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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



tlc

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

Date:

FEB 16 2011

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:

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 \$630. 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,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, 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. 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). 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.

On appeal, the applicant's spouse asserts that she has a close relationship with her husband and that she cannot bear living without him. She conveys that she is having difficulty sleeping, has extreme anxieties, and is depressed. She avers that it will be extremely difficult to maintain two homes: one in Mexico for her husband and one in the United States for herself.

We will first address the finding of inadmissibility, which the applicant does not dispute. The applicant was found to be inadmissible for unlawful presence under section 212(a)(9)(B) of the Act. 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.

....

The director indicates that the applicant was admitted to the United States on May 2, 1999 as a B2 visitor for pleasure, with authorization to stay in the country until November 1, 1999. The director further indicates that the applicant accrued unlawful presence in the United States from November 2, 1999 until January 2003, and triggered the 10-year-bar when he left the country.

We take notice that U.S. Citizenship and Immigration Services (USCIS) records reflect the following. On August 3, 1990, the applicant filed an application for temporary residence under

section 245A of the Act. USCIS records indicate that the legacy Immigration and Naturalization Service (Service) personally served the applicant with a document dated July 21, 1992, which states that the applicant failed to establish class membership and that the Service was, therefore, unable to continue processing his application. On May 3, 1992, the applicant applied for entry at the Calexico port of entry and was personally served with the Notice of Visa Cancellation/Border Crossing Card Voidance for the B-1/B-2 visa (number 452066). On August 26, 1993, the applicant filed an asylum application, which indicates that he entered the United States without inspection. The asylum application was denied on April 19, 1994. The record contains the I-94, which shows the applicant entered the United States on his B-2, Border Crossing Card, with authorization to stay in the United States until November 1, 1999. On June 3, 2002, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status based on the LIFE Act, which application was denied on November 30, 2007. On January 10, 2004, the applicant was paroled into the United States. On July 30, 2007, the I-130, Petition for Alien Relative, filed on behalf of the applicant, was approved on January 9, 2008. This petition indicates that the applicant arrived in the United States on January 11, 2003. The Form I-485, which was filed on July 30, 2007, was denied on April 16, 2008. The Federal Insurance Contributions Act (FICA) records and the social security statement in the record reflect the applicant was employed in the United States from 1990 to 2005.

USCIS records reflect that the applicant remained in the United States after the denial of his asylum application on April 19, 1994. FICA and social security records show that he worked in the United States from 1990 to 2005. At some unknown date, the applicant left the United States, and was admitted to the United States [REDACTED] as a B2 visitor for pleasure, with authorization to stay in the country until November 1, 1999. The applicant therefore would have accrued unlawful presence from November 1, 1999 until June 3, 2002, when he filed a Form I-485 based on the LIFE Act. Though we cannot determine the exact date the applicant departed from the United States, he was paroled into the United States on January 10, 2004. Thus, the applicant accrued more than two years of unlawful presence from November 1, 1999, [REDACTED] (the date he filed the Form I-485), and triggered the ten-year bar when he left the country, 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 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 and his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s lawful permanent resident 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 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 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 letters, a real estate contract, photographs, birth certificates, and other documentation.

With regard to remaining in the United States without the applicant, the applicant’s wife states on appeal that she has a close relationship with her husband and cannot live without him. She conveys that she has difficulty sleeping, has extreme anxieties, and is depressed. She indicates that it will be extremely difficult to maintain a home in Mexico for her husband and a home for herself in the United States. [REDACTED] states in the letter dated June 12, 2008, that the applicant’s spouse has been a patient since 1997. He indicates that she has chronic anxiety disorder and a history of facial neuralgias and multiple thyroid cysts. He maintains that her anxiety disorder significantly worsened, and that she started taking medication for her condition, after learning that her husband is in deportation proceedings. In the letter dated March 12, 2008, the applicant’s oldest son states that his parents married 33 years ago and his mother would suffer emotionally without him. He describes his parents as having a close relationship. The applicant’s youngest son states in his letter dated March 18, 2008, that they have a very united family. Letters describe the applicant as an active church member. The record shows that the applicant purchased a house in 2008, and that he has been married to his wife since 1976.

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 that of the emotional hardship to the applicant’s wife as a result of separation from her husband. The AAO finds that the assertion of emotional hardship to the applicant’s spouse is corroborated by the evidence of letters by the applicant’s wife and adult sons attesting to the close relationship that the applicant has with his wife, to whom he has been married since 1976; and [REDACTED]’s letter, which conveys that the applicant’s spouse’s chronic anxiety disorder has significantly worsened after her husband was placed in deportation proceedings. In view of the substantial weight that we give to the separation of spouses who have been married for many years and have a close relationship, and in light of the evidence in the record that establishes the emotional impact that separation from the applicant will have on the applicant’s wife, we find the applicant has demonstrated that the hardship that his wife will experience as a result of separation is extreme.

The applicant must also demonstrate extreme hardship to his wife if she joins him to live in Mexico. However, there is no claim made of hardship to the applicant’s wife if she joined her husband 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).

We take notice that the record indicates that the applicant was convicted of misdemeanor theft in violation of Cal. Penal Code § 484 on June 13, 1994 in California. The judge suspended imposition of the sentence, which was to serve summary probation for 12 months. We need not determine whether the applicant’s conviction involves moral turpitude because the theft offense qualifies for the petty offense exception under section 212(a)(2)(A) of the Act. The petty offense exception requires that the “maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year” and that the “alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).” The maximum penalty possible for the theft offense is imprisonment that will not exceed six months. *See* Cal. Penal Code §§ 486 and 490.

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.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.