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



U.S. Citizenship
and Immigration
Services

H6



FILE: [Redacted] Office: MEXICO CITY (CIUDAD JUAREZ)

Date: SEP 21 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); and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**ACTION COMPLETED
APPROVED FOR FILING**
Initials: JT Date: 6/22/11
FCO/Unit COW

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 dismissed.

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 section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having been convicted of a crime involving a controlled substance. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant submitted a timely appeal.

On appeal, the applicant contends that his son who was born in El Paso, Texas on January 4, 2006, will experience extreme hardship without him.¹ He conveys that his son's mother is not able to take care of him while she is at work, and that she has appointed his mother, [REDACTED], to take care of his son. The applicant indicates that his mother requires a hysterectomy and is under a doctor's care for depression, for which she takes medication. He asserts that all of his brothers and sisters live in the United States, and that his parents need him at home to financially support the family because his father earned only \$17,000 last year, which supported their family of six.

The AAO will first address the grounds of inadmissibility. The applicant was found inadmissible for having been convicted of a crime involving a controlled substance. The record reflects that in El Paso, Texas, on September 28, 2002, the applicant was arrested for and charged with possession of marijuana, with an aggregate weight of 17.90 grams. He was found guilty of the charge and the judge sentenced him to serve 8 days in jail and to pay costs.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —

¹ The AAO notes that because the record does not contain a Notice of Entry of Appearance as Attorney or Representative, Form G-28, the decision will be issued solely to the applicant. However, because [REDACTED] is an accredited representative of United Neighborhood Organization, the AAO will consider any evidence submitted by [REDACTED]

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The marijuana conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II). A section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. Since the police report reflects that the applicant possessed marijuana in the amount of 17.90 grams, his controlled substance conviction involved simple possession of 30 grams or less of marijuana. The applicant, therefore, is eligible for consideration of a section 212(h) waiver.

The applicant was also found inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection on March 20, 2001. On October 11, 2001, the applicant was placed in removal proceedings and ordered to appear before an immigration judge. On November 20, 2001, a Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on November 21, 2001. On November 21, 2001, a second Notice of Hearing in Removal Proceedings was personally issued to the applicant for a master hearing on December 5, 2001. On December 5, 2001, the immigration judge ordered that the applicant be released from custody on his own recognizance and return to his high school and maintain good grades. On December 17, 2001, a third Notice of Hearing in Removal Proceedings was mailed to the applicant for a master hearing on April 4, 2002. On April 4, 2002, a fourth Notice of Hearing in Removal Proceedings was personally served to the applicant for a master hearing on June 13, 2002. On June 13, 2002, a fifth Notice of Hearing in Removal Proceedings was personally served to the applicant for a master hearing on August 29, 2002. On August 29, 2002, a sixth Notice of Hearing in Removal Proceedings was personally served to the applicant for a master hearing on October 17, 2002. On September 28, 2002, the applicant was convicted of possession of marijuana. On November 18, 2002, the immigration judge ordered that the applicant's case be administratively closed. On December 5, 2002, a Notice of Hearing in Removal Proceedings was personally served to the applicant for a master hearing on January 21, 2003. On January 21, 2003, the immigration judge ordered that the applicant's application for voluntary departure be granted until January 23, 2003, with an alternate order of removal to Mexico. The applicant voluntarily departed from the United States on January 23, 2003.

The applicant would have begun to accrue unlawful presence from March 20, 2001, when he entered the country without inspection, until January 21, 2003, when the immigration judge ordered that he be granted voluntary departure or removed from the United States. When the applicant left the country he triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

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

A waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Under section 212(h), qualifying relatives include U.S. citizen or lawful permanent resident spouses, parents, sons and daughters. However, under section 212(a)(9)(B)(v), the only qualifying relatives are U.S. citizen or lawful permanent resident spouses and parents. As a waiver of inadmissibility in this case is dependant on the applicant meeting the requirements of section 212(a)(9)(B)(v) of the Act, he must demonstrate extreme hardship to his lawful permanent resident parents. Hardship to the applicant and his U.S. citizen son is considered under section 212(a)(9)(B)(v) only to the extent it results in hardship to the qualifying relatives. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant’s inadmissibility, two distinct factual scenarios are possible 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 to be taken is difficult, and it 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 (the 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

In rendering this decision, the AAO will consider all of the evidence in the record including copies of birth certificates, letters, medical documentation, the power of attorney, and other documentation.

The AAO notes that the letter dated May 6, 2006 by the applicant's mother does not have an English language translation. The regulation at 8 C.F.R. § 103.2(b)(3) states:

- (3) Translations. Any document containing foreign language submitted to USCIS

shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In that the letter by the applicant's mother is written completely in Spanish and has no translation, the letter will carry no weight in this proceeding.

With regard to the hardship to the applicant's parents if they remained in the United States without the applicant, the applicant contends on appeal that although his mother has been appointed pursuant to a power of attorney to take care of his four-year-old child, she requires a hysterectomy and is under a doctor's care for depression. The applicant asserts that his child needs him because his child's mother works and is not able to take care of his son. The record contains a power of attorney in which the mother of the applicant's son appointed the applicant's mother, Lilia S. Barraza, to take care of his son.

Family separation 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 type of familial 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 otherwise 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 familial relationship involved, the hardship resulting from family separation is 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the

Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 hardship factor asserted in the instant case is the emotional and financial impact to the applicant's parents as a result of separation from the applicant. We acknowledge that the power of attorney indicates that the applicant's mother has been appointed to take care of her four-year-old grandchild. However, the applicant has not demonstrated that taking care of his son is a hardship for his mother. The applicant has provided no documentation to establish that his mother requires a hysterectomy and is under a doctor's care for depression. He has presented no documentation to show that his parents require financial assistance from him. Of the applicant's three siblings, the record reflects that the youngest will be 18 years old this October, and as young adults they are less likely to be as financially and emotionally dependent upon the applicant's parents. Furthermore, although we recognize that the applicant's parents will experience emotional hardship as a result of separation from their son, who is 28 years old, we do not find that their emotional hardship is the same as that of a parent who is separated from a minor child. Thus, when the hardship factors are considered in their totality, we find that they do not demonstrate that the hardship that the applicant's mother will experience as a result of separation is extreme.

There is no claim made that the applicant's parents will experience extreme hardship if they joined him to live in Mexico. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. 245, 247 (Comm'r 1984).

The applicant has not established extreme hardship to his parents if they remained in the United States without him or if they joined him to live in Mexico. Thus, based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act.

Because the applicant is statutorily ineligible for a waiver under section 212(a)(9)(B)(v) of the Act, no purpose is served in discussing whether he merits a waiver under section 212(h) of the Act or as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.