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

U.S. Citizenship and Immigration Services

[redacted]

H6

Date: MAY 06 2011 Office: MEXICO CITY, MEXICO FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATIONS: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i); and Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the 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)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or the willful misrepresentation of a material fact; and 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 her last departure from the United States. The record indicates that the applicant is married to a United States citizen and the mother of a United States citizen child. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and 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 husband and son.

The District Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated June 9, 2009.

On appeal, the applicant, through counsel, asserts that "[t]he consulate erroneously denied the I-601 Waiver which [the applicant's husband] filed on behalf of [the applicant]." *Form I-290B*, filed July 10, 2009. Counsel claims that "[e]vidence shows that [the applicant's husband] is clearly suffering extreme hardship without [the applicant] and will continue to do so until she [is] allowed to return to the United States." *Id.*

The record includes, but is not limited to, counsel's appeal brief; an affidavit and statements from the applicant's husband in English and Spanish[1]; letters of support for the applicant and her husband; an individualized education program worksheet for the applicant's son; medical documents for the applicant's husband; pay stubs for the applicant's husband; money transfer receipts, mortgage documents, household bills, insurance documents, and utility bills; and articles on average income in Mexico and special education in Mexico. The entire record was reviewed and considered, with the exception of the Spanish language statement, in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured)

[1] Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), an applicant who submits a document in a foreign language must provide a certified English-language translation of that document. As a statement from the applicant's husband is in Spanish and is not accompanied by an English-language translation, the AAO will not consider it in this proceeding.

a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

. . . .

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

(i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

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 [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 indicates that the applicant attempted to enter the United States on October 20, 2002, by presenting a laser visa in another individual's name. The applicant was returned to Mexico and reentered the United States without inspection on an unknown date in October 2002. In February 2008, the applicant departed the United States.

Based on the applicant's presentation of a laser visa in another individual's name in order to enter the United States, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute this finding.

Additionally, the applicant accrued unlawful presence from October 2002, when she entered the United States without inspection, until February 2008, when she departed the United States. The applicant is seeking admission into the United States within ten years of her February 2008 departure. 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.

Waivers of inadmissibility under section 212(i) and section 212(a)(9)(B)(v) of the Act are 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 husband 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 United States Citizenship and Immigration Service (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 (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,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board

considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on a qualifying relative, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The first prong of the analysis addresses hardship to the applicant's husband if he relocates to Mexico. In an affidavit dated August 4, 2009, the applicant's husband states he cannot "simply move to Mexico to be with [the applicant] as [his] life, including [his] work and the home [he] own[s], is here in the United States." In counsel's appeal brief dated July 30, 2009, counsel states that the applicant's husband "has substantial financial obligations" in the United States, and if he joined the applicant in Mexico, "[h]e would lose his home and other assets that he has accumulated as a result of his hard work in the U.S." The applicant's husband states "[w]ork is hard to find and income is very minimal in Mexico." Additionally, the applicant's husband states he suffers from various medical conditions. The AAO notes that the record establishes that the applicant's husband was diagnosed with depressed mood, separation anxiety, chronic insomnia, recurrent headaches, gastrocolitis, hypercholesterolemia, and hyperlipidemia. *See medical record from Lincoln Health Center*, dated July 21, 2009. Additionally, on January 23, 2008, the applicant was diagnosed with post traumatic stress disorder. *See medical record from Lincoln Health Center*, dated January 23, 2008. The AAO notes the applicant's husband's financial and medical concerns.

Counsel claims that the applicant's husband has "substantial family ties to the U.S. He has a U.S. citizen son. His mother and one of his brothers are also U.S. citizens and [the applicant's husband] has another brother who is a legal permanent resident of the United States." The AAO notes that the record establishes that the applicant's husband has nine siblings; however, there is no indication in the record as to where the applicant's husband's other seven siblings reside. *See medical record from* [redacted], dated July 21, 2009. Counsel claims that the applicant's husband "has no ties left in Mexico." Counsel states the applicant's husband's "life is in the U.S. as this is where he works, is raising his family, and has [his son] enrolled in the special education program so that he can overcome his speech and language delay." The AAO notes that the record establishes that the applicant's son is residing in Mexico with the applicant. Additionally, the AAO notes that the record establishes that when the applicant's son resided in the United States, he was diagnosed with a learning disability and was receiving speech therapy. *See Individualized Education Program worksheet.* Counsel states the "special education programs in Mexico are not the equivalent to what is available in the U.S.," and he submitted an article regarding special education in Mexico. The AAO notes that the article states "Mexican law guarantees that the state will serve all people with disabilities and special education needs." *See special education in Mexico*, undated. Additionally, the article states that students "are put into five categories when assessed for special education;" however, there is no category "for learning disability or reading disability." The AAO notes that the article indicates that even though students "may not be assigned a disability category," they "may receive services for special learning needs that" have been identified. Therefore, the AAO finds that the submitted evidence does not establish that the applicant's son cannot receive speech therapy in Mexico. However, the AAO notes the claims made regarding the difficulties the applicant's husband and son would face in relocating to Mexico.

