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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**

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MAR 02 2011

FILE:  Office: MEXICO CITY (CIUDAD JUAREZ) Date:

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 Acting District Director, Mexico City, Mexico, 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 his last departure from the United States. The record indicates that the applicant is married to a United States citizen 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 his United States citizen wife and children.

The Acting District 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 Acting District Director*, dated August 19, 2008.

On appeal, counsel asserts that the director did not properly evaluate the evidence submitted by the applicant in support of his application. Counsel asserts that denial of the applicant's waiver request would result in extreme hardship to his family. *See Form I-290B*, dated September 18, 2008 and the accompanying brief in support of the appeal.

The record includes, but is not limited to, statements from the applicant's spouse, three reports from [REDACTED] Oregon City, Oregon, dated June 6, July 11, and September 18, 2008, a copy of an Individualized Treatment Plan for the applicant's spouse from [REDACTED] dated May 23, 2008, a copy of a report of a psychological assessment of the applicant's wife by [REDACTED] Salem, Oregon, a letter and a report from [REDACTED] the applicant's wife's physician, supportive letters from family and friends detailing the hardships the applicant's family are undergoing since the applicant left the United States for Mexico, Notice of Payment Delinquency from Washington Mutual addressed to the applicant's spouse, and copies of U.S. Department of State country reports on Mexico. 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.

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- (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 applicant claims that he entered the United States in May 1999 without being inspected and admitted or paroled. On April 3, 2006, the applicant's United States citizen spouse filed a Form I-130 on the applicant's behalf. On July 10, 2006, the Form I-130 was approved. In March 2008, the applicant voluntarily departed the United States. On April 1, 2008, the applicant was found inadmissible under section 212(a)(9)(B)(i)(II) of the Act by a Consular Officer in Mexico, and refused to issue him an immigrant visa. On May 9, 2008, the applicant filed a Form I-601 waiver. On August 19, 2008, the Acting District Director denied the Form I-601, finding that the applicant failed to establish extreme hardship to his spouse. The applicant accrued unlawful presence from May 1999, when he illegally entered the United States until March 2008, when he voluntarily departed the United States. The applicant's unlawful presence for more than one year and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. Thus, the applicant is inadmissible to the United States 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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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.

In this case, the record reflects that the applicant’s spouse, [REDACTED], is a 40-year-old native of Mexico and citizen of the United States. The applicant and his wife were married in Gladeston, Oregon, on February 17, 2006, and they have two children together. The record also reflects that the applicant’s spouse has two children from a prior marriage and are being raised by the applicant and his

spouse. The applicant's spouse states that she is suffering extreme emotional and financial hardships as a result of family separation and the denial of the applicant's waiver request.

Regarding the emotional and financial hardships of separation, the applicant's spouse submitted detailed statements of the emotional and financial hardships she and her children are undergoing as a result of the applicant's inadmissibility. The applicant's spouse states that she was the victim of severe domestic violence from her ex-husband, which resulted in extreme depression, financial distress, homelessness, years of therapy and anti-depression medications. The applicant's spouse states the applicant restored her trust in relationships and that when she met and married the applicant, the applicant became her emotional support and best friend, and that without him, "I do not know what would happen to me." *Statement by* [REDACTED], dated March 20, 2008. The applicant's spouse states that her children from the prior marriage were also abused but that the applicant has filled the role of a father for them, and that he takes care of them as if there were his own children. *Id.* The applicant's spouse states that she is under severe financial stress, that her income alone is not sufficient to take care of her family's financial obligations, that she can no longer keep up with mortgage payments, that she is fearful that she will lose her home and would have to return to shelters with her four children like she did in the past, and that she has had to apply for food stamps to help feed her children. *Additional Statement by* [REDACTED], dated September 15, 2008. The applicant's wife further states, "I am losing my strength and my ability to keep our family in good housing, with enough food, and a good situation so that my children can grow and learn." *Id.* The record contains a notice from Washington Mutual addressed to the applicant's spouse dated September 5, 2008, indicating that she is delinquent in her loan payment in the amount of \$2,570.74, and is at risk of losing her home. *See Debt Validation Notice from Washington Mutual*, dated September 5, 2008.

