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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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[Redacted]

FILE:

[Redacted]

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: OCT 29 2010

IN RE:

Applicant:

[Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the
Immigration and Nationality Act, 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 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 his last departure from the United States. The applicant is married to a United States citizen and the stepfather of two United States citizen children. 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 United States citizen wife and stepchildren.

The District Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated February 8, 2008.

On appeal, the applicant, through counsel, claims that United States Citizenship and Immigration Service (USCIS) erred "in denying the applicant's waiver," "in finding that applicant's qualifying relative (USC spouse) would not suffer extreme hardship if applicant is not allowed to return to the United States," and "in finding that applicant did not merit the favorable discretion of the Attorney General." *Form I-290B*, filed March 11, 2008.

The record includes, but is not limited to, statements and an affidavit from the applicant's wife, a psychological evaluation for the applicant's wife, and a loan statement. The entire record was reviewed and considered in arriving at 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 [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 in June 2001 without inspection. On February 10, 2007, the applicant departed the United States.

The applicant accrued unlawful presence from June 2001, the date he entered the United States without inspection, until February 10, 2007, the date he departed the United States. The applicant is seeking admission into the United States within ten years of his February 10, 2007 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.

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 stepchildren can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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 (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 [REDACTED] 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 counsel’s appeal brief filed March 11, 2008, counsel states that the applicant’s wife has “lived in the United States all of her life” and “her children, work, life and future [are] in the United States.” Counsel also states if the applicant’s wife “leaves the United States and moves to [REDACTED] to live with [the applicant] she will suffer tremendously. She will have to leave the only country she knows, her past, her family and her children behind.” Counsel states the applicant’s wife “helps some of her siblings because they are having medical difficulties.” In a psychological evaluation dated March 3, 2008, Licensed Clinical Social Worker [REDACTED] states the applicant’s wife “helps her sister, [REDACTED] who is terminally ill, with meals” and her brother, [REDACTED] “is suffering from bone cancer.” Counsel claims that the applicant’s wife “will have to leave behind her job and move to a country where she does not think she will be able to find employment.” The AAO acknowledges that the applicant’s wife is a native and citizen of the United States and that she may experience hardship in relocating to Mexico.

In a letter dated April 23, 2010, the applicant's wife states when she went to [REDACTED] the previous week, she was stopped by the police and was told not to return, and if she did, she would be killed. She claims that she is "very scared for [her] life," and she is afraid to visit the applicant because of what is going on in [REDACTED]. The AAO notes that on September 10, 2010, the Department of State issued a travel warning to United States citizens thinking of traveling to [REDACTED] which focuses on northern [REDACTED] i.e., along the [REDACTED]. The record establishes that the applicant currently resides in [REDACTED]. The travel warning clearly states that "[t]he level of violence in [REDACTED] is increasing." "Since 2006, large firefights have taken place in towns and cities in many parts of [REDACTED] often in broad daylight on streets and other public venues. Such firefights have occurred mostly in northern [REDACTED] including.. [REDACTED]" The travel warning states "[t]ravelers on the highways between [REDACTED]..have been targeted for robbery that has resulted in violence and have also been caught in incidents of gunfire between criminals and [REDACTED] enforcement... U.S. citizens traveling by road to and from the U.S. border through [REDACTED]..should be especially vigilant." The travel warning also states "[t]he situation in northern [REDACTED] remains fluid; the location and timing of future armed engagements cannot be predicted. U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in those areas specifically mentioned in this Travel Warning."

Based on the applicant's spouse's lack of family and employment ties to [REDACTED], her concern for her siblings' health, the emotional hardship of being separated from her family including her two children, and her brother and sister with their health issues, and the increased violence in [REDACTED] and travel warning issued to United States citizens, 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, in an affidavit dated March 3, 2008, the applicant's wife states if the applicant "is not allowed to return [she] will suffer tremendously being apart and separated from him." She states she is "having a lot of financial problems," she owes on some money loans, and she "cannot make it by [herself]." Counsel claims that the applicant "was the primary financial support of the household." Counsel states the applicant's wife's youngest son is residing with the applicant's wife because he "is experiencing some financial difficulties." Counsel states the applicant's wife "works but goes through periods where she is unemployed." The applicant's wife states the applicant "was the primary bread winner and although [she] work[s], [her] income is not enough to cover all the bills." Counsel states the applicant's wife now "has to keep up with the bills and expenses" in the United States and "she drives to [REDACTED] every two or three months to visit [the applicant]." [REDACTED] indicates that the applicant's wife's monthly expenses are [REDACTED] and her average income was [REDACTED] for the past year, "making it impossible to keep current in paying her bills." The AAO notes the financial concerns of the applicant's wife.

Counsel states the applicant's wife's "mental health has suffered a great impact from the separation from [the applicant]," she "has lost thirty pounds and is very depressed." The applicant's wife states she "feel[s] all alone now and [she] [is] very depressed." [REDACTED] indicates that the applicant's wife cries often, gets angry, she is lonely, she wakes up at night, she has no appetite, and she has lost 30 pounds.

states the applicant's wife reports "having high cholesterol" and she is "dizzy and faint." She states that she is concerned that if the applicant's wife's "current situation continues, she, too, will continue to decline, along with her mood and weight, she soon will not be able to work at all, given her symptoms of depressed mood, 30-lb. weight loss, and dizzy spells." The applicant's wife states she is afraid for the applicant. She claims that "[t]he last time [she] called to him, he said that there had been a killing two blocks from [her] mother-in-law's house."

The applicant's wife states she is "the youngest of nine children and [she] help[s] some of [her] siblings who are experiencing tremendous difficulties due to some health issues. [The applicant's] support and his care [had] enabled [her] to help [her] family. Now that he is not here [she] feel[s] terribly lonely and it is very hard for [her] to keep assisting [her] family." The AAO notes the applicant's wife's concerns for her siblings.

Considering the applicant's spouse's mental health issues, concern for the applicant's safety in financial issues, employment problems, her siblings' 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 she remained in the United States in his absence.

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 initial entry without inspection, and periods of unauthorized employment and unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife and stepchildren, the extreme hardship to his wife if he were refused admission, and the absence of a criminal 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. 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