's spouse asserts that she will be unable to work and pay for daycare expenses for her child. *Statement from the applicant's spouse*, undated. While the AAO acknowledges this statement, it notes the record fails to include documentation showing the expenses of daycare. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)). Furthermore, the record does not address if there are other family members in the United States who could assist the applicant's spouse with some of the child-caring responsibilities. Although the record fails to document the expenses of child-caring, the AAO notes that the record includes documentation of credit card statements and tuition expenses for the applicant's spouse. *Credit card statements; Tuition bill for the applicant's spouse.* The record also includes a tax statement and W-2 Forms for the applicant's spouse showing her total earnings to be less than $5,000.00 for 2007 and $12,415.00 for 2005. *W-2 Forms; Tax statement.* As such, the AAO acknowledges the documented financial difficulties of the applicant's spouse. When looking at the aforementioned factors, particularly the psychological effect of being separated from the applicant as documented by a licensed healthcare professional, raising her child alone, and the documented

financial difficulties of the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

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).

The adverse factors in the present case are the applicant's February 2000 entry without inspection, his prior unlawful presence for which he now seeks a waiver, and his unauthorized employment while in the United States. The favorable and mitigating factors are his United States citizen spouse, his United States citizen child, the extreme hardship to his spouse if he were refused admission and his supportive relationship with his spouse and family, as documented in the record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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. *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.