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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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H6

OCT 29 2010

FILE: [REDACTED]

Office: LIMA, PERU

Date:

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, 8 U.S.C. § 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 Acting Field Office Director, Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of [REDACTED] who was found to be inadmissible to the United States under section 212(a)(6)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(B), for failing to attend a removal proceeding; and 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 10 years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen, the son of lawful permanent residents of the United States, and the father of a United States citizen child. He 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 his wife, son, and parents.

The Acting Field Office Director found that no waiver was available for the applicant's inadmissibility under section 212(a)(6)(B) of the Act, the applicant had failed to establish that extreme hardship would be imposed on his qualifying relative, and she denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated March 11, 2009.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "did not accord the appropriate weight to the equities that weigh in [the applicant's] favor, such as his family ties, his employment history, and his lack of a criminal record, and focused on the unfavorable factors, such as his unlawful presence subsequent to a deportation order issued in absentia." *Form I-290B*, filed April 13, 2009.

The record includes, but is not limited to, counsel's appeal brief; statements from the applicant, his wife, and his parents; letters of support for the applicant and his wife; medical and psychological documentation for the applicant's wife, mother, and father; medical documentation for the applicant's mother-in-law; tax documents, insurance documents, credit card and student loan statements, bank statements, and household and utility bills; letters from [REDACTED] regarding the applicant's wife and son receiving [REDACTED] articles on [REDACTED] among children in [REDACTED] and [REDACTED] articles on [REDACTED] and documents from the applicant's removal proceedings. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(B) of the Act provides, in pertinent part:

- (B) Failure to attend removal proceedings.—Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

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 [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present case, the record indicates that on October 7, 1992, the applicant entered the United States without inspection. On October 8, 1992, an Order to Show Cause (OSC) was issued against the applicant. On February 19, 1993, an immigration judge ordered the applicant removed *in absentia* from the United States. On March 6, 2008, the applicant departed the United States.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until March 6, 2008, the day he departed the United States. The applicant is seeking admission into the United States within ten years of his March 6, 2008 departure. 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.

However, the AAO notes that the Acting Field Office Director erred in finding that the applicant was inadmissible to the United States under section 212(a)(6)(B) of the Act, as this ground of inadmissibility does not apply to aliens who failed to attend a deportation proceeding under section 242 of the Act or an exclusion hearing under section 236 of the Act. *See INS Memo on Unlawful Presence - June 17, 1997.*

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 his son can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and parents are the only qualifying relatives 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 (Board) 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 a statement dated May 6, 2009, the applicant's wife states she cannot move to [REDACTED] because she does not speak Spanish and she has no family ties there. In a letter dated January 17, 2008, [REDACTED] states the applicant's son "suffers from severe [REDACTED] characterized by [REDACTED] with production of [REDACTED] and [REDACTED] of increased severity requiring immediate and aggressive treatment to prevent life threatening complications." In counsel's appeal brief dated May 11, 2009, counsel states moving to [REDACTED] would "worsen [the applicant's son's] [REDACTED] due to the pollution." In [REDACTED]

[REDACTED] dated March 1998, the author indicates that [REDACTED] among [REDACTED] children is significantly affected by air pollution." The AAO notes that the record establishes that the applicant is currently residing in [REDACTED]. Counsel claims that the applicant's wife cannot leave the United States because she takes care of her mother who has been diagnosed with [REDACTED]. The AAO notes that documentation in the record establishes that the applicant's mother was diagnosed with [REDACTED]. The applicant's wife states there is no one else who can help care for her mother. Counsel states the applicant's wife "recently completed a certification program to be a pharmacy technician, but that certification is useless outside of [REDACTED]." Additionally, counsel states the applicant's parents "have established a life for themselves in the United States" and "[g]oing back to [REDACTED] is not an option for them: they cannot afford to relocate and their home is now the United States." The AAO notes the concerns of the applicant's wife and his parents.

