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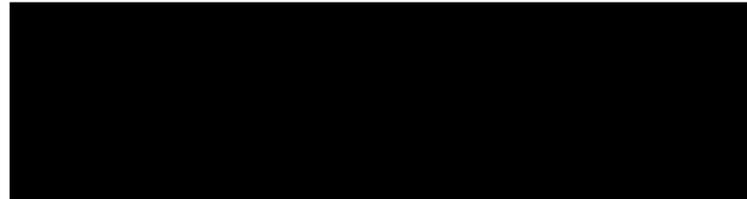
U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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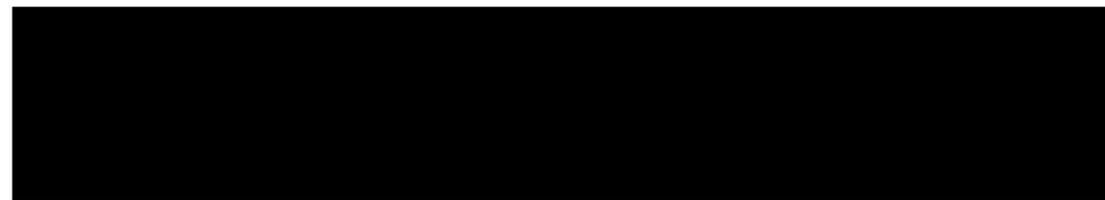


FILE: [REDACTED] Office: MEXICO CITY, MEXICO Date: **OCT 07 2010**

IN RE: Applicant: [REDACTED]

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) and Permission to Reapply for Admission under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

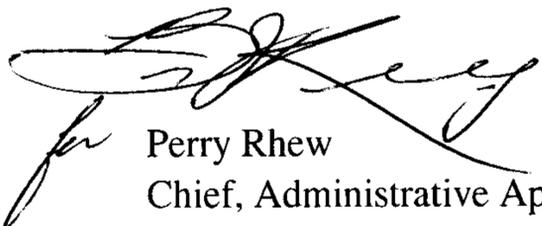
ON BEHALF OF APPLICANT:



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.

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 sustained.

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, and section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) for having departed the United States pursuant to an order of removal and seeking readmission within ten years of her last departure from the United States. The applicant is married to a United States citizen, 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 United States citizen husband and children, and permission to reapply for admission into the United States pursuant to section 212(a)(9)(A)(iii).

The Acting District Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly and also his Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). *Decision of the Acting District Director*, dated April 28, 2008.

On appeal, counsel asserts that the Acting District Director erred in denying the Form I-601 application in that the applicant has submitted sufficient evidence to establish that her husband will suffer extreme hardship if the applicant's waiver application is denied because of (1) the applicant's husband's family ties in the United States; (2) the applicant's husband's residence in the United States since he was a child; (3) the emotional and financial hardship that the applicant's husband will suffer either if he remains in the United States without his wife or relocates to Mexico; (4) the poor condition of health care in Mexico; and (5) the deteriorating health conditions of the applicant's wife and children in Mexico. *See Form I-290B*, and the accompanying brief in support of the appeal.

The record includes, but is not limited to, affidavits from the applicant and her husband; counsel's brief in support of the appeal, copies of medical records including prescriptions for the applicant and her children from health care providers in Mexico, a copy of the applicant's family's household expenses and bills, a copy of the applicant's husband's insurance card from Aetna showing coverage for the entire family, supportive letters from family members and friends attesting to hardship to the applicant's husband as a result of family separation, and copies of various country condition reports on Mexico. The entire record was considered in rendering a decision on the appeal.

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

(A) Aliens Previously Removed –

(ii) Other Aliens

Any alien not described in clause (i) who - ...

(I) has been ordered removed under section 240 or any other provision of the law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security (Secretary)] has consented to the alien's reapplying for admission.

(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.

The applicant claims that she entered the United States without being inspected and admitted or paroled on August 31, 1996. On August 17, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The Form I-485 was denied and the applicant was placed in removal proceedings. On August 2, 2000, the applicant's United States citizen husband filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. On June 20, 2001, the Form I-130 was approved. On March 20, 2001, the immigration judge ordered the applicant removed from the United States to Mexico *in absentia*. The applicant subsequently departed the United States on June 25, 2006. On March 2, 2007, the applicant filed a Form I-601 and a Form I-212. On April 28, 2008, the Acting District Director denied the Form I-601, finding that the applicant failed to demonstrate extreme hardship to her qualifying relative. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provision under the Act until June 25, 2006, when she departed the United States to Mexico. The applicant's unlawful presence for more than one year and her departure from the United States on June 25, 2006, 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). The AAO notes that the applicant does not dispute she accrued unlawful presence in the United States for more than one year.

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 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.

In this case, the record reflects that the applicant’s husband, [REDACTED] year-old native of Mexico and citizen of the United States. The applicant and her husband were married in [REDACTED] on July 9, 1999, and they have two children. The applicant currently resides in Mexico with their two children.

