U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
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U.S. Citizenship and Immigration Services

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DATE: JUN 08 2011 Office: MEXICO CITY, MEXICO (CIUDAD JUAREZ) FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: 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:

[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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico and 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 pursuant to 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 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 November 7, 2007.

On appeal, counsel for the applicant asserts that the applicant's spouse would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*; *Attorney's brief.*

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; a class schedule for the applicant's spouse; a statement from the applicant; a high school diploma for the applicant's spouse; an employment letter for the applicant's spouse; bank statements; money transfer receipts; school report cards for the applicant's spouse; medical records for the applicant's child; medical records for the applicant's spouse; a statement from the applicant's child's school; travel receipts; a telephone bill; medical bills; statements from family members and friends; and employment letters for the applicant and his spouse. The entire record was reviewed and considered in rendering 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-
> >
> > . . . .
> >
> > (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 March 1996 and remained until August 2006, voluntarily departing to Mexico. As

such, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States in August 2006.[1] In applying for an immigrant visa, the applicant is seeking admission within ten years of his 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-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*:

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[1] The AAO notes that the District Director erred in finding that the applicant accrued unlawful presence from March 1996, the date he entered the United States without inspection, until his departure in August 2006. As noted above, April 1, 1997 is the effective date of the unlawful presence provisions under the Act. Therefore, individuals, regardless of their immigration status, cannot accrue unlawful presence for purposes of the Act prior to April 1, 1997.

> [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.

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 was born in the United States. *Birth certificate*. Her parents were born in Mexico. *Id.* She has numerous family members who reside in the United States. *Statements from family members*. The record does not address whether she has family members in Mexico. The applicant's spouse notes that Mexico is not secure, and that she does not want to walk down the street in Mexico for fear of being shot. *Statement from the*

applicant's spouse, undated. On April 22, 2011 the United States Department of State updated its Travel Warning for United States citizens traveling to Mexico. *Travel Warning, Mexico, U.S. Department of State*, dated April 22, 2011. The Travel Warning notes that since 2006, the Mexican government has engaged in an extensive effort to combat transnational criminal organizations (TCOs). *Id.* The TCOs, meanwhile, have been engaged in a vicious struggle to control drug trafficking routes and other criminal activity. *Id.* According to Government of Mexico figures, 34,612 people have been killed in narcotics-related violence in Mexico since December 2006. *Id.* More than 15,000 narcotics-related homicides occurred in 2010, an increase of almost two-thirds compared to 2009. *Id.* Bystanders, including United States 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. *Id.* TCOs, meanwhile, engage in a wide-range of criminal activities that can directly impact United States citizens, including kidnapping, armed car-jacking, and extortion that can directly impact United States citizens. *Id.* 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. *Id.*

In addition to concerns over conditions in Mexico, the applicant's spouse notes that her child has been sick. *Statement from the applicant's spouse*, undated. Medical documentation included in the record notes that the applicant's child has been diagnosed with asthma. *Medical records for the applicant's child.* Counsel further states that it would be impossible for the applicant's spouse to relocate to Mexico because of the lack of employment opportunities and adequate medical care in the country. *Attorney's brief.* While the AAO acknowledges counsel's assertions, it notes that the record does not include documentation, such as published country conditions, to support such assertions. Nevertheless, the AAO acknowledges the consistent medical care the applicant's child has received in the United States according to the medical documentation included in the record. The AAO recognizes that relocating to Mexico would cause a disruption in this care and also acknowledges the difficulties for the applicant's spouse in caring for a child with documented health conditions in another country. When looking at the aforementioned factors, particularly the fact that the applicant's spouse was born in the United States, safety concerns in Mexico for United States citizens as documented in the Travel Warning, and the documented health conditions of the applicant's child and the effect this would have upon the applicant's spouse in Mexico, 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 was born in the United States. *Birth certificate*. Her parents were born in Mexico. *Id.* She has numerous family members who reside in the United States. *Statements from family members*. The applicant's spouse notes the difficulties of being a single parent while working and going to school. *Statement from the applicant's spouse*, undated. The record includes an employment letter for the applicant's spouse stating that she has been employed with [redacted] as an Inventory Clerk since April 16, 2007. *Employment letter for the applicant's spouse*, dated November 20, 2007. The record also includes an undergraduate class schedule for the applicant's spouse for Fall 2010. [redacted] *College, Undergraduate Class Schedule – Fall 2010*, dated November 19, 2010. Counsel notes that the applicant's spouse must send money to the applicant in Mexico as he is unable to support

himself. *Attorney's brief.* The record includes money transfer receipts documenting that the applicant's spouse is sending money to the applicant in Mexico. *Money transfer receipts.* The AAO further observes there are various expenses of the applicant's spouse documented in the record. *See travel receipts; a telephone bill; and medical bills.* While the record indicates that the applicant's spouse has numerous family members in the area who may be able to assist her with some of the child care responsibilities, the AAO acknowledges the documented financial difficulties of the applicant's spouse as well as the difficulties of being a single parent. Counsel notes that that being separated from the applicant is causing the applicant's spouse to suffer. *Attorney's brief.* Statements from family members and friends observe the sadness and moodiness of the applicant's spouse due to the separation. *Statements from family members and friends.* As previously noted, the United States Department of States has issued a Travel Warning advising United States citizens of the risks of travel to Mexico. *Travel Warning, Mexico, U.S. Department of State*, dated April 22, 2011. As such, the ability of the applicant's spouse to visit the applicant in Mexico is limited. When looking at the aforementioned factors, particularly documented financial difficulties of the applicant's spouse, the difficulties of being a single parent, the observed sadness she has due to the separation, as well as the risks of travel to Mexico as documented by the Travel Warning, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain 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 unlawful presence for which he now seeks a waiver. The favorable and mitigating factors are his United States citizen spouse, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse 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)(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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.