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



U.S. Citizenship
and Immigration
Services

H6

FILE:

[REDACTED]

Office: CHICAGO (ILLINOIS)

Date:

FEB 28 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:

[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.

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The district director found the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days and seeking readmission within 3 years of her last departure from the United States. The record indicates that the applicant is the spouse of a Lawful Permanent Resident of the United States and she is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 her lawful permanent resident spouse.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 14, 2008.

On appeal, counsel states that the applicant had accrued over 180 days, but less than a year unlawful presence; and counsel asserts that the waiver application is moot because the applicant's last departure from the United States was over three years ago in December 1997. Counsel submits a brief and additional evidence. *See Form I-290B and attachments.*

The record includes a statement from the applicant's spouse, [REDACTED] describing the hardship claimed; reference letters from [REDACTED] various household bills; and, counsel's brief. *See statement from [REDACTED] dated February 14, 2008; letters from [REDACTED] and [REDACTED]; and, counsel's brief and attachments.* The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant first entered the United States in March 1995, without inspection, and remained in the United States until December 1997, when he departed to Mexico. In May 2000, the applicant re-entered the United States, without inspection. On November 6, 2000 the applicant married her lawful permanent resident spouse. On March 24, 2001, the applicant's spouse filed a Form I-130, Petition for Alien Relative, on behalf of the applicant. The applicant's Form I-130 was approved on October 30, 2001. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on July 26, 2007. On February 26, 2008, the applicant filed a Form I-601. On July 14, 2008, the District Director simultaneously denied the Form I-485, and the Form I-601, finding that the applicant accrued more than 180 days of unlawful presence and failed to demonstrate extreme hardship to her lawful permanent resident spouse.

According to counsel, the applicant had accrued over 180 days (but less than one year) unlawful presence from April 1, 1997 through December 1997 when the applicant last departed the United States. Counsel contends, therefore, that since the applicant's last departure from the United States was over three years ago, the applicant is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act and she does not need a waiver of inadmissibility.

However, as noted above, the record reflects that after the applicant accrued over 180 days unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, through December 1997 when she departed the United States, and she re-entered the United States in May 2000, without inspection. At the time she re-entered the United States, the applicant had been absent from the United States for less than three years, and she has not since departed.

Upon review, the applicant is inadmissible on account of having accrued over one year unlawful presence in the United States. As also noted above, the record reflects that the applicant re-entered the United States in May 2000, without inspection. The applicant filed her Form I-485 on July 26, 2007. Therefore, the applicant accrued unlawful presence from May 2000 when she re-entered the United States without inspection, until July 26, 2007, the date she filed her Form I-485 application. In this case, the unlawful presence accrued exceeds the one year unlawful presence threshold necessary to trigger a 10-year bar to admission under section 212(a)(9)(B)(i)(II).

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.

The applicant is attempting to seek admission into the United States. The applicant has not departed the United States since she accrued over a year of unlawful presence. Therefore the applicant requires a waiver of inadmissibility.

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 her 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios 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.

The applicant's spouse states that separation will result in financial and emotional hardship to him and the children. The applicant's spouse states that his wife helps him with the household bills, and that they will risk losing their home and he will lose everything that he has if she has to return to Mexico, because with his earnings on his job "it will be impossible for [him] to keep up with payments [on] the house and bill[s] as well as support another [household] in Mexico;" and, that he cannot take care of four children and work to support the household. The applicant's spouse submits a property tax bill for \$223.24, which was paid on May 30, 2007, a receipt for a tax bill reflecting a payment of \$140.00, a bill reflecting a \$1,346.71 mortgage payment due on February 1, 2008, a \$60.69 television bill, due February 17, 2008, and utility bills. The applicant's spouse does not indicate his earnings, and whether the applicant is employed and her earnings, nor does he specify the household bills for their home in the United States, and the expenses he will incur to maintain a separate household in Mexico. Without details of the family's income and expenses, the AAO is unable to assess the nature and extent of financial hardship, if any, the family will face.

The applicant states that "[His] dream has been always[s] that [his] children get their education in this country for the opportunity this country gives persons who get an education;" but, he will have to send the children to Mexico with his wife because he cannot care for them and work to support the family. Reference letters from attest to the applicant's good character, and state that separation will cause the children emotional pain. These letters, however, do not provide sufficient details to allow an assessment of the extent of emotional harm, if any, the applicant's spouse will suffer.

The AAO notes that the applicant's spouse may experience some emotional hardship. However, the record lacks details of the nature and extent of the hardships and supporting documentation to establish the hardships claimed. The AAO finds, therefore, that the applicant has failed to establish that extreme hardship would result to her United States citizen spouse due to separation.

Regarding hardship in Mexico, the applicant's spouse states that he will not be able to earn enough in Mexico to provide for his family and educate his children. However, as discussed above, the applicant does not provide details for the family's earnings and the expenses they will incur to maintain a household in Mexico. The applicant does not claim any other hardship to her spouse in Mexico if he joins her there. Also, the record does not include evidence of hardship to the applicant's spouse in Mexico. While, the applicant's spouse may experience some hardship in Mexico, the AAO finds that the applicant has failed to establish that any hardship her United States lawful permanent resident spouse may suffer in Mexico will be extreme.

Therefore, a review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse in the United States and in Mexico caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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

ORDER: The appeal is dismissed.