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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: **OCT 28 2011** Office: SAINT PAUL, MN

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 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.

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, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Mexico and a citizen of Mexico and Italy, who was found inadmissible to the United States under section 212(a)(9)(B)(i)(I) or (II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I) or (II), for having been unlawfully present in the United States for the requisite period of time. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Field Office Director*, dated March 6, 2007.

On appeal, counsel asserts that a request for an extension of time for submission of additional evidence had been improperly denied, and that the evidence now in the record, which includes evidence submitted on appeal, demonstrates that removal of the applicant from the United States will cause extreme hardship to his wife. *Form I-290B*, received April 3, 2007.

The record includes, but is not limited to, the applicant's spouse's statements, the applicant's statement, statements of support, statements from a social worker, statements from nurse practitioners, a settlement statement and financial records. The entire record was reviewed and considered in rendering a decision on the appeal.

Initially, the AAO notes that the evidence that counsel wished to provide and asked the field office director to abide is now in the record, and that all of the evidence now in the record will be considered. The AAO need not, therefore, analyze whether the field office director's denial of counsel's second motion for an extension of time for the submission of additional evidence constituted error. Whether or not it was error, the evidence will now be considered, and the failure to grant the motion has not, therefore, substantially prejudiced the applicant's case.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

At his adjustment interview, conducted on October 3, 2006 by an officer of USCIS, the applicant admitted that he had entered the United States without inspection in or around March 2002 and remained until his departure in December 2002 or January 2003. The applicant's presence from in or around March 2002 through either December 2002 or January 2003 was unlawful and apparently exceeded six months.

He further admitted that he had entered the United States on March 22, 2004 and remained until October 12, 2004. A stamp in the applicant's passport confirms that he was admitted to the United States on March 22, 2004 with permission to remain for 90 days, which permission was effective through June 20, 2004. That applicant's presence from June 21, 2004 through October 12, 2004 was therefore unlawful. That period of unlawful presence was less than six months.

The applicant admitted that he returned to the United States on October 13, 2004, the day following his departure, and that he has remained in the United States since. A Form I-94W Visa Waiver Departure Record confirms that the applicant entered the United States on October 13, 2004 with permission to remain in the United States until January 11, 2005, after which his presence became unlawful.

The applicant filed a Form I-485 Application to Adjust Status on July 3, 2006. That filing abated his unlawful presence. *See Memo. from Donald Neufeld, Acting Assoc. Dir., Domestic Ops. Directorate, US Citizenship and Immigration Services, US Dept. Homeland Sec., to Field Leadership, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, at 33, dated May 6, 2009. When that application was denied on February 2, 2007, the applicant's presence in the United States again became unlawful.

The applicant was therefore additionally unlawfully present in the United States from January 11, 2005 through July 3, 2006, and has been unlawfully present in the United States since February 2, 2007. Those two periods of unlawful presence exceed one year. Unlawful presence for more than one year would typically result in inadmissibility to the United States for ten years. However, as per section 212(a)(9)(B)(i) of the Act, that inadmissibility is only triggered by a voluntary departure from the United States. The applicant has not left the United States since his unlawful presence of more than one year, and is not, therefore, inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

As noted above, the record reflects that the applicant entered the United States without inspection in or around March 2002 and departed the United States in December of 2002 or January of 2003. The applicant accrued unlawful presence during this entire period of time. The applicant subsequently departed the United States voluntarily during one or the other of those months. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully

present in the United States for a period of more than 180 days but less than 1 year more and seeking readmission within three years of his departure from the United States. Although that inadmissibility was triggered more than three years ago, the AAO notes that inadmissibility under section 212(a)(9)(B)(i)(I) remains in force until the alien has been absent from the United States for three years. Further, as explained above, although the applicant was admitted to the United States pursuant to the Visa Waiver Pilot Program (VWPP) on October 13, 2004, he was only authorized to remain in the United States until January 11, 2005 and he has accrued additional unlawful presence since that time. Allowing an alien to meet the time requirement of the bar to his admission while simultaneously accruing additional unlawful presence in the United States is incongruent and rewards recidivism, which the AAO deems contrary to the congressional intent underlying the creation of section 212(a)(9) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