The record also contains detailed assessment from the applicant's spouse's mental health counselor, [REDACTED], Oregon City, Oregon, and [REDACTED], Salem, Oregon. The reports provide details of the severity of the applicant's spouse's mental and psychological health condition and the impact of the applicant's absence on his family. [REDACTED] diagnosed the applicant's spouse with Post-Traumatic Stress Disorder and Dysthymic Disorder. [REDACTED] states that if the applicant is not allowed to return to the United States, his spouse's symptoms could become worse. [REDACTED] recommends that the applicant's spouse engage in counseling services immediately so that she is able to express her feelings and emotions in a healthy, and safe environment. *See Assessment of the applicant's spouse by* [REDACTED] [REDACTED] Salem, Oregon, dated February 28, 2008. The record reflects that the applicant's spouse was enrolled in a treatment plan at Clackamas County Mental Health. Her treatment involves weekly individualized therapy and weekly meetings with a care coordinator. *See Clackamas County Mental Health Individualized Treatment Plan for* [REDACTED], dated May 23, 2008. [REDACTED] states that the applicant's spouse has Post-Traumatic Stress Syndrome, stemming from the emotional and psychological hardships she had to endure during her prior abusive marriage, the death of her father when she was quite young, and separation from the applicant. [REDACTED] states that the applicant's spouse has depression, anxiety, sleeplessness, lack of appetite, cries many hours of the day and fears for herself and her children. [REDACTED] states that with the removal of the applicant, "[the applicant's spouse] is again reminded and experiencing the removal of [the applicant] from this country as she did the death of her father." *See Letter by* [REDACTED]

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Clackamas County Community Health, Oregon City, Oregon, dated June 6, 2008. ██████████ also states that a case manager from Clackamas County went to the applicant's spouse's home and found her to be tearful and exhausted, depressed and anxious and fears for her family, and that the family is at risk of homelessness due to missing house payments and not enough money to live on. *See letter from ██████████*, dated September 18, 2008.

In this case, a preponderance of the relevant evidence demonstrates that the applicant's spouse would face extreme hardship if the applicant's waiver request is denied and his spouse remained in the United States. Based on the detailed statements from the applicant's spouse, copies of psychological evaluations and treatment, the family's expenses and supportive letters from family and friends, the applicant has demonstrated that the financial and emotional hardships faced by his spouse, rise beyond the common results of removal or inadmissibility to the level of 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 criteria, counsel states that the applicant's spouse has been residing in the United States for more than twenty years, and has built a life for herself and her family here in the United States. The applicant's spouse states that if forced to relocate to Mexico, she would be concerned for the health and financial well-being of her family, she would be concerned that she and the applicant would not make enough money to take care of their family, and that she would not have access to mental health services or therapists she desperately needs to treat her depression and stress. The applicant's spouse is also concerned for the safety of her children and for their educational advancement and expresses concerns about the violence in Mexico and the substandard educational facilities in Mexico. The record includes a copy of a U.S. Department of State Travel Alert for Mexico, dated September 15, 2008.

As noted in the U.S. Department of State recent Travel Alert:

Although narcotics-related crime is a particular concern along Mexico's northern border, violence has occurred throughout the country, including in areas frequented by American tourists. U.S. citizens traveling in Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

Travel Warning – Mexico, U.S. Department of State, Bureau of Consular Affairs, dated September 10, 2010.

The emotional hardship when combined with the financial hardship, the difficulty of adjusting to the conditions in Mexico after an extended period of absence from the country, and the health and safety concerns of the applicant's spouse, the AAO finds that the applicant has established that his spouse would experience extreme hardship if she is forced to relocate to Mexico to be with the applicant.

A review of the documentation in the record, when considered in the aggregate, demonstrates that the applicant has established that his United States citizen spouse would suffer extreme hardship if the applicant's 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-Moralez*, 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 factors in this case are the applicant's entry into the United States without inspection and his unlawful presence in the United States. The positive factors in this case include the extreme hardship the applicant's United States citizen spouse and children face if the waiver is denied, supportive letters, and his 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 his burden and the appeal will be sustained.

ORDER: The appeal is sustained.