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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

**PUBLIC COPY**

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FILE:

Office: CHICAGO, IL

Date: **SEP 29 2010**

IN RE:

Applicant:

APPLICATION:

Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

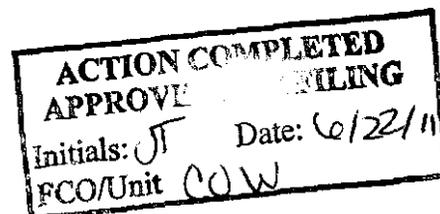
INSTRUCTIONS:

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

Thank you,

*Tariq Syed*  
for

Perry Rhew  
Chief, Administrative Appeals Office



**DISCUSSION:** The waiver application was denied by the Field Office Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 ten years of her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated September 21, 2007.

On appeal, counsel for the applicant asserts that the applicant's qualifying relative would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of this assertion, counsel submits a brief. The record also includes, but is not limited to, a statement and brief from counsel; statements from the applicant; employment letters for the applicant's spouse; tax statements; W-2 Forms for the applicant's spouse; a statement from the applicant's spouse; a medical letter for the applicant's spouse; medical prescriptions for the applicant's spouse; publications on medical conditions; health insurance cards for the applicant's spouse; a psychological evaluation; a statement from the mother of the applicant's spouse; a medical letter for the mother of the applicant's spouse; medical prescriptions for the mother of the applicant's spouse; statements from the sister of the applicant's spouse; a statement from the sister of the applicant; statements from friends; credit card statements; home loan statements; utility bills; car payments; bank statements; a cable bill; a cell phone bill; an employment letter for the applicant; a social security statement for the applicant; an investment account; country conditions reports; bank statements; and a loan statement.

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.

In the present case, the record indicates that the applicant was admitted to the United States in August 1997 and overstayed her period of authorized stay, remaining in the United States until March 2006. *Attorney's brief*, dated May 15, 2007; *Form I-601, Application for Waiver of Grounds of Inadmissibility*. On April 20, 2006 the applicant was admitted to the United States in a B-2 status. *Id.*; *Form I-94, Departure Card*. She has not again departed the United States. *Form I-601, Application for Waiver of Grounds of Inadmissibility*. The applicant, therefore, accrued unlawful presence from the expiration of her period of authorized stay until her departure in March 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of her March 2006 departure from the United States. 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. Additionally, it appears that the applicant is inadmissible under section 212(a)(6)(C) of the Act as an intending immigrant for her April 20, 2006 admission.

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

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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(i) and 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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the

qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996)

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec.

at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

If the applicant's spouse joins the applicant in Mexico, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Mexico and naturalized in 1997. *Naturalization certificate*. The applicant's spouse came to the United States at age 18. *Attorney's brief*, dated November 15, 2007. His sister resides in the United States. *Id.* The applicant's spouse suffers from migraine headaches, diverticulitis/diverticulosis, depression, and anxiety. *Statement from* [REDACTED], dated November 9, 2007. He has been treated by the same physician for the last 10 years. *Id.* While the applicant's spouse is typically able to function and attend to all activities of daily living, both migraine headaches and diverticulitis are conditions that are episodic and can be incapacitating for the applicant's spouse. *Statement from* [REDACTED] dated March 19, 2007. During migraine attacks, the applicant's spouse also suffers from visual impairment and nausea and vomiting. *Id.* Country conditions reports included in the record note that Mexico lags well behind other Organization for Economic Cooperation and Development countries in health status and health care availability. *Library of Congress – Federal Research Division, Country Profile: Mexico, July 2006*. The AAO also acknowledges the consistent treatment the applicant's spouse has received in the United States and notes that relocating to Mexico would disrupt that consistency. The mother of the applicant's spouse lives with him in the United States. *Attorney's brief*, dated November 15, 2007. His mother suffers from arthritis, depression and high blood pressure. *Statement from* [REDACTED] dated March 19, 2007. She has also been treated for a thyroid condition, bladder incontinence, and certain musculo-skeletal issues. *Id.* Her physician notes that she takes a number of different medications, many of which have contraindications with other drugs, and it is therefore important that her family is involved in her care to ensure that she is careful about her drug regimen. *Id.*; *Medical prescriptions for the mother of the applicant's spouse*. Her physician further notes that she does not drive a car and depends upon her family to transport her everywhere, whether it be to the grocery store or to medical appointments. *Statement from* [REDACTED] dated March 19, 2007. The mother of the applicant's spouse notes that she relies on her children for financial support which is supplemented by Social Security payments. *Statement from the mother of the applicant's spouse*, undated. She asserts that she cannot even think about the possibility of the applicant's spouse leaving. *Id.* The applicant's spouse has worked for Morton's steakhouse since 1982. *Employment letter for the applicant's spouse*, dated May 14, 2007. He notes that if he were to work as a waiter in Mexico, he would likely earn less than \$10,000.00 a year. *Statement from the applicant's spouse*, dated April 16, 2007. Country conditions reports included in the record note that the minimum wage in Mexico did not provide a decent standard of living for a worker and family. *Mexico, Country Reports on Human Rights Practices – 2005, U.S. Department of State*, dated March 8, 2006. When

