

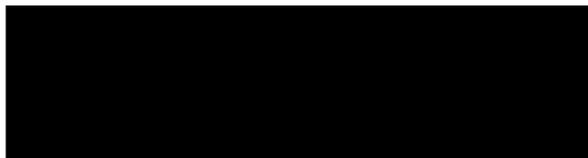
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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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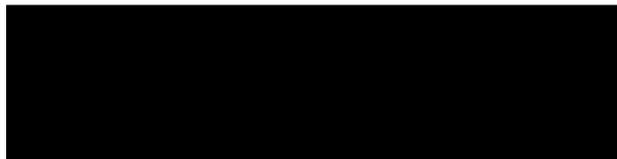
DATE: **MAY 02 2011** Office:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, [REDACTED] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of [REDACTED] 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. 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). The acting district director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the director failed to consider the submitted evidence as a whole in determining hardship. Counsel avers that when the evidence is considered in the aggregate it demonstrates extreme economic and emotional hardship to the applicant's U.S. citizen spouse and lawful permanent resident mother and U.S. citizen father. Counsel maintains that prior to his removal the applicant financially supported his wife and three children, and since his removal his wife had to apply for public assistance benefits. According to counsel, without the applicant's financial support the applicant's parents are also experiencing economic hardship, as the applicant is no longer helping to pay mortgage and medical and household expenses. Counsel contends that the applicant's wife experienced the emotional stress of returning to work two months after the birth of their child. Further, counsel indicates that the applicant's son, Felix, requires stretching exercises for his health problem, torticollis (a twisted neck). Counsel states that if his condition does not improve by the time Felix is four or five years old, he will require surgery.

We will first address the finding of inadmissibility. The applicant was found to be inadmissibility for unlawful presence under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(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 . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in 1986. The applicant filed an application for temporary resident status pursuant to section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160, which was denied on January 22, 1992. On June 27, 1995, the applicant's appeal was dismissed by the Legalization Appeals Unit. On August 13, 1999, the applicant filed an asylum application, which was rejected on September 27, 1999. On September 20, 1999, the applicant was placed in removal proceedings. On September 27, 1999, the applicant was personally served with a notice to appear before an immigration judge on October 27, 1999. On October 27, 1999, the applicant filed an application for cancellation of removal. On October 27, 1999, a notice of hearing for a regular hearing was issued to the applicant for a regular hearing on October 23, 2000. On October 23, 2000, the immigrant judge ordered that the applicant's application for asylum and the application for withholding of removal were to be withdrawn, that the application for cancellation of removal was denied, and that the applicant's application for voluntary departure was granted until December 22, 2000. On November 22, 2000, the applicant filed an appeal with the Board of Immigration Appeals (Board), and the Board affirmed the immigration judge's order on July 23, 2002. On August 20, 2002, the applicant filed a Petition for Review and Request for a Stay of Deportation with the Ninth Circuit Court of Appeals, which was denied on February 17, 2004. On February 9, 2006, the applicant was removed from the United States.

Based on the record, the applicant began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until August 13, 1999, when the applicant filed the asylum application. The applicant also accrued unlawful presence from September 27, 1999 until October 23, 2000; and from February 17, 2004 until his removal on February 9, 2006. The applicant's removal from the United States triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 Attorney General [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.

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 child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse and his U.S. citizen father and lawful permanent resident mother are the qualifying relatives 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 are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

With regard to the hardships associated with remaining in the United States without the applicant, the applicant’s wife states in the declaration dated June 4, 2007 that she has lived with her in-laws since her marriage to the applicant on October 17, 1997. She states that their oldest son was born on September 9, 1998, and their other children were born on June 7, 2004 and December 30, 2005. She conveys that she worked in housekeeping from 2000 to 2005, and stopped working full time after her husband was removed from the United States. The applicant’s wife states that she worked in the field from February 2006 to January 2007 and afterwards started receiving welfare and medical benefits, and food stamps for her children. The applicant’s wife avers that her children need their father and require his financial and emotional support. She indicates that she cannot help her in-laws in paying the mortgage, which is something that her husband had done. The applicant’s wife states that her son [REDACTED] has difficulty walking due to a neck problem. She avers that he had eight months of physical therapy starting in March 2006, and that she performs his physical therapy stretching at home. The applicant’s wife conveys that every year her son visits the doctor for his condition and that her son will require surgery when he is four or five years old if the condition does not improve.