Based on the applicant's spouse's lack of family and employment ties to [REDACTED], her lack of [REDACTED] language skills which will affect her ability to work and settle into [REDACTED] society, her concern for her son's health, and the emotional hardship of being separated from her family including her mother who has health issues, the AAO finds that the applicant's wife would suffer extreme hardship if she were to relocate to [REDACTED] to be with the applicant.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States without the applicant, counsel states that since the applicant returned to [REDACTED] his wife's "mental health has worsened." In a psychological evaluation dated April 22, 2009, [REDACTED] states in October 2007, she diagnosed the applicant's wife with major [REDACTED] type, and during "2007 to 2008, [the applicant's wife] was making a lot of progress in therapy: [REDACTED] was close to being in remission and she was less [REDACTED]. However, "in January 2008, her [REDACTED] functioning was getting a lot worse as she was getting more and more nervous and [REDACTED] about [the applicant's] status and possibility of him having to leave her and their young son." "At this time, ... [the applicant's wife] is experiencing severe level of depression, often numb to her feelings, unable to experience happy moments that she used to enjoy, [REDACTED], thus instead of making progress on her [REDACTED], [REDACTED]."

The AAO notes that the applicant's wife was prescribed a medication for her depression. The applicant's wife states that since the applicant departed to [REDACTED] her son "has become more anxious" and he "keeps waiting anxiously for [the applicant] to come home." Counsel states the applicant's son "has already begun to experience massive amounts of anxiety as a result of his separation from [the applicant]." [REDACTED] diagnosed the applicant's son with separation [REDACTED] and major [REDACTED] moderate severity. Additionally, [REDACTED] noticed the applicant's son has developed a [REDACTED]. The AAO notes that the record establishes that the applicant's departure from the United States has exacerbated the [REDACTED] problems of his wife and son.

Counsel states the applicant cannot find employment in [REDACTED] and "[a]s a result, cannot contribute financially to his family." The applicant's wife states that when the applicant was in the United States, he was the sole provider of their family. Counsel claims that since the applicant departed the United States, the applicant's wife "is now on the verge of destitution." The applicant's wife claims that "[w]ithin three months of [the applicant's] absence..., the line of credit on [their] home was put on freeze" and "[t]his line of credit...was the only means of cash flow that [they] depended on to survive." She states that she was forced to give up their home, she had to return their leased vehicle, she could not afford a daycare provider for her son, and she has credit card bills "that cannot be paid which will force [her] to file bankruptcy." The AAO notes that the record establishes that the applicant's wife has received collection notices for her unpaid credit card bills and her health insurance was terminated because of non-payment of dues. Additionally, the record establishes that the applicant's wife and son are now receiving government assistance, in the form of food stamps, cash aid, and [REDACTED]. The applicant's wife claims that because of "everyone's personal struggles and the unstable situation [she] was putting [their] son into," she moved in with her mother, where she and her son share a bedroom with her mother. She states her mother was diagnosed with lupus so "[i]t is extremely hard to rely on her for help with [her son]." Additionally, she states that when her mother's disease is debilitating, she has taken on the role of mother for her younger siblings. [REDACTED] states that the applicant administered the specialized [REDACTED] treatments for his son when he was in the United States, and abrupt "changes in the stability of the family, such as [the applicant] having to leave the country while [his son] stays here in the United States, can adversely affect the course of the disease with unpredictable consequences in the child's health."

Considering the applicant's spouse's serious mental health issues, financial issues, her son's emotional and medical issues, her mother's medical issues, and the normal effects of separation, the AAO finds the record to establish that the applicant's wife would face extreme hardship if they remained in the United States in his absence. As the AAO has found extreme hardship to the applicant's wife, it will not address hardship to his parents.

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 entry into the United States without inspection, period of unauthorized employment, period of unauthorized stay and unlawful presence, failure to attend his deportation proceeding and depart the United States at the required time, and the deportation order.

The favorable and mitigating factors are the applicant's United States citizen wife, son, and lawful permanent resident parents, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, and the letters of support.

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. Accordingly, 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 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