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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 **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)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

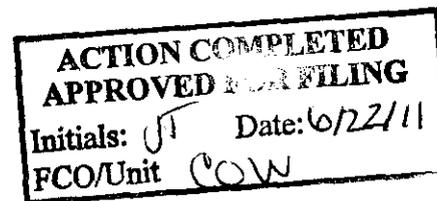
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Tariq Syed
for

Perry Rhew

Chief, Administrative Appeals Office



DISCUSSION: The waiver application was denied by the Acting 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 father of two United States citizen children. He is the beneficiary of an approved Petition for Alien Fiancé(e) (Form I-129F). 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 children.

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated April 15, 2008.

On appeal, the applicant's wife claims that "being away from [the United States] for 10 years would cause great suffering to [her] and [her] children." *Statement from Janett Lopez*, dated May 9, 2008. Additionally, she prays that the applicant will have the opportunity to be with his family again. *Id.*

The record includes, but is not limited to, statements from the applicant and his wife in English and Spanish¹; letters of support for the applicant and his wife in English and Spanish; medical documents pertaining to the applicant's wife's adjustment disorder; letters from Texas Health and Human Services Commission regarding the applicant's wife and children receiving food stamps and Medicaid; a letter from Dr. Laura Burgos regarding the applicant's son, Francisco; a letter from Dr. David Feinstein regarding the applicant's father-in-law's medical conditions; and household bills, collection notices, and medical bills. The entire record was reviewed and considered, with the exception of the Spanish language statements, 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-

.....

¹ Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), an applicant who submits a document in a foreign language must provide a certified English-language translation of that document. As a statement from the applicant and letters of support are in Spanish and are not accompanied by English-language translations, the AAO will not consider them in this proceeding.

(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.

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- (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 January 2004 without inspection. In December 2006, the applicant voluntarily departed the United States. On August 7, 2007, the applicant filed a Form I-601. On April 15, 2008, the Acting District Director denied the Form I-601, finding that the applicant had accrued more than a year of unlawful presence and had failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from January 2004, when he entered the United States without inspection, until December 2006, when he departed the United States. The applicant is seeking admission into the United States within ten years of his December 2006 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 children 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 the United States Citizenship and Immigration Service (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.

The applicant’s wife states that when she first married the applicant in 2003, she tried to live in Mexico for 10 months, “but [she] could not stay much longer because it wasn’t [her] world. [She] [is] used to [her] life here

in the United States.” She and the applicant then moved to the United States and in December 2006, they decided to go back to Mexico to legalize the applicant’s immigration status. The applicant’s wife claims that she lived “there for 8 months. That was all [she] could really handle.” In a statement dated May 9, 2008, the applicant’s mother-in-law states her daughter cannot live in Mexico “because she is going to enroll the kids in school.” The applicant’s wife states that when they lived in Mexico, her children did not have insurance and they had to pay for everything, “sometimes up to 100.00 a visit for their shots.” She claims her younger son, Andres, was born premature and “because of that he gets sick very often and [she] [has] to take him frequently to the doctor.” Although the record is not clear as the severity and nature of his health issues, the AAO notes the applicant’s spouse’s concerns for her son’s health.

In a statement dated September 3, 2007, the applicant’s wife states that if she moves to Mexico, she “would not have the employment opportunity that [she] [has] in the United States because [her] Spanish is limited and [she] [is] not used to living the Mexican [lifestyle].” Additionally, she states she was really affected by being separated from her parents and family when she lived in Mexico. The AAO acknowledges that although the applicant’s wife is a native of Mexico, she has resided in the United States for many years. In a statement dated May 7, 2008, the applicant’s father-in-law states he was “diagnosed with diabetes about 13 years ago. Lately, [he] [has] been really delicate of [his] health due to all the stress doing on in [their] family.” In a progress note dated April 30, 2008, [REDACTED] states the applicant’s father-in-law’s diabetes is uncontrolled and he is “extremely stressed under the current living situation which has interfered significantly with his ability to sleep.”