The applicant’s father conveys in the declaration dated June 7, 2007, that he is 61 years old and that he is employed with [REDACTED] driving a harvester in farm fields. He states that in 1994 he and the applicant bought a house together and that the applicant every month paid part of the mortgage before he went to Mexico. The applicant’s father indicates that his wife is diabetic and takes medication for his condition, and that they do not have health insurance through his employer. He states that the applicant had helped pay for his wife’s doctor visits, lab tests, and prescriptions, and that they cannot afford all of her tests without financial support from the applicant.

We note that the record contains documentation of the public assistance received by the applicant’s wife in 2006 through 2008, income tax records, school records and letters by the applicant’s children, patient information from [REDACTED] and other documentation.

Family separation 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 type of familial 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 otherwise 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 familial relationship involved, the hardship resulting from family separation is 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 hardship factors asserted in the instant case are the emotional and financial impact to the applicant’s wife as a result of separation from her husband. We note that in support of the asserted hardship factors the record contains documentation from [REDACTED] Human Services Agency reflecting that the applicant’s wife and three young children have received welfare benefits from January 1, 2006 until through May 31, 2008. We observe that the W-2 Form shows the applicant’s wife as earning \$850.25 with [REDACTED] Labor Services in 2007. In addition the record contains a letter dated May 25, 2008 from a licensed clinical social worker with [REDACTED] Family Health,

which states that the applicant's wife is receiving treatment for depression and anxiety. Further, medical records show the applicant's son, [REDACTED] as having torticollis. Though [REDACTED] is now six years old, the record does not indicate whether he has had or will require surgery. Substantial weight is given in the hardship analysis to the hardships associated with the separation of spouses from one another. In the instant case, where the evidence shows significant financial and emotional hardship to the applicant's wife, we find that the applicant has demonstrated that the hardships that his wife will experience as a result of separation are extreme.

The applicant's wife states in the declaration that if she joined her husband to live in [REDACTED] they would not have a house in which to live, and that she would not want to take away her children's future and opportunities. The applicant's wife conveys that her oldest son, who is eight years old, speaks Spanish and English, but can only read and write in English, and if he attending school in [REDACTED] he would have to start all over. Further, she states that it would be difficult for her to take [REDACTED] to have follow-up examinations with a doctor in the United States. Moreover, she indicates that she takes her diabetic mother-in-law to medical appointments and helps with her medication. Lastly, she states that her parents live in [REDACTED] and are lawful permanent residents, and that nearly all of her family members reside in the United States as either lawful permanent residents or U.S. citizens.

The stated hardships to the applicant's wife are not having a house in [REDACTED]; anxiety about the lack of future and opportunities for her children; scholastic problems for her children, particularly for [REDACTED] difficulties in scheduling [REDACTED] medical examinations in the United States; living apart from her parents and other family members; and not being able to assist her mother-in-law. We note that the clinic note from Children's Hospital [REDACTED] dated February 20, 2007, reflects that [REDACTED] was in therapy for two to three months for torticollis, without much improvement, and that he has a tight muscle on the left side. The record by [REDACTED] General Hospital dated February 3, 2006 reflects that [REDACTED] has a clinical history of shoulder pain. When all of the evidence is considered in totality, which is [REDACTED] serious health problem (a neurological movement disorder), and the applicant's wife's anxiety about whether [REDACTED] he will require surgery; the applicant's having completed only nine years of education and having worked most of his life as a farm laborer, which will severely affect his earning potential and ability to find employment providing health benefits; the applicant's wife's apprehension about the educational hardships of her children and their lack of opportunities in [REDACTED] and lastly, the applicant's wife's separation from her parents in [REDACTED] we find that the hardship factors, considered collectively, demonstrate extreme hardship to the applicant's wife if she joins the applicant to live in [REDACTED]

Thus, the AAO finds that the applicant has demonstrated extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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 AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's entry into the United States without inspection, his unlawful presence in the United States, his driving under the influence convictions, any unauthorized employment. The favorable factors are positive references from neighbors regarding the applicant's character, and the passage of five years since the applicant's removal from the United States. While the AAO finds that the immigration violations committed by the applicant are serious in nature, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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 rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.