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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: Office: MEXICO CITY, MEXICO File: 

NOV 21 2011
IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v), and section 212(d)(11) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(d)(11).

ON BEHALF OF APPLICANT:

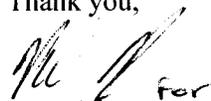
SELF-REPRESENTED

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, with a fee of \$630. 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,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. She 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 one year or more and seeking admission within ten years of her last departure, and pursuant to section 212(a)(6)(E) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E), for having smuggled her daughter into the United States in 1995. She is married to a United States citizen. She 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), and section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11) in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 19, 2009.

On appeal, the applicant's spouse asserts that she did not assist anyone in entering the United States illegally and that the applicant fears for her safety from her first husband who has sworn to kill her for divorcing him. *Form I-290B*, received on June 25, 2009.

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.

....

The record indicates that the applicant entered the United States without inspection in 1995 and remained until she departed voluntarily in October 2007. Therefore, the applicant was unlawfully present in the United States for over a year from April 1, 1997, the effective date of the unlawful presence provision of the Act until October 2007, and is now seeking admission within ten years of her last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

Section 212(a)(6)(E) of the Act states, in relevant part:

(i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

A conviction for smuggling is not necessary to render an alien inadmissible under section 1182(a)(6)(E), section 212(a)(6)(E) of the act. *In Re Ruiz-Romero*, 22 I&N Dec. 486, 490 (BIA 1999)(reasoning that the title of the section was non-substantive, and did not describe the full extent of activities that may be regarded as “alien smuggling” or “related to alien smuggling,” and were intended to describe activities which would suffice, even in the absence of a conviction, to exclude or deport an alien).

The record indicates that the applicant appeared for her visa interview on October 29, 2007, and admitted that she had brought her minor daughter with her when she entered the United States without inspection in 1995. On appeal, the applicant’s spouse asserts that the applicant entered by herself in 1995 and that her daughter entered at a later time. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant has failed to submit any evidence to resolve the inconsistencies between her testimony at her visa interview and her spouse’s statements made on appeal.

The applicant bears the burden of establishing that she is not inadmissible under any provision of the Act. *See* section 291 of the Act, 8 U.S.C. § 1361. Based on the evidence in the record, the AAO finds that the applicant has failed to establish that she is not inadmissible under section 212(a)(6)(E) of the Act.

Section 212(d)(11) States, in relevant part:

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record includes, but is not limited to: a brief from prior counsel; a statement from the applicant's spouse; statements from the applicant's children; photographs of the applicant's living quarters in Mexico; statements from the teacher and psychologists of the applicant's children in Mexico; medical records pertaining to the applicant; a legal document from the Office of the Attorney General of the State of Jalisco [Mexico]; background materials on the psychological impacts of separation on children; a UNICEF printout on sexual exploitation of children in Mexico; a psychological assessment of the applicant's spouse by [REDACTED] photographs of the applicant, her spouse and their children; copy of a residential deed in the applicant's spouse's name; and copies of utility bills and invoices.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

The AAO will first determine if the applicant has established extreme hardship to a qualifying relative as required for a waiver of inadmissibility under section 212(a)(9)(B)(v). If the applicant establishes extreme hardship to a qualifying relative as required by section 212(a)(9)(B)(v), the AAO may then move to determine whether the applicant warrants a waiver of inadmissibility as a matter of discretion pursuant to sections 212(a)(9)(B)(v) and 212(d)(11).

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 spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

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

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23

I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's spouse states on appeal that he only anticipated the applicant having to reside in Mexico for a year or so due to her inadmissibility and that her prolonged absence has caused him significant hardship. *Statement of the Applicant's Spouse on Appeal*, received June 25, 2009. He also states that when he went to visit her in 2008 he had to take his young sons to stay with her there because they were unable to reside without her in the United States. The applicant's spouse explains that his sons are failing in school, unable to adapt to the Spanish language, society or culture and that he does not have the money to buy adequate living space for them in Mexico. He further states that the applicant suffered from a serious back condition which caused excruciating pain and had to have surgery to correct the condition. He also explains that he fears for the applicant's safety because she has been threatened by her ex-husband who lives in Mexico.

As noted above, hardship to the applicant or her children are not directly relevant to a determination of extreme hardship to the qualifying relative, in this case the applicant's spouse. Nonetheless, the AAO may examine hardships experienced by the applicant and her children as they may impact the emotional hardship on her spouse. The record includes a statement from a teacher of one of the applicant's sons which details the difficulties the child is having in school. Specifically, the letter states that the child is having difficulties in learning Spanish, has shown difficulties in his "formative process" and does not socialize with classmates. The record also includes a psychological assessment which states that both of the applicant's children are having difficulty due to separation from their father and that they have had difficulty in adapting to the school environment in Mexico.

The record contains sufficient documentation to corroborate the applicant's spouse's assertions that the applicant suffered a serious back condition and had to have surgery. The submitted medical records indicate that she was successfully treated and was symptom free at the time of her discharge after her surgery. The records do not indicate that she continues to suffer from this condition, or that it impacts her ability to function on a daily basis. Nonetheless, the AAO will acknowledge that back surgery would result in a period of rehabilitation and that having to raise two children as a single parent in these conditions represents a hardship impact. This hardship impact on the applicant may result in an emotional hardship to the applicant's spouse due to the stress and anxiety created by her condition, and it will be considered when aggregating the overall hardship impacts on him.

The record includes a copy of a summons issued to the applicant's former spouse in Mexico, with the applicant listed as the plaintiff. The summons directs the applicant's former spouse to appear in the Office of the Public Ministry "regarding the complaint filed against [REDACTED] for harassment and threats." The record does not include a copy of the complaint filed by the applicant and no information is provided regarding the complaint, or of the nature of the harassment or threats. However, the AAO notes the applicant's spouse's concerns regarding the applicant's former spouse.

The applicant has also asserted that he is struggling financially to support the applicant and their sons in Mexico. The applicant's oldest daughter, who is now 23, has also indicated that she is working to help support the applicant and her step-brothers in Mexico. *Statement of the Applicant's Daughter*, dated December 5, 2007. Despite these assertions there is very little evidence of financial hardship in the record. There is evidence that the applicant's spouse owns a home and pays some utility bills, but there are no financial records which establish the applicant's spouse's income, no documents which establish the cost of living in Mexico, or which establish that the applicant's spouse is unable to meet his financial obligations. Based on these observations the AAO cannot determine that the financial impact of the applicant's departure rises above that commonly experienced by the relatives of inadmissible aliens.

Based on the difficulties that his sons are having in adjusting to life in Mexico, the applicant's medical concerns, and the concerns regarding the applicant's former spouse, the AAO finds that the applicant's spouse will experience extreme hardship as a result of separation from the applicant.

The AAO notes that neither former counsel, the applicant nor her spouse articulated any basis of hardship on the applicant's spouse if he were to relocate to Mexico with the applicant and his sons. Although the record contains some general background materials on the impacts of separation on children and sexual exploitation in Mexico, these are insufficient to establish that the applicant's spouse in particular would experience hardship upon relocation to Mexico or from emotional hardship if he remains in the United States.

Although the applicant has demonstrated that the qualifying relative would experience extreme hardship if separated from the applicant, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

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, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.