The AAO notes that on September 10, 2010, the Department of State issued a travel warning to United States citizens thinking of traveling to Mexico, which focuses on northern Mexico, i.e., along the United States-Mexico border. The record establishes that the applicant and his wife are from the northern Mexican state of Coahuila, and the applicant currently resides in Coahuila. The travel warning clearly states that in “the area known as “La Laguna” in the state of Coahuila, which includes the city of Torreon,” there have been “sharp increases in violence.” The travel warning states “[r]ecent violent attacks and persistent security concerns have prompted the U.S. Embassy to urge U.S. citizens to defer unnecessary travel to ... Coahuila,... and to advise U.S. citizens residing or traveling in those areas to exercise extreme caution.” The travel warning states “[t]he situation in northern Mexico 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 Spanish language skills which will affect her ability to work and settle into Mexico society, her concern for her son’s health, her previous attempts at living in Mexico, the emotional hardship of being separated from her family including her father with his health issues, and the increased violence in northern Mexico 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 Mexico 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, the applicant’s wife states the applicant is the main provider and since he has been

gone, she has “had to ask for help from the government.” The AAO notes that the record establishes that the applicant’s wife and children are receiving food stamps and Medicaid. She claims that she has “had to take control of all the extra expenses that [the applicant] and [her] had together, like the car payment, insurance and [their] phone bill which has gone up tremendously because that is [her] only means of communication with [the applicant].” The applicant’s wife states she cannot afford an apartment. The AAO notes that the record establishes some of the applicant’s wife’s expenses, including some bills that were past due and have been sent to collection agencies. Additionally, the AAO notes that the record establishes that the applicant’s wife and children had to move in with her parents. The applicant’s father-in-law states it is difficult having his daughter and grandchildren reside with him because they “keep [him] up at night due to all their crying.” He also states that his health is very delicate right now and he “can’t help her anymore.” [REDACTED] states the applicant’s father-in-law is “really is in no position to provide much assistance for looking after [his grandchildren].”

The applicant’s mother-in-law states she has “witnessed first hand the suffering [the applicant’s wife] has gone through dealing with all this. She come[s] to [her] and cries all the time.” The applicant’s father-in-law states his daughter is “depressed and had to go to a doctor.” The applicant’s wife states “all [she] [does] is think about [her] life away from [the applicant]. The doctor gave [her] some medications. [She] feel[s] a little better but it is still hard for [her] and [her] children.” The AAO notes that the record establishes that on April 29, 2008, the applicant’s wife saw [REDACTED] who diagnosed her with adjustment disorder, depressive, and prescribed her an antidepressant. The AAO notes that the record is not clear as to the severity of the applicant’s wife’s adjustment disorder.

In a letter dated May 7, 2008, [REDACTED] states the applicant’s older son, [REDACTED] is suffering from “separation anxiety and possible depression from being separated from [the applicant].” [REDACTED] states her concern “is that the separation from [the applicant] and changes in the family are causing this uncontrolled behavior” and she “recommend[s] [the applicant] be present in his development and growth.” The applicant’s wife claims that her son “has been rejected twice from babysitter’s because he has been angry and they do not want to watch him.” The applicant’s mother-in-law states her grandson “has become very angry since [the applicant] is not around. He hits [them] and [she] feel[s] like he thinks its [their] fault for which [the applicant] is not around.” The AAO acknowledges that the applicant’s son is suffering some hardship through his separation from the applicant.

Considering the applicant’s spouse’s mental health issues, financial issues, employment problems, her younger son’s medical issues, her older son’s discipline problems, 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 entry into the United States without inspection, and periods of unauthorized employment and unlawful presence. The favorable and mitigating factors are

the applicant's United States citizen wife and children, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, and the numerous letters relating to his parenting skills and good character.

The AAO finds that, although the immigration violations committed by the applicant were 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. The waiver application is approved.