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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



tlc

DATE: **JUN 30 2011** office: MILWAUKEE, WISCONSIN

FILE:

IN RE: Applicant:

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:

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, Milwaukee, Wisconsin, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 ten years of her last departure from the United States. The record indicates that the applicant is married to a Lawful Permanent Resident (LPR) of the United States and 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 LPR spouse and children.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated September 11, 2008.

On appeal, counsel asserts that the director did not properly evaluate the evidence submitted by the applicant in support of her application and that denial of the applicant's waiver application would result in extreme hardship to her spouse and children. *See Form I-290B*, dated October 10, 2008 and additional documentation submitted with the appeal.

The record includes, but is not limited to, a letter from the applicant's spouse, dated June 12, 2008, letters of employment for the applicant and her spouse, copies of wage and tax documents, copies of bills, bank and other financial documents, a copy of a rental agreement, copies of medical records for the applicant's spouse, copies of school and medical records for the applicant's children, a copy of a psychological evaluation report of the applicant's family by [REDACTED] MCSW, LCSW, Quad-Med Employee Assistance Program, Lomira, Wisconsin, dated October 21, 2008, and letters from the school counselor and the school principal, Bessie Allen Middle School, Fond Du Lac, Wisconsin, regarding the applicant's children. 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-

....

- (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.

....

- (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 case, the record reflects that the applicant made four entries into the United States using a validly issued B1/B2 visa; from January 21, 2000 to July 2003; from July 2003 to December 2005; from January 2006 to December 2006; and her last on January 17, 2007. The applicant has remained in the United States since her last entry on January 17, 2007. On July 24, 2001, the applicant's LPR spouse filed a Form I-130 on the applicant's behalf, which was approved on October 31, 2005. On September 23, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The district director found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and on June 16, 2008, the applicant filed a Form I-601 waiver application. On September 11, 2008, the Field Office Director denied the Form I-485 and Form I-601, finding that the applicant failed to establish extreme hardship to a qualifying relative. The record reflects that the applicant accumulated unlawful presence in the United States based on her prior legal entries from January 21, 2000 to July 2003, from July 2003 to December 2005, and from January 2006 to December 2006. Although the exact periods of unlawful presence are not clear, the record shows that the applicant accumulated unlawful presence of more than one year on at least two occasions and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In this case, the record reflects that the applicant's spouse, [REDACTED] is a 48-year-old native of Mexico and Lawful Permanent Resident of the United States. The applicant and her husband were married in Jalisco, Mexico, on December 5, 1987, and they have four children. All the children are Lawful Permanent Residents and they currently reside in the United States with their parents.

The applicant's spouse, [REDACTED] states that he will suffer extreme emotional and financial hardship if the applicant's waiver request is denied and she is removed to Mexico. Regarding

the emotional hardship of separation, [REDACTED] states that he needs the applicant in the United States to help care for their children while he is at work. He states that due to his demanding work schedule, he will not be able to provide his children the level of supervision and care they need. [REDACTED] states that he is still haunted by his failure to provide parental supervision for his two daughters when they were residing in Mexico by themselves and as a result, his older daughter, Jessica, became pregnant at a very young age. [REDACTED] states, "if [the applicant] is not here, I will once again struggle to give my children any attention and they will not get the parental supervision they need." See *Letter from [REDACTED]* dated June 12, 2003. Regarding the financial hardship of separation, [REDACTED] states that the family needs the applicant's income to be able to meet their financial obligations. He states, "Without [the applicant] here, I would have to work more hours to supplement our income." *Id.* [REDACTED] also states that without the applicant in the United States, he would have increased parenting responsibilities because all his children are in the United States and three of them are enrolled in school, which would make it difficult for him to work extra hours to supplement the family's income, and that it would be extremely difficult for him to meet the family's financial obligations without the applicant's help.

