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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: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: **OCT 07 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.

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 sustained.

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

In a decision dated March 12, 2008, the district director found that the applicant failed to establish extreme hardship to a qualifying relative as a result of her inadmissibility. The application was denied accordingly.

In a Notice of Appeal to the AAO dated April 4, 2008, the applicant's spouse states that he is appealing because he believes that he has shown that he is suffering extreme and unusual hardships as a result of the applicant's inadmissibility. The applicant's spouse submits a brief in support of the applicant's appeal.

The record indicates that the applicant entered the United States without inspection in June 1996. The applicant remained in the United States until June 2007. Therefore, the applicant accrued unlawful presence from June 1996 until June 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of her June 2007 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.

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-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: a brief from the applicant’s spouse, two other statements from the applicant’s spouse, a list of medications for the applicant’s children, numerous letters from the applicant’s spouse’s doctor, an assessment from the applicant’s child’s doctor, and a letter of recommendation for the applicant and her spouse.

In his brief the applicant’s spouse states that he understands that his children are not qualifying relatives, but he submits evidence of the medical problems related to his children to show that he

is suffering by seeing them suffer without the applicant. He states that it was hard for his family to make the decision to stay in the United States without the applicant, but that they made this decision because they felt it was in the best interest of their children's education, safety, and health given their chronic medical conditions.

The applicant's spouse states further that he is overwhelmed and emotionally drained by the constant questions from his children regarding their mother and when she can return to the United States. He states that his children will start to cry and he can provide no words to comfort them. He states that witnessing his children suffer is devastating to him and yet he states that he feels he cannot provide evidence to satisfy U.S. Citizenship and Immigration Services' burden of proof. The applicant's spouse also states that he is beginning to feel inadequate and guilty as he cannot provide the level of care his wife was providing to his children. He states that this emotional instability is affecting his daily life at home and at work. He states that it is hard for him to focus and that he feels himself becoming angry and has difficulty interacting with others. He states further that he has fallen into a depressed mood which affects him everyday and he also experiences difficulty falling asleep. The applicant's spouse states that relocating to Mexico is not a choice as he does not want his children living in fear of their safety. Finally, the applicant's spouse states that maintaining a house in California and a house in Mexico with two children to care for is extreme financial hardship. He states that he has been forced to rent out part of their home to another single parent family. He also states that making the 250 mile round trip drive to Tijuana and back to visit the applicant is expensive.

In the two other statements submitted by the applicant's spouse he indicates that the children were living with the applicant in Mexico for some time. The AAO notes that the applicant's spouse states that they were living in an area of Mexico called Nayarit, where the applicant was born, which is over 1,000 miles away from Anaheim, California. The record currently indicates that the applicant's children have returned to the United States and the applicant is living in Tijuana. In his statements the applicant's spouse describes the issues his children were having in Mexico including problems with the education system and medical problems. The applicant's spouse states that his youngest son suffers from insufficiency of attention and hyperactivity. He states that both of his sons suffer from asthma and allergies that cause them to have frequent colds, influenza, vomiting, and dizziness.

The AAO notes that medical documentation in the record indicates that the applicant's children do take allergy and asthma medication and that they both have been diagnosed with asthma and allergic rhinitis. The AAO also notes that an assessment from the applicant's child's school shows that he has been diagnosed with attention deficit with hyperactivity and problems with learning.

The AAO notes that although the applicant has not submitted country condition documentation for Mexico, the U.S. Department of States has issued a travel warning, dated September 10, 2010 for U.S. citizens traveling or residing in Mexico. This warning specifically recommends that U.S. citizens defer unnecessary travel to the northern border regions of Mexico, including Tijuana. In

general, the warning states that since 2006, the Mexican government has been engaging in an extensive effort to combat drug-trafficking organizations [REDACTED] and that Mexican [REDACTED]s have been engaged in a vicious struggle with each other for control of trafficking routes. The warning states that in order to combat violence, the government of Mexico has deployed military troops throughout the country and that U.S. citizens should expect to encounter military and other law enforcement checkpoints when traveling in Mexico and are urged to cooperate fully. The travel warning states further that in confrontations with the Mexican army and police, [REDACTED] have employed automatic weapons and grenades with some assailants wearing full or partial police or military uniforms, and have also been using vehicles that resemble police vehicles. The warning asserts that according to published reports, 22,700 people have been killed in narcotics-related violence in Mexico since 2006 with innocent bystanders having been killed in shootouts between [REDACTED] and Mexican law enforcement.

The warning then states specifically that more than half of all Americans killed in Mexico in 2009 whose deaths were reported to the U.S. Embassy were killed in the border cities of Ciudad Juarez and Tijuana. The warning states that since 2006 large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues and that such firefights have occurred mostly in northern Mexico, including Tijuana. The warning states further that the situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted and that U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in those areas specifically mentioned in the travel warning.

Thus, the AAO finds that relocation to Mexico would be extreme hardship to the applicant's spouse. In relocating to Mexico, the applicant's spouse likely would be residing in an area of Mexico, with two young children, where there is serious violence. The applicant's spouse has also established that his children suffer from chronic health conditions which require regular care. Thus, the hardship that the applicant's spouse would face raising young children in a potentially violent and dangerous atmosphere rises to the level of extreme hardship.

The AAO also finds that the applicant's spouse will suffer extreme hardship as a result of separation. The applicant's spouse has consistently and in detail described the emotional suffering he is experiencing as a single parent unable to comfort his suffering children. In addition, given the current country conditions in Tijuana, Mexico where the applicant is residing, the applicant's spouse is risking his and his children's safety in traveling to see his wife. The emotional suffering experienced by the applicant surpasses the hardship typically encountered in instances of separation because of the applicant's spouse's inability to relocate to Mexico, the very dangerous conditions in Tijuana, Mexico, the presence of two young children in the family, and the fact that the family is facing separation for a period of seven years. The AAO has carefully considered the facts of this particular case and finds that the hardship suffered by the applicant's spouse rises to the level of extreme hardship. The AAO therefore concludes that the

applicant has established that his spouse would suffer extreme hardship if his waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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-Morales, 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 adverse factors in the present case are the applicant's immigration violations. The favorable factors in the present case are extreme hardship to the applicant's U.S. citizen spouse and children if she were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense; and, as indicated by statements from family and a teacher from the applicant's children's school, the applicant's good moral character and attributes as a good mother and wife.

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

ORDER: The appeal is sustained.