The applicant's husband, [REDACTED] states that the separation from his family has caused him extreme emotional and financial hardship. Regarding the emotional hardship of separation, [REDACTED] states that he has been with the applicant since he was 19 years old, that the applicant inspired him to buy a house at the age of 21, and that the applicant took care of the house and the children while he worked and provided for the family's financial needs. [REDACTED] states that since the applicant and the children left for Mexico, he has not been able to stay in their home without feeling lonely and depressed and at times crying because he misses his family. [REDACTED] that he spends a lot of time at his mother's home to minimize the empty feeling of being in their home without the applicant and their children. *See Notarized Statement from [REDACTED] dated March 16, 2008.* [REDACTED] also states that he is concerned about the health and wellbeing of his family in Mexico, that his children have become very sick since relocating to Mexico. *Id.* Counsel states that [REDACTED]'s children have been suffering from continual bacterial, skin, and upper respiratory infections since their arrival in Mexico for which they require continuous medical attention, that the applicant has begun to suffer symptoms of anxiety disorder, for which she has been prescribed medication and that the health insurance provided by [REDACTED] employer does not cover the expenses his wife and children are currently incurring in Mexico. *See Counsel's Brief in Support of the Appeal.* The record contains copies of prescription medications that [REDACTED]'s family are taking, and copies of medical records of the applicant and her children from Mexico.

Regarding the financial hardship of separation, [REDACTED] states that he is paying the mortgage and all the family's bills and expenses here in the United States as well as providing for his family in Mexico. *See Notarized Statement from [REDACTED] dated March 16, 2008.* [REDACTED] also states that he is spending a lot of money "in doctors, medicine and laboratory" for his family in Mexico. *Id.* Counsel states that [REDACTED] has faced great difficulties in maintaining the mortgage payments and household expenses while also sustaining the applicant and his children in Mexico. *See Counsel's Brief in Support of the Appeal.* Counsel also states that if [REDACTED] remains in the United States without the applicant, he would have to continue sending a portion of his earnings to support his family in Mexico, and will have to travel back and forth to Mexico to visit his family, which will result in financial hardship for him. *Id.* The record includes a copy of the family's bills and expenses, including a home equity loan. The record also shows that one of the bills is in collection.

While the record does not contain information on [REDACTED] income, a complete review of the evidence in the record shows that the applicant has established that her husband would experience extreme hardship if she is denied admission to the United States. The evidence in the record shows that [REDACTED] wife and children have serious medical problems that require continuous treatment with medication, and since he does not have any medical insurance coverage for his family in Mexico, he would continue to incur out of pocket expenses for his family's medical treatments as well as provide for their financial wellbeing in Mexico. Although [REDACTED] children are not qualifying relatives, the emotional effect and the hardship his children are experiencing due to separation and relocating to Mexico is a relevant factor in assessing extreme hardship. The evidence in the record indicates that his children have medical problems that require continuous treatment with medications, that their medical problems are caused or exacerbated by the pollution or the

environment where they reside in Mexico, that their conditions appear to be serious, and [REDACTED] is paying for their medical treatments out of pocket. The evidence in the record also indicates that the applicant is prescribed medication for anxiety disorder. The emotional effects of the hardship to his children combined with the emotional and financial hardship caused by separation from the applicant, rise to the level of extreme hardship for [REDACTED] if he remains in the United States.

Regarding relocation to Mexico, [REDACTED] states that he could not relocate to Mexico for the following reasons: he has been residing in the United States since he was a child; he has close family ties in the United States, his family (mother, sister, and step-father) live close to him in [REDACTED] he has no close family ties in Mexico, except for the applicant and his children; the medical care in Mexico is poor, and too expensive for him to afford; life in Mexico for him will be difficult and it will be difficult to find a good paying job in Mexico. *See Notarized Statement from [REDACTED] dated March 16, 2008.* The record contains copies of various country condition reports on Mexico.

The record reflects that [REDACTED] has a good paying job with benefits in the United States, but in Mexico, wages are much less and he would have difficulty finding a good paying job. His children's continuous medical problems in Mexico and the poor living condition there would continue to cause [REDACTED] to suffer emotional hardship if he relocates to Mexico. He would be forced to relocate to a country where he hasn't lived since he was a child. He would have to leave his support network and long-term gainful employment and he would be concerned about his and his family's safety, health, education, and financial well-being at all times in Mexico.

In support, the AAO notes that the United States Department of State has issued a travel alert for Mexico. As noted by the U.S. Department of State:

Although the greatest increase in violence has occurred on the Mexican side of the U.S. border, U.S. citizens traveling throughout Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

Travel Warning – Mexico, U.S. Department of State, Bureau of Consular Affairs, dated September 10, 2010.

The emotional hardship, when combined with the financial hardship of leaving his job and having to seek employment in Mexico and the difficulty of readjusting to conditions there after a very long absence, would amount to extreme hardship for [REDACTED] if he relocated to Mexico to be with the applicant.

A review of the documentation in the record, when considered in the aggregate, shows that the applicant has established that her husband would suffer extreme hardship if the applicant's waiver request is denied. Here, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The adverse factors in this case are the applicant's initial entry without inspection and the unlawful presence for which she seeks a waiver. The favorable and mitigating factors in this case include: the applicant's ties to her United States citizen spouse and children; the applicant's lack of a criminal record; and the extreme hardship to the applicant's spouse caused by the denial of the spouse's waiver request. *See Matter of Mendez-Moralez*, 21 I&N Dec. at 301 (setting forth relevant factors).

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors, and a grant of relief in the exercise of discretion is warranted. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

In the same decision the director denied the applicant's Form I-212 as a matter of discretion. The AAO finds that for the same discretionary reasons noted above that the Form I-212 should be approved and permission to reapply for admission be granted pursuant to Section 212(a)(9)(A)(iii) of the Act.

ORDER: The appeal is sustained.