In this case, a preponderance of the relevant evidence demonstrates that the applicant's husband, [REDACTED], would face extreme hardship if the applicant is returned to Mexico and he remained in the United States with their children. The applicant has submitted ample documentation that her spouse will endure significant financial hardship without her income. The record contains joint federal income tax returns showing that the family's income was \$52,756 in 2007, and that the applicant's income was \$17,990. Were the applicant to be removed to Mexico, her family's income would drop to \$35,329. The record also contains employment letters showing that the applicant and her spouse are employed by the same company and that the applicant was making \$11.50 per hour as of April 2008.

The record also contains evidence that the applicant's spouse will face severe emotional hardship if the applicant is returned to Mexico and he remained in the United States with their children. The record contains a copy of a psychological evaluation of the applicant's family by [REDACTED], [REDACTED] Program. [REDACTED] states that [REDACTED] would undergo significant hardship if the applicant is returned to Mexico. He states that [REDACTED] works 12-hour shifts at [REDACTED], which switch from day (7:00 am until 7:00 pm) to night shift (7:00 pm to 7:00 am) on an annual basis, and that makes it impossible for their children to be properly watched over and cared for by [REDACTED]. [REDACTED] notes that [REDACTED] has never functioned as the primary caretaker for their children, that he depends on the applicant to provide the day-to-day parenting their children require, and that the prospect of [REDACTED] assuming the primary parental role in the children's lives would be not only overwhelming to him, but would probably necessitate leaving his current employer, since the option of working a schedule more conducive to parental responsibilities is not available at [REDACTED]. [REDACTED] also states that the applicant's family is a very loving, and mutually supportive family, that their children are well behaved and are doing well in school, and that returning the applicant to Mexico would devastate her spouse as a father and husband. See *Psychological Evaluation Report by [REDACTED] MSSW, LCSW, [REDACTED] Wisconsin*, dated October 21, 2008.

The school's counselor, [REDACTED] and the school's principal, [REDACTED], state that having the applicant available to provide critical help and understanding, set positive examples, and instill beliefs and values to her children, [REDACTED] and [REDACTED] is an important part of their social, emotional, personal, and academic development, and that the loss of the applicant's guidance and care would be a detriment to both of them at this critical point in their lives. See *Letter from [REDACTED] Principal, [REDACTED] Wisconsin*, dated June 5, 2008 and *Letter from [REDACTED] School Counselor, [REDACTED] School, [REDACTED] Wisconsin*, dated June 5, 2008. The hardship to the applicant's children will in turn cause hardship to her spouse. Accordingly, the applicant has demonstrated that her spouse would suffer extreme hardship if she is returned to Mexico and her spouse remained in the United States with their children.

The AAO notes that the applicant has established extreme hardship to her spouse if he were to relocate to Mexico to live with her. With respect to this criteria, [REDACTED] states that he has lived in the United States for a long time, he has a good paying job with benefits, which he does not want to give up by relocating to Mexico with the applicant, his entire family is now residing in the United States and all his children are lawful permanent residents, the children are well adjusted in the United States and the three younger children are doing well in school. [REDACTED] states that he needs to remain in the United States so that his children would be able to get "the best and highest level of education they can so that they can be successful." *Letter from [REDACTED]* dated June 12, 2008. [REDACTED] also states that he needs to be in the United States to receive medical, optical and dental treatment and to be able to provide for his family's medical needs because he is concerned that he would not be able to afford the procedures in Mexico. Additionally, [REDACTED] states that he is concerned that he would not be able to financially provide for his family if they moved to Mexico. *Id.*

Based on the applicant's spouse's long-term residence in the United States, his long-term employment with benefits, his significant family ties in the United States, the health and financial concerns for him and his family, the AAO finds that the applicant has demonstrated that her spouse would suffer extreme hardship if he were to relocate to Mexico to live with the applicant.

A review of the documentation in the record, when considered in the aggregate, demonstrates that the applicant has established that her LPR spouse would suffer extreme hardship if her waiver request is denied. Here, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The negative factor in this case is the applicant's unlawful presence in the United States. The positive factors in this case include the extreme hardship the applicant's LPR spouse and children will face if the waiver is denied, employment in the United States, payment of taxes, and a lack of criminal record.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.