The record contains an additional issue that was not discussed in the decision of denial. The applicant's entry on October 13, 2004 was pursuant to the VWPP. The applicant was not authorized to work in the United States pursuant to that classification. A Form G-325A, which the applicant signed on June 29, 2006, indicates that the applicant began working at McCoy's Public House, in St. Louis Park, Minnesota, during April of 2004 and was working there as of the date he signed the Form G-325A. At his October 3, 2006 interview, the applicant confirmed that employment history. That the applicant had a pre-existing relationship with a United States citizen and resident, that he had children living in the United States, and that he engaged in employment upon entering the United States all suggest that he intended to live and work in the United States when he entered on October 13, 2004, and that he misrepresented his immigrant intent in obtaining permission to enter, and entering, as a nonimmigrant pursuant to the VWPP.

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

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The Department of State Foreign Affairs Manual states,

[I]n determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application.

The Department of State developed the 30/60-day rule which applies when, an alien enters the United States and conducts him or herself in a manner incompatible with the intent asserted to gain entry. *DOS Foreign Affairs Manual*, § 40.63 N4.7(a)(1) at § 40.63 N4.7-1(3). The rules states, in pertinent part:

If an alien initiates such violation of status occurs more than 30 days but less than 60 days after entry into the United States, no presumption of misrepresentation arises. However, if the facts in the case give the consular officer reasonable belief that the alien misrepresented his or her intent, then the consular officer must give the alien opportunity to present countervailing evidence." Id. at § 40.63 N4.7-3. "When violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility." Id. at § 40.63 N4.7-4.

If the violation occurs within the first 30 days, there is a presumption of misrepresentation. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. Therefore, the AAO finds that the applicant, who, having entered the United States on October 13, 2004 and began working immediately, misrepresented his intent upon entry and is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act. Inadmissibility under section 212(a)(6)(C)(i) of the Act is permanent. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The remainder of this decision will address whether waiver of the applicant's inadmissibility under section 212(a)(9)(B)(i)(I) of the Act and section 212(a)(6)(C)(i) of the Act is available, and, if so, whether the waiver of inadmissibility should be granted.

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

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 to the satisfaction of the Attorney General 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(i)(1) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident spouse or parent of such an alien . . ."

A waiver of inadmissibility under sections 212(a)(9)(B)(v) or 212(i)(1) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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.

In her statement, the applicant's wife stated, "One of the primary reasons why I would not leave the USA is because my entire family lives [in the United States]." She states that her mother, brother, sister, grandmother, aunts and uncles live in the Twin Cities; she has a close-knit family; they spend a majority of their time together; and her children play with her relatives' children. The AAO notes that, according to a G-325A Biographic Information form in the record, which she signed on June 29, 2006, the applicant's wife lived in Mexico from approximately 1999 to October 2001, and from December 2002 to March 2003. There is no evidence that she experienced difficulty while residing in Mexico previously. The applicant has provided no further evidence pertinent to any hardship his wife would suffer from living outside of the United States. The evidence submitted does not demonstrate that, if the applicant is removed from the United States and his wife departs to join him in either Mexico or Italy, she will suffer extreme hardship.

The record contains a portion of a HUD-1 Settlement Sheet that states that the applicant and his wife went to settlement on the purchase of a house for \$250,000 on April 27, 2007. That document also indicates that the applicant and his wife placed a \$250,000 mortgage on their property. The applicant's wife has stated that if the applicant is removed from the United States and she is obliged to forego his income contribution, she will suffer financial hardship and lose the family home. Form W-2 Wage and Tax Statements in the record show that the applicant's wife earned \$11,601.75 during 2004 and \$17,401.53 during 2005. A 2004 Form 1040A shows that the applicant's wife filed as a single taxpayer during that year and declared total income of \$11,601, which corresponds to the amount shown on her W-2 forms, rounded. The record does not contain a 2004 tax return or W-2 form for the applicant. The joint 2005 Form 1040A U.S. Individual Income Tax Return of the applicant and his wife shows that they declared total income of \$17,401, which corresponds to the amount the applicant's wife earned during that year, rounded. This indicates that the applicant did not declare any income in the United States during that year. The record also contains employment verification letters showing that the applicant's wife is employed, and pay statements showing her income. The record is not clear as to the applicant's income.

