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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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FILE:



Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: **SEP 30 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)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

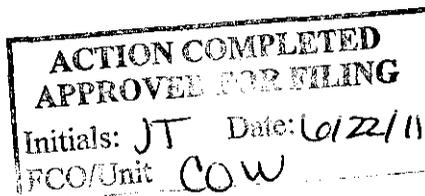
INSTRUCTIONS:

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.

Thank you,

Tang Syed
for

Perry Rhew
Chief, Administrative Appeals Office



DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. 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 his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their children.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated August 24, 2007.

On appeal, the applicant's spouse asserts that she and her family would suffer should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of this assertion the record includes, but is not limited to, tax statements for the applicant and his spouse; W-2 forms for the applicant's spouse; unemployment records for the applicant's spouse; a statement from the applicant's child's school; a medical letter for the applicant's spouse; a statement from the applicant's child; a statement from the mayor; student report cards for the applicant's children; a statement from the applicant's spouse; a medical letter and prescription for the applicant's child; a housing bill; insurance policy statements; a quitclaim deed; an Internal Revenue Service tax notice; and awards for the applicant's children.

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 entered the United States without inspection in 1989 and voluntarily departed on January 3, 2007, returning to Mexico. *Consular Memorandum, American Consulate General, Ciudad Juarez, Mexico*, dated January 12, 2007. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful

presence provisions under the Act, until he departed the United States on January 3, 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of his January 3, 2007 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.

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 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 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 his spouse will suffer extreme hardship. The applicant’s spouse is a native of El Salvador. *Naturalization certificate*. The applicant’s spouse came to the United States in 1989, when she was 17 years old. *Statement from the applicant’s spouse*, dated December 8, 2006. The record does not address the language abilities of the applicant’s spouse. The applicant’s spouse states that relocating their family to Mexico is not a realistic option, as they would not have a place to live. *Id.* She notes that the applicant is from an impoverished area, and she worries that he would be unable to find work or he would find work that paid less than was needed to survive. *Id.* While the AAO acknowledges these statements, it notes that the record fails to include documentation, such as published country conditions reports, regarding the poverty levels in Mexico and employment opportunities. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing

Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record documents that the applicant's spouse suffers from Diabetes Mellitus Type II. *Statement from* [REDACTED] dated September 12, 2007. Her physician notes that while her diabetes is currently controlled, she has recently been under an inordinate amount of stress and that stress worsens diabetic control secondary to the elevation of the body's endogenous stress steroids. *Id.* He notes that this will cause her to develop complications of Diabetes, and that this condition is quite disabling. *Id.* Medical documentation included in the record also show that the applicant's child suffers from asthma as well as gastritis, sinusitis, a urinary tract infection, an upper respiratory infection, constipation, tonsillitis, bronchitis, an ankle sprain, and epistaxis. *Statement from* [REDACTED] dated December 12, 2006; *Medical prescription*. While the record does not include documentation, such as published country conditions reports, regarding the availability and adequacy of health care in Mexico, the AAO acknowledges the documented medical conditions of the applicant's spouse and child and continuing treatment they have received in the United States. As such, the AAO notes that a relocation to Mexico would cause a disruption in care for their health conditions. The applicant's spouse notes that her children would not have the same educational opportunities in Mexico as they would in the United States. *Statement from the applicant's spouse*, dated December 8, 2006. While the record does not document the type of educational opportunities the applicant's children would have in Mexico, the AAO acknowledges a statement from Citrus Middle School noting that the applicant's daughter [REDACTED] is high performing and very dedicated to her community and school. *Statement from* [REDACTED] dated September 13, 2007. A student report card shows that [REDACTED] has consistently received A and B grades, and the applicant's other child, [REDACTED] is performing at an intermediate and early advanced proficiency level. *Student report cards for the applicant's children*. While the applicant's children are not qualifying relatives for the purposes of this case, the AAO acknowledges that a relocation to Mexico may disrupt their proven successful education and affect their caregiver, the applicant's spouse. When looking at the record before it, particularly the lack of cultural ties to Mexico for the applicant's spouse, the length of time she has resided in the United States, the hardship related to the disruption in her children's education, and the documented health conditions of the applicant's spouse and child and consistent treatment they have received in the United States, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of El Salvador. *Naturalization certificate*. The record does not address whether she has family members in the United States. The applicant's spouse suffers from Diabetes Mellitus Type II. *Statement from Robert Fernandez, M.D.*, dated September 12, 2007. Her physician notes that while her diabetes is currently controlled, she has recently been under an inordinate amount of stress and that stress worsens diabetic control secondary to the elevation of the body's endogenous stress steroids. *Id.* He notes that this will cause her to develop complications of Diabetes, and that this condition is quite disabling. *Id.* The applicant's spouse states she has a very hard time concentrating on everyday life and that without the applicant, she would feel empty inside. *Statement from the applicant's spouse*, dated December 8, 2006. She further notes that one of her children was diagnosed with asthma, and that she needs the applicant's support to care for their child. *Id.* Medical documentation included in the record confirm that the applicant's child suffers from asthma as well as gastritis, sinusitis, a

urinary tract infection, an upper respiratory infection, constipation, tonsillitis, bronchitis, an ankle sprain, and epistaxis. *Statement from* [REDACTED] dated December 12, 2006; *Medical prescription*. The applicant's spouse states that she works seasonally for the State of California as an inspector at State Agriculture and Food. *Statement from the applicant's spouse*, dated December 8, 2006. She notes that her income alone is insufficient to meet all of her family's needs. *Id.* The record includes W-2 forms for the applicant's spouse showing earnings of \$13,830.44 and \$9724.60 in 2006, \$1,062.12, \$4,692.40 and \$8096.59 in 2005, and \$9,012.18 for 2004. *W-2 forms for the applicant's spouse*. The record shows the applicant's spouse received unemployment compensation in the amounts of \$2,827.00 in 2006, \$2,759.00 in 2005, and \$6,122.00 in 2004. *Forms 1099G for the applicant's spouse*. The record also includes a housing bill and insurance policy statements showing the expenses of the applicant's spouse. *Housing bill; insurance policy statements*. The AAO notes the documentation in the record and acknowledges the financial difficulties of the applicant's spouse. When looking at the aforementioned factors, particularly the health condition of the applicant's spouse as documented by a licensed healthcare professional, the difficulties of being a single parent with two children, one of whom has documented health conditions; the emotional difficulties of being separated from the applicant; and the documented financial difficulties the applicant's spouse would endure, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she 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 1989 entry without inspection, his conviction for driving without a license, his conviction for Driving Under the Influence, his prior unlawful presence for which he now seeks a waiver, and his unauthorized employment while in the United States. The favorable and mitigating factors are his United States citizen spouse, his United States citizen children, the extreme hardship to his spouse if he were refused admission and his supportive relationship with his 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 section 212(a)(9)(B) 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.