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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

[redacted]

H6

Date: JUN 06 2011 Office: CHICAGO FILE: [redacted]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the field office director for continued processing.

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)(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 but less than one year and seeking admission within 3 years of her last departure from the United States. The record indicates that the applicant is married to a Lawful Permanent Resident and she is the derivative 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 husband and their children.

The 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 Field Office Director*, dated September 17, 2008.

On appeal, the applicant, through counsel, asserts that the applicant's spouse will suffer extreme hardship as a result of separation of the family. Counsel submits a brief and additional evidence. *See, Form I-290B and counsel's brief and attachments.*

The record consists of statements from the applicant and the applicant's spouse detailing the hardship claim; various documents, including income tax returns and household bills; school records for the applicant's son; and, counsel's brief and attachments. The entire record was reviewed and considered in arriving at a decision on the appeal.

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-
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> . . . .
>
> (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 (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> . . . .

> (v) Waiver.-The Attorney General [now the Secretary of 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 [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.

In the present application, the record reflects that the applicant entered the United States in January 2000 without inspection and remained in unlawful status until December 2000 when she departed the United States. The applicant re-entered the United States with a B-2 non-immigrant visa on May 19, 2003. Her authorized stay expired on November 18, 2003. The applicant is a derivative beneficiary of an approved Form I-130, Petition for Alien Relative, filed on behalf of the applicant's spouse. The applicant filed a Form I-485, Application to Register Residence or Adjust Status on February 7, 2007. On February 26, 2008, the applicant filed a Form I-601. On September 17, 2008, the Director denied the Form I-485 and the Form I-601, finding that the applicant was inadmissible for having accrued more than 180 days, but less than a year of unlawful presence and failed to demonstrate extreme hardship to her United States citizen spouse.

Counsel does not dispute that the applicant accrued over 180 days unlawful presence. Counsel states, however, that the applicant is not inadmissible under the provisions of section 212(a)(9)(B)(i)(I) which imposes a 3-year bar because it has been over three years since the applicant last departed the United States. Counsel references an AAO decision which counsel states addresses the same issues that are in the instant case. However, the facts are different. In the referenced case, the applicant had applied for adjustment of status before the departure that rendered her inadmissible. The AAO found that the three years had passed because the applicant was paroled and she was "seeking admission" by the Form I-485 adjustment application which was still pending, and she was technically not admitted. By contrast, in the instant case, the applicant was admitted less than three years after her departure and she did not have a pending adjustment application. Since the applicant was not seeking admission with her Form I-485 as she had already been admitted as a B1/B2 non-immigrant, her time in the United States does not count towards the 3 years,

The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days.

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-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 a qualifying relative, 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 will suffer extreme emotional and financial hardship were he to reside in the United States while the applicant relocates to Mexico due to her inadmissibility. He states that while he works to provide for the family, his wife provides the parental support for their two young children by caring for them and playing essential roles such as helping them with their homework and dealing with problems related to the children's schooling. The applicant's spouse states that his 7-year old son is "impatient." The applicant states that her son is "very excitable in class," and she had to sign up "as a volunteer in his school to help him." Counsel states that because the applicant's spouse works two jobs he needs the applicant to assist with the care of the children; that "Based on his DIBELS Reading Progress Report, [the applicant's son] is somewhat at risk in his reading skills." In support, counsel submits a DIBELS Reading Progress Report of an assessment conducted for the December 2007 to January 2008 period. The report indicates that the applicant's son is either "AT RISK," or has "SOME RISK" in the reading skill components assessed.

The applicant's spouse also states that he needs the applicant's help in caring for the children because without working two jobs he cannot carry the household expenses, and he will not be able to also pay for a second household in Mexico for his wife. The applicant submits income tax returns, and provides evidence of various expenses, including mortgage, taxes, credit cards, and utilities.

Cumulatively, the expenses listed and supporting documents indicate the family has substantial financial commitments.

Were the applicant to remain abroad due to her inadmissibility, the record indicates that the applicant's spouse would be required to assume the role of primary caregiver and breadwinner to his two young children without the support of the applicant. In addition, due to the eldest child's reading difficulties, the additional assistance associated with helping that child without his wife would be beyond the norm. Finally, the separation of the young children from their mother, who plays a pivotal role in their day to day care would cause the children emotional hardship and by extension, will cause hardship to the applicant's spouse, the qualifying relative. This is particularly significant since the applicant's spouse must work two jobs to cover family expenses and has little time to spend with their children.

Given the difficulties the applicant's spouse would face with having to provide for the family and care for his children without the help of his wife, the applicant's spouse would face hardship beyond that normally expected of one facing the removal of a spouse. The AAO thus concludes that based on the totality of the circumstances, were the applicant unable to reside in the United States due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. With respect to this criterion, counsel states that the applicant's spouse has spent his adult years only in the United States where he has resided for the past 17 years, and except for his grandparents, he does not have family in Mexico.

The record reflects, in relocating to Mexico, the applicant's spouse would have to leave his long-term gainful employment; and, he would be concerned about his and his children's safety, health, academics, and financial well-being at all times while in Mexico.

The AAO notes that recently the United States Department of State, *Bureau of Consular Affairs*, warned of dangers in Mexico. The travel warning states, in part, that:

> "Bystanders, including U.S. citizens, have been injured or killed in violent incidents in various parts of the country, especially, but not exclusively in the northern border region, demonstrating the heightened risk of violence throughout Mexico. TCOs, meanwhile, engage in a wide-range of criminal activities that can directly impact U.S. citizens, including kidnapping, armed car-jacking, and extortion that can directly impact U.S. citizens. The number of U.S. citizens reported to the Department of State as murdered in Mexico increased from 35 in 2007 to 111 in 2010.

See, United States Department of State, *Bureau of Consular Affairs*, Washington, DC, *Travel Warning,* April 22, 2011.

It has thus been established that the applicant's spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant due to her inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her lawful permanent resident spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe.

The favorable factors in this matter are the hardships the applicant's Lawful Permanent Resident spouse and U.S. citizen children would face if the applicant were to relocate abroad, regardless of whether they relocate to Mexico or remain in the United States, the applicant's apparent lack of a criminal record, and the passage of more than ten years since the applicant's entry to the United States without inspection. The unfavorable factors in this matter are the applicant's entry to the United States without inspection and the period of unlawful presence.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.