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

[REDACTED]

H6

Date: **OCT 28 2011**

Office: CIUDAD JUAREZ

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, 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, 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 Nicaragua who was found to be inadmissible to the United States under 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; section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed; and section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failure to attend removal proceedings.

The director stated that the applicant is eligible for a waiver for inadmissibility for unlawful presence and for removal from the United States. However, the director found that the applicant is statutorily inadmissible to the United States for five years from September 7, 2006, which is the date of his last departure, because he failed to attend his immigration hearing on January 8, 2003. Finding the applicant to be statutorily ineligible for a waiver until September 7, 2011, the Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

On appeal, counsel contends that the director was incorrect in finding the applicant statutorily inadmissible under section 212(a)(6)(B) of the Act. Moreover, counsel states that the director erred in failing to provide the applicant with an opportunity to establish "good cause" for failing to attend his immigration hearing. Finally, counsel avers that the director erred in denying the applicant's waiver under section 212(a)(9)(B)(v) of the Act.

The AAO will first address the finding of inadmissibility for unlawful presence, which is found under section 212(a)(9) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - 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 . . . 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.

....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection on July 2, 2002. The applicant was placed in removal proceedings under section 240 of the Act. On July 3, 2002, a Warrant for Arrest of Alien was issued. On July 3, 2002, the applicant was personally served with the Notice to Appear before an immigration judge. On August 26, 2002, the Notice of Hearing in Removal Proceedings was issued to the applicant for a master hearing on January 8, 2003. On January 8, 2003, the applicant failed to appear and immigration judge ordered his removal *in absentia* from the United States. On January 8, 2003, a warrant of removal was issued. On September 7, 2006, the applicant was removed from the United States.

In sum, the record shows that the applicant accrued unlawful presence from July 2, 2002 until September 7, 2006, and his removal triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

The applicant was also found to be inadmissible under sections 212(a)(6)(B) of the Act for failure to attend removal proceedings, and section 212(a)(9)(A)(ii) of the Act for having been previously removed from the United States.

Section 212(a)(6)(B) of the Act states:

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

Section 212(a)(9)(A)(ii) of the Act relates to aliens previously removed, and it states:

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date

of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who--

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

We note the regulation under 8 C.F.R. § 212.2(a), consent to reapply for admission after deportation, removal or departure at Government expense, states:

Any alien who has been deported or removed from the United States is inadmissible to the United States unless the alien has remained outside of the United States for five consecutive years since the date of deportation or removal. . . . Any alien who has been deported or removed from the United States and is applying for a visa, admission to the United States, or adjustment of status, must present proof that he or she has remained outside of the United States for the time period required for re-entry after deportation or removal. . . . any alien who is seeking to enter the United States prior to the completion of the requisite five- or twenty-year absence, must apply for permission to reapply for admission to the United States as provided under this part.

Section 212(a)(9)(A)(i) and (ii) of the Act bars deported aliens from seeking readmission for a specified period of time unless they first obtain Attorney General's permission. Thus, based on the plain language of section 212(a)(9)(A)(iii) of the Act, an alien shall not be ineligible for a visa under section 212(a)(9)(A)(i) or (ii) of the Act if the Attorney General has consented to the alien's application for early admission.

Inadmissibility under section 212(a)(6)(B) of the Act for failure to attend removal proceedings is to be read in conjunction with section 212(a)(9)(A) of the Act. *See e.g. Peralta-Cabrera v. Gonzales*, 501 F.3d 837 (7th Cir. 2007) (under section 212(a)(6)(B) of the Act deported aliens are barred from seeking readmission for five years unless they obtain Attorney General's permission to apply for

earlier admission). *See also Lopez-Flores v. Dep't of Homeland Sec.*, 387 F.3d 773, 777 & n. 4 (8th Cir. 2004), (aliens who have been “arrested and deported” pursuant to 8 U.S.C. § 1182(a)(6)(B) are inadmissible, absent the consent of the Attorney General, unless they wait at least five years to reenter,” citing 8 C.F.R. § 212.2(a). Thus, pursuant to 8 C.F.R. § 212.2(a) since the applicant in the instant case has remained outside of the United States for five consecutive years since the date of his removal, he is no longer inadmissible under section 212(a)(6)(B) of the Act.

We have determined that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence. The waiver for unlawful presence is under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

The waiver under section 212(a)(9)(B)(v) 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. Thus, hardship to the applicant will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *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.

In rendering this decision, the AAO will consider all of the evidence in the record, which consists of invoices, medical records, letters, and other documentation.

On appeal, counsel stated that the applicant lived in Nicaragua until July 2002. Counsel further stated that the applicant married his U.S. citizen wife on April 4, 2005, and for medical reasons they have not been able to have children. Counsel declared that the applicant’s wife was diagnosed with major depressive disorder since separation from the applicant. Counsel indicated that the applicant’s spouse is from Managua, Nicaragua, and lived in the United States since 2000, and will not live in Nicaragua due to its poverty and economic problems and the applicant’s wife’s having to give up her dream, which is to have an education and obtain a job. Counsel stated that the applicant supported his wife in graduating from high school and starting college.

The applicant stated in the unsigned letter dated September 26, 2007 that he met his wife through his stepmother