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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

PUBLIC COPY

[Redacted]

H6

FILE: [Redacted] Office: PHOENIX (ARIZONA) Date: JAN 05 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 Field Office Director, Phoenix, Arizona, 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 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 10 years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen 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 United States citizen husband.

The Field Office 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. The Acting District Director noted that the applicant failed to submit supporting evidence of the hardship claimed. *Decision of the Field Office Director, dated May 23, 2008.*

On appeal, counsel for the applicant states that the director erred in denying the application and asserts that the applicant has established extreme hardship to her U.S. citizen spouse. Counsel submits additional evidence. It is noted that counsel states on the Notice of Appeal to the Administrative Appeals Office (AAO), filed June 19, 2008, that a brief and/or additional evidence will be submitted within 30 days. *See Form I-290 and attachments.* However, the record does not reflect receipt of additional evidence. Also, counsel states in a September 9, 2009 letter that he has not received a copy of the applicant's file to prepare the appeal brief. It is noted that the letter is not addressed to the AAO, but to the U.S. Department of Homeland Security, Examination Section, 2035 North Central Avenue, Phoenix, Arizona 85004. It is also noted, however, that the record does not reflect receipt of a F.O.I.A. request for a copy of the applicant's file. Therefore, the record must be considered complete and the AAO will review the record as constituted.

The record includes statements from the applicant and the applicant's spouse describing the hardship claimed; letters from the applicant's spouse's parents; the applicant's spouse's sister; the applicant's sister; a medical letter; and, former counsel's brief which accompanied the Form I-601 application. *See statements from*

and former counsel's brief. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record indicates that the applicant stated during her adjustment interview, that she entered the United States in February 1997, as a B-2 nonimmigrant visitor with a visa/border crossing card and resided in the United States until she departed in June 2000, and she re-entered the United States one week after her departure. The record reflects, however, that on April 15, 2001 the applicant was issued an I-94 arrival/departure card at El Paso, Texas, which indicates that she was admitted as a B-2 visitor with authorization to stay until August 14, 2001. On September 23, 2007, the applicant's husband filed a Form I-130 on behalf of the applicant. Simultaneously, with the filing of the Form I-130 the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On March 21, 2008, the applicant filed a Form I-601. On May 23, 2008, the Field Office Director denied the Form I-601,

finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to her United States citizen spouse.

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 accrued over a year of unlawful presence from the date her authorized stay expired after her entry in February 1997 and after the effective date of the unlawful presence provision until June 2000 when she departed the United States. There is no indication in the record that the applicant obtained extensions of her authorized stay after her February 1997 entry. Also, after her entry on April 15, 2001, the applicant accrued unlawful presence from August 14, 2001, when her authorization to stay expired until September 23, 2007, when she filed her Form I-485. The applicant is attempting to adjust status in the United States. However, after her arrival on April 15, 2001, the applicant has not departed the United States and remained overseas for 10 years. 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 his 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.

The applicant's spouse states that he "was going [through] a very difficult situation" because his father was seriously ill and was hospitalized as a result of a cerebral hemorrhage and his wife helps him to "be positive [through] this difficult time." Former counsel also states that the applicant's spouse's father had been hospitalized and was "in very serious condition due to cerebral hemorrhage," and "just as his parents have depended upon him for financial, emotional and moral support, [he] has depended upon his wife to buoy him up and to maintain a positive perspective in the face of adversity." However, the record does not include medical documentation of the medical condition the applicant's spouse's father suffered, including an updated medical report, nor a report of how the condition impacts the applicant's spouse and details and supporting evidence of how he needs the applicant's assistance and support. Without this evidence the AAO cannot make an assessment of the nature and extent of any hardships that would result to the applicant's spouse due to his father's medical condition.

The applicant's spouse states that he has a united family who is special to him and the family should not be separated. The applicant states she does not want to be separated from her husband; that her husband plays and does homework with the children, and the children are "very sad, depressed and fear losing their father." The AAO notes that the applicant's spouse will suffer some hardship if the applicant departs to Mexico. However, it has not been established that these hardships are beyond that which would be experienced as a result of separation due to inadmissibility.

The AAO finds, therefore, that the applicant has failed to establish that the hardships her U.S. citizen spouse will suffer in the United States as a result of separation are extreme.

Regarding hardship he will suffer in Mexico if he joins the applicant there, counsel states that the applicant's spouse does not have family in Mexico; he is not familiar with the culture in Mexico, having been born and raised in the United States; that he does not have "a complete knowledge of the language and culture;" and, that the applicant and his family will be susceptible to criminal elements because he is unfamiliar with the language and culture. Counsel points to poor employment opportunities, inadequate healthcare, and rampant crime conditions in Mexico.

Counsel references a letter from [REDACTED] and states that the applicant's spouse underwent knee surgery, has had physical therapy for the condition, and "his injury may be prone to reinjury in the future, which would require additional therapy, treatment and assessment by an orthopedic specialist." that due to his knee condition it is necessary that he maintains employment with health insurance coverage. Counsel states that due to a re-injury to his knee the applicant's spouse was treated by [REDACTED] in October 2007. In an undated letter, [REDACTED] states that the applicant's spouse was "seen on October 23, 2007 after a minor reinjury to his knee" ... and that the "injury and its treatment are common in the United States" and are typically treated by orthopedic specialist." [REDACTED] also states that the applicant's spouse "has a good prognosis; however, his knee may be prone to reinjury in the future."

The applicant's spouse's parents state that they are in need of financial support from the applicant's spouse. [REDACTED] states that her brother, the applicant's spouse, "assists [her] parents financially and helps take care of [her] parent's home." The applicant's spouse's parents, however, are not qualifying relatives, and the applicant does not provide details of the family's finances to allow an assessment of the nature and extent of any hardship the applicant's spouse would suffer if he relocates to Mexico with the applicant and is unable to assist his parents financially.

The AAO notes that recently the United States Department of State, *Bureau of Consular Affairs*, warned of dangers in Mexico. *See*, United States Department of State, *Bureau of Consular Affairs*, Washington, DC, *Travel Warning*, September 10, 2010.

Despite these shortcomings in the evidence provided, if the applicant's spouse were to choose to relocate to Mexico with the two infant children to live with the applicant, he would be in an unfamiliar culture where he has no other family and no assurance of employment or health insurance. It has thus been established that the applicant's spouse would suffer hardship beyond that which would normally be experienced as a result of inadmissibility.

However, as discussed above, 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 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.