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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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Date: **MAY 11 2011**

Office: MEXICO CITY (CIUDAD JUAREZ) FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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, Mexico City. The matter 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 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 is married to a U.S. citizen and 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 with her husband in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Field Office Director*, dated February 25, 2009.

On appeal, counsel contends that the field office director's decision did not consider all of the evidence. Counsel contends the applicant established the requisite hardship, particularly considering the applicant's husband's high level of depression and significant impairment in functioning.

The record contains, *inter alia*: three letters from the applicant's husband, [REDACTED] letters from a psychologist and a psychotherapist; a letter advising [REDACTED] of foreclosure proceedings; a letter from [REDACTED] employer; copies of tax returns, bills, and other financial documents; copies of medical notes for [REDACTED] two children from a previous marriage; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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 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.

In this case, the record shows, and the applicant does not contest, that she entered the United States in March 2005 without inspection and remained until September 2007. The applicant accrued unlawful presence of over two years. She now seeks admission within ten years of her September 2007 departure. Accordingly, she is 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 one year or more and seeking admission to the United States within ten years of her last departure.

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 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[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.

In this case, the applicant’s husband [REDACTED] states that he is suffering from being separated from his wife and son. He states he worries about their safety. He states his son was admitted to a hospital in Mexico for two days because he was dehydrated due to stomach ailments. According to [REDACTED] the closest hospital has only one doctor for four hours per day. In addition, [REDACTED] contends his wife gave birth to their second child on November 14, 2007. He states he cannot care for his children in the United States without his wife because he has to work and it would be extremely difficult to find child care. [REDACTED] also states that he is suffering extreme financial hardship, that their house is in foreclosure proceedings, and that he is overdue in paying many of his bills. He states he has had to

incur travel expenses visiting his wife in Mexico and that he sends money to support his wife and children in Mexico. In addition, [REDACTED] contends that his relationship with all of his children is deteriorating. He states he has two children from a previous marriage and that they stay with him every other week. [REDACTED] states that according to the court order, he is required to pay for health insurance for his children. He states that it has been difficult maintaining the custody arrangement because his wife is not present to help with child care. [REDACTED] states that when his wife was in the United States, she would help get his children to school and he now has to rely on his mother for help. He contends his ex-wife would never allow his children from his first marriage to move to Mexico with him. [REDACTED] states his life is full of stress and he has gone to a psychologist for his depression. *Letters from [REDACTED], dated March 17, 2009, November 5, 2007, and September 19, 2007.*

A letter from a psychotherapist states that [REDACTED] is seeking therapy because of depression, stress, worry, and anxiety. According to the psychotherapist, [REDACTED] feels an obligation to stay in the United States in order to care for his two older children from his first marriage as well as provide for his current wife and their son. The psychotherapist recommended that [REDACTED] continue in therapy. *Letter from [REDACTED], dated October 30, 2007.*

A letter from a psychologist states that [REDACTED] is suffering from Adjustment Disorder with Depressed Mood due to the separation from his wife and children. According to the psychologist, [REDACTED] reported symptoms including, but not limited to: decreased appetite, sleep disturbance, impaired concentration, irritability, hopelessness, guilt, anger, and frustration. The psychologist states that [REDACTED] feels hopeless because he feels he must choose between staying in the United States in order to care for his two older children from his first marriage, or moving to Mexico in order to be with his wife and his two younger children. *Letter from [REDACTED], dated March 16, 2009.*

A letter from [REDACTED] employer states that due to the current economic situation in the United States, [REDACTED] was unemployed for three weeks from December 2008 to January 2009. In addition, Mr. [REDACTED] had to change shifts and had his hours reduced to thirty hours per week in February 2009. [REDACTED] employer states that although [REDACTED] is currently back to working forty hours per week, he has the least seniority among workers and would be the first to be unemployed if business lags. In addition, the employer contends that insurance premiums have increased and that even though [REDACTED] wife and children reside in Mexico, he must pay for the family plan. *Letter from [REDACTED], dated March 16, 2009.*

Upon a complete review of the record evidence, the AAO finds that the applicant has established her husband has suffered, and will continue to suffer, extreme hardship if her waiver application is denied. The record shows that [REDACTED] has four U.S. citizen children – three and five year old sons with his current wife, the applicant, as well as a ten year old and a fourteen year old with his ex-wife. The record also shows that [REDACTED] has joint custody of his two older children, that he is prohibited from removing his children from Wisconsin for more than ninety days without court approval, and that he is responsible for his children's health and dental insurance and their uninsured medical expenses. *Marital Settlement Agreement, dated January 29, 2002.* Therefore, if [REDACTED]

██████████ moved to Mexico to avoid the hardship of separation from his wife, he would be unable to maintain joint custody of his two older children in accordance with the custody agreement. The AAO finds that the hardship ██████████ would experience if he had to move to Mexico to be with his wife is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion.

Moreover, ██████████ would continue to suffer extreme financial hardship if he remains in the United States without his wife. The record shows that ██████████ house is in foreclosure proceedings and that numerous collection agencies are seeking to recover account balances that are overdue. *See, e.g., Letter from ██████████*, dated March 11, 2009 (letter from a collection agency for \$1,269.34 for Mr. ██████████'s Citibank account); *Letter from Law Office of ██████████ PC*, dated February 27, 2009 (stating that a law firm has been retained to collect \$1,619.84 for ██████████'s account); *Letter from Collection ██████████*, dated October 1, 2008 (letter from a debt collector for \$920.57 for ██████████ account); *Letter from The ██████████*, dated June 19, 2008 (letter from a debt collector for \$263.61 for ██████████ account). The record also shows that health insurance through ██████████ employer costs \$179.86 per month, an expense he must pay in accordance with the court's marital settlement agreement. The record further shows that ██████████ regularly sends money to his wife in Mexico in order to financially support her and their two young children. Copies of airline tickets and phone cards show the high cost ██████████ has paid in order to stay in touch with his wife and children. Tax documents in the record show that ██████████ earned \$23,033 in wages in 2006 and a letter from his employer states that due to the economy, his full-time employment is not guaranteed. *Letter from ██████████, supra*. The AAO finds that if ██████████ remains in the United States without his wife, he will continue to suffer extreme financial hardship supporting his family on his sole income. Considering these unique factors cumulatively, particularly ██████████ responsibilities to his children from his previous marriage, the AAO finds that the effect of separation from the applicant on ██████████ goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility or exclusion and rises to the level of extreme hardship. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that ██████████ faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's unlawful entry and presence in the United States. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission; family ties in the United States including her U.S. citizen husband and two U.S. citizen children; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is 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.

**ORDER:** The appeal is sustained.