The record contains an affidavit, dated February 16, 2007, from the applicant's wife. In it, she stated that if she remains in the United States without the applicant she "would lose [their] home and have

to move in with a family member.” She stated that she and the applicant have signed a contract to purchase a property, and that they intend to live in that house and give up their apartment. She noted that she has various expenses and stated that her salary and tips are insufficient to support her family without the applicant’s contribution. She stated that without the applicant’s income she would be unable to keep her older daughter in pre-school. She also stated that her husband cares for their children when she is at work. Finally, she stated, “I . . . would be devastated if he had to leave.”

The record contains a letter, dated January 11, 2007, from [REDACTED] in Minneapolis. In that letter [REDACTED] stated that she worked with the applicant’s wife during her first pregnancy, intermittently after that pregnancy, and then more frequently during the applicant’s wife’s second pregnancy. She stated that more recently she has been seeing her pertinent to issues related to the potential removal of the applicant.

The record contains a letter, dated March 26, 2007, from [REDACTED] a certified nurse practitioner at the same clinic [REDACTED] stated that the applicant’s wife came to her complaining of mood issues, and that the prospect of her husband leaving the United States caused the applicant’s wife emotional turmoil. She stated that the applicant’s wife was crying routinely and professed inability to care for herself. She further stated that the applicant’s wife reported that she was sleeping most of the day, smoking more than before, was irritable, and has no energy and no sexual desire. [REDACTED] also noted that the applicant’s wife has spoken with [REDACTED]. [REDACTED] She stated that the applicant’s wife denied any suicidal ideation. [REDACTED] diagnosed the applicant’s wife with situational depression and prescribed an anti-depressant.

The record contains a letter, dated March 30, 2007, from [REDACTED]. [REDACTED] stated that the applicant’s wife has anhedonia, that she has been sleeping 10 to 12 hours at night and been napping during the day, has been irritable and emotional, has no desire to leave her house, is overwhelmed by public places, has been unable to complete household tasks, and has not been caring for her daughters as well as she did previously. [REDACTED] stated that the applicant’s wife has decreased appetite and has lost approximately 20 lbs. [REDACTED] stated that the applicant’s wife spends time thinking about how she will care for her family if the applicant is obliged to leave the United States. [REDACTED] diagnosed the applicant’s wife with Major Depressive Episode.

The record contains a letter, dated March 30, 2007, from [REDACTED], a certified pediatric nurse practitioner, who stated that the applicant has brought the children to the clinic since they were infants and that the applicant is the primary caregiver for the children. [REDACTED] stated that it “is concerning to break up this kind of family especially when the father has been so instrumental in the children’s wellbeing. Noting that the applicant’s older child was then preparing to enter kindergarten, [REDACTED] further stated,

Given the stress of the family separation, [the applicant’s older child] will be predisposed to have academic issues and behavioral problems. Kindergarten can be a very stressful time for children and to have her family disrupted at such a crucial developmental time in her life could have devastating results.

██████████ stated that, in general, single-parent households subject the remaining parent to greater stress than do two-parent households, and that removal of the applicant might have “devastating results.”

The record reflects that the applicant’s spouse is experiencing mental health issues. She would have to raise the two children without the assistance of the applicant and, given that the applicant has been the primary caregiver for the children, the children may experience difficulty without the applicant. In addition, the record reflects that the applicant’s spouse is likely to have difficulty paying her mortgage and other living expenses based on her salary. When considering these factors, in addition to the normal results of separation from a spouse, the AAO finds that the applicant’s spouse would experience extreme hardship if she remained 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(s) in this case.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and INA § 212(i), 8 U.S.C. § 212(i), and that a waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.