looking at the aforementioned factors, particularly the length of time the applicant's spouse has resided in the United States, his health conditions as documented by a licensed healthcare professional, the consistent medical treatment he has received in the United States, the lack of health care availability in Mexico as documented by published country conditions reports, the economic conditions in Mexico as documented by published reports, and the health conditions of the mother of the applicant's spouse as documented by a licensed healthcare professional and her physical, emotional, and financial dependency upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of Mexico and naturalized in 1997. *Naturalization certificate*. The applicant's spouse came to the United States at age 18. *Attorney's brief*, dated November 15, 2007. A psychological evaluation included in the record notes that the applicant's spouse has a long history of emotional problems. *Statement from [REDACTED]* dated March 19, 2007. Starting with disabling migraines more than 20 years ago, these difficulties have also more recently included depression. *Id.* The results of psychological tests showed a high level of anxiety. *Id.* The high level of tension shown is typically what fuels the occurrence of migraines. *Id.* The findings also show that the applicant's spouse has been sad and dysphoric. *Id.* The emotional problems that the applicant's spouse has been struggling with make him very vulnerable to any negative changes in his life. *Id.* If he were to stay in the United States after the applicant returns to Mexico, he would have to give up the support he receives from her. *Id.* The applicant's spouse suffers from migraine headaches, diverticulitis/diverticulosis, depression, and anxiety. *Statement from [REDACTED]*, dated November 9, 2007. He has been treated by the same physician for the last 10 years. *Id.* While the applicant's spouse is typically able to function and attend to all activities of daily living, both migraine headaches and diverticulitis are conditions that are episodic and can be incapacitating for the applicant's spouse. *Statement from [REDACTED]*, dated March 19, 2007. During migraine attacks, the applicant's spouse also suffers from visual impairment and nausea and vomiting. *Id.* His physician has written an explanation note for his employer to ask that he be excused from work when his migraine headaches are severe. *Id.* The applicant's spouse notes that due to his medical conditions, he is often unable to work, frequently calling in sick. *Statement from the applicant's spouse*, dated April 16, 2007. He therefore often has difficulties meeting his responsibilities and covering his bills. *Id.* The record includes documentation of the various expenses of the applicant's spouse. *See credit card statements, home loan statements, utility bills, car payments, bank statements, a cable bill, and a cell phone bill.* The record also includes documentation showing the annual earnings of the applicant's spouse to be approximately \$30,000.00. *Tax statements, W-2 Forms, and employment letters for the applicant's spouse.* In addition to these documented expenses, the AAO acknowledges that the mother of the applicant's spouse lives with him in the United States and is partially financially dependent upon him. *Attorney's brief*, dated November 15, 2007; *Statement from the mother of the applicant's spouse*, undated. When looking at the aforementioned factors, particularly the psychological and physical health conditions of the applicant's spouse as documented by licensed healthcare professionals, the impairment of the applicant's spouse's ability to work due to his health conditions, and his documented financial expenses, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

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 periods of unlawful presence for which she now seeks a waiver, her misrepresentation of her intent, and her unauthorized employment while in the United States. The favorable and mitigating factors are her United States citizen spouse, the extreme hardship to her spouse if she were refused admission, and her supportive relationship with her spouse and family, as documented in the 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.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(6)(C)(i) 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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.