Based on the applicant's spouse's mental health problems, his separation from his family, losing his employment and possibly his home in the United States, his medical issues, disruption of the applicant's spouse's medical treatments, and disruption of the applicant's son's special education, the AAO find that the applicant's husband would suffer extreme hardship if he were to return to Mexico to be with the applicant.

Regarding the hardship the applicant's husband would suffer if he were to remain in the United States, counsel claims that the "financial impact on [the applicant's husband] is substantial." Counsel states that the applicant's son will return to the United States, and there will be "a dramatic increase in child care expenses." Counsel claims that the applicant's husband "would not obtain a second job when his son returns to him because of the added child care expenses." He states that the applicant's husband "would not be able to care for [his son] on his own." The applicant's husband states he "would not be able to work all day, meet with [his son's] teachers, take care of [their] home, and make sure [his son] receives the care and additional support he needs on [his] own." The AAO notes that the record establishes that the applicant's husband is concerned for his son's education and wellbeing. The AAO finds that the applicant's son's learning disability elevates the applicant's husband's challenges to an extreme level. Counsel claims that the applicant's husband "was working full-time plus overtime to pay his bills here in the U.S. and to support [the applicant] and [his son] in Mexico. [The applicant's

husband's] hours have been cut at his job." The AAO notes that the record establishes that on July 3, 2009, the applicant's husband was paid $1,160.64 for two weeks worth of work, and on July 17, 2009, he was paid $467.01 for two weeks. The applicant's husband states his monthly bills total approximately $1,575.00, which does not include living expenses and the money he sends to the applicant in Mexico. The AAO notes that the record establishes that the applicant's husband sends the applicant approximately $300.00 per month. The applicant's husband claims that his "financial hardship has gotten so bad that [he] [has] actually been forced to take out a loan against the mortgage on [his] house." The AAO notes the financial concerns of the applicant's husband.

The applicant's husband states he needs the applicant "to return home as [he] [is] suffering extreme emotional hardship which has started to show physical symptoms." Counsel states that the applicant's husband "suffers from depression, separation anxiety, insomnia, and chronic headaches. These psychological problems have also started to cause [the applicant's husband] physical ailments." The applicant's husband states he also suffers from "gastrocolitis, and elevated cholesterol and lipidemia," and he was prescribed antidepressants. Additionally, the applicant's husband claims that "[j]ust thinking about [his son] and his education and how he will ultimately suffer as a result of this separation of his family greatly increases the emotional hardship [he] [is] enduring." As noted above, the record establishes that the applicant's husband was diagnosed with depressed mood, separation anxiety, chronic insomnia, recurrent headaches, gastrocolitis, hypercholesterolemia, and hyperlipidemia. *See medical record from* [redacted], dated July 21, 2009. Additionally, as noted above, on January 23, 2008, the applicant was diagnosed with post traumatic stress disorder. *See medical record from Lincoln Health Center*, dated January 23, 2008. The applicant's husband states "[t]he post traumatic stress disorder was a result of an accident [he] had at work.... This resulted in the need for physical therapy and numerous medical exams." The AAO notes that the record establishes that the applicant's husband suffered a back injury at his place of employment on August 20, 2007. The applicant's husband states the "extreme emotional hardship and depression [he] [is] currently enduring is causing physical problems and affecting [his] concentration[,] which [he] need[s] as a laborer in a factory." In a letter dated March 19, 2008, [redacted] the applicant's husband's manager, states that the applicant's husband returned from Mexico without his family, and "he needs to be reunited with [the applicant] and [his son] because it is affecting his ability to perform his daily work." The AAO acknowledges that the applicant's husband is experiencing emotional, medical, and employment issues due to his separation from the applicant.

Considering the applicant's spouse's mental health issues, his medical problems, his financial issues, his son's learning disability, and the normal effects of separation of a loved one, the AAO finds the record to establish that the applicant's husband would face extreme hardship if he remained in the United States in her absence.

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 misrepresentation and her unlawful presence. The favorable and mitigating factors are the applicant's United States citizen husband and son, the extreme hardship to her husband if she were refused admission, the absence of a criminal record, and the letters of support.

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. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) and section 212(i) 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. The waiver application is approved.