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



H6

DATE: OCT 19 2011 OFFICE: CIUDAD JUAREZ, MEXICO

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:

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 must 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 Field Office Director, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant does not contest this finding of inadmissibility. Rather, she seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse and their child.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Field Office Director's Decision*, dated January 30, 2009.

On appeal, the applicant's spouse asserts that he will experience emotional, medical, and financial hardship if the waiver is not granted. Notice of Appeal or Motion (Form I-290B). Specifically, the applicant's spouse states that he has been trying some way to solve the problem of getting the applicant permanent status in the United States. *Id.* The applicant's spouse also states that he does not know what to do anymore given that his wife has been in Mexico for so many years, waiting for a waiver and now they have to submit a new application. *Id.* Additionally, the applicant's spouse states that he cannot live without his wife and child, and that the only wrong that the applicant has done is to have entered the United States illegally to be with the applicant and their child. *Id.*

The record includes, but is not limited to: Notice of Appeal or Motion (Form I-290B); a letter of support from the applicant's spouse; copies of birth certificates; photographs; copies of medical prescriptions; copy of a burial plot receipt; copies of telephone bills; copies of remittances; an employment letter; airline stubs; Application for Waiver of Grounds of Inadmissibility (Form I-601); and Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

...

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

...

(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. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary] regarding a waiver under this clause.

The record establishes that the applicant entered the United States without inspection in or around May 2002 and remained until in or around November 2005, when she voluntarily departed. The AAO finds that the Field Office Director incorrectly calculated the timeframe for which the applicant accrued unlawful presence by finding, "The applicant unlawfully resided in and accrued unlawful presence in the United States from May 2002, when she entered the United States without inspection until November 2005, when the applicant voluntarily departed the United States." *Field Office Director's Decision, supra*. At the time of the applicant's entry without inspection into the United States, the applicant was approximately 17 years of age. Section 212(a)(9)(B)(iii) of the Act provides, in pertinent part that, an individual does not accrue unlawful presence while under 18 years of age. The applicant did not turn 18 years of age until April 16, 2003. Accordingly, the applicant did not accrue unlawful presence from in or around May 2002 through in or around November 2005, but from April 16, 2003 until in or around November 2005.

Nevertheless, the AAO finds that the Field Office Director's incorrect calculation of unlawful presence is harmless error given that the applicant still accumulated more than one year of unlawful presence by remaining in the United States without inspection from April 16, 2003 until in or around November 2005. As the applicant is seeking admission within 10 years of departure, she is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

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 record contains references to hardship the applicant's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

The applicant's spouse indicates that he has suffered extreme emotional hardship since the applicant and their child have been in Mexico and that he would like to be reunited with them as a family because he loves them very much and cannot live without them. *Letter of Support from [REDACTED]* undated; *see Photographs*. Additionally, the applicant's spouse indicates that because of their separation and his work obligations, he has been unable to be with the applicant for extended periods of time during difficult moments like the operation and resulting death of their other child. *Letter of Support from [REDACTED]*, *supra*. The applicant's spouse also indicates that a pediatrician was unavailable to assist with the care of his deceased child. *Id.* In support of his assertions, the applicant's spouse has submitted a funeral plot receipt and an employment letter. *Funeral Receipt*, dated March 28, 2007, indicating a burial plot for [REDACTED], who died on March 27, 2007; *see [REDACTED] Employment Letter from [REDACTED], Supervisor*, dated December 22, 2007, indicating that the applicant's spouse was on funeral-related leave from March 22 through April 11, 2007.

The applicant's spouse also indicates that he has suffered extreme medical hardship since the applicant and their son have been in Mexico because the applicant's spouse has a heart murmur. *Letter of Support from [REDACTED]* *supra*. However, the record does not contain any documentary evidence to establish that the applicant's spouse has a heart murmur of what impact such a medical condition may have on him. The applicant's spouse also indicates that his and the applicant's son suffers from a bad tooth and a skin illness, one that results in bleeding when their

son scratches. *Id.* In support of his assertions, the applicant's spouse has submitted a medical appointment notice and several medical prescriptions for his son. *Medical Appointment Notice from [REDACTED] Pediatrician*, indicating that the applicant's son has a medical appointment on Thursday, May 17, 2007 at 12:00 p.m.; *Medical Prescriptions for [REDACTED]*, dated May 11 and 14, August 3, November 18, and December 19, 2007, indicating the various medications, quantities, and times that the applicant's son was required to take the prescribed medications. Although the record supports the applicant's spouse's assertion that his son has a medical condition, there is no documentary evidence in the record showing the nature and severity of the medical condition. Nor is there any evidence that the applicant's son is unable to receive proper medical treatment in Mexico.

And, the applicant's spouse indicates that he has suffered financial hardship since the applicant and their son have been in Mexico because the applicant's spouse has had to maintain two households: his household in the United States, and the applicant and their sons' household in Mexico. *Letter of Support from [REDACTED], supra.* Also, the applicant's spouse indicates that he has tried to save money to buy a house, but it has been difficult because he only works three or four days each week. *Id.* In support of his assertions, the applicant's spouse has submitted several telephone bills, copies of remittances, and airline stubs. *TELMEX Telephone Bills*, dated July, August, October, and November 2006, and May 2007, indicating various phone charges to Mexico; *Verizon Wireless Bills*, dated September 22 and November 22, 2007, indicating various phone charges to Mexico; *Remittances*, dated March 22, April 5 and 26, August 2, October 26, and November 4 and 16, 2006, and February 5, 7, 10, March 17, April 19, July 18, September 19, October 3, 9, 18, 24, and 31, and November 14 and 30, 2007, indicating money being sent to Mexico; *AeroMexico Stub*, dated February 21, 2006 and *Delta Airline Stubs*, dated February 9 and October 4 (unknown year), indicating the applicant's spouse's travels to Mexico. The AAO notes that applicant's spouse's financial concerns.

The record is sufficient to establish that the applicant and her spouse have experienced the loss of a child, resulting in emotional hardship to the applicant's spouse. And, the AAO acknowledges that separation of the applicant's spouse from his family, following the death of his and the applicant's child, is a significant emotional hardship. In addition, the record reflects that the applicant's spouse is experiencing some financial hardship as a result of separation from the applicant. Considering these hardships, as well as the hardships normally associated with separation from an inadmissible family member, the AAO concludes that the continued separation from the applicant would result in extreme emotional hardship to the applicant's spouse.

However, the record does not contain sufficient evidence demonstrating how the applicant's spouse would experience extreme hardship if he were to relocate to Mexico. Neither the applicant nor her spouse has asserted that her spouse would endure hardship should he relocate to Mexico. In the absence of clear assertions from the applicant, the AAO may not speculate regarding the challenges that her spouse may face outside the United States. Moreover, the record indicates that the applicant's spouse has travelled to Mexico on a regular basis to visit the applicant and their child. *See [REDACTED] and [REDACTED], supra; see also [REDACTED] Employment Letter from [REDACTED] Supervisor, supra,* indicating the applicant's spouse's

travels to visit the applicant and their child in Mexico throughout 2007. Additionally, the record does not contain any country conditions information concerning economic and social conditions as well as the applicant's spouse's employment opportunities in Mexico. Based on the record, the AAO cannot conclude that the applicant's spouse's relocation to Mexico would result in extreme hardship to the applicant's spouse. The applicant bears the burden of showing extreme hardship to a qualifying relative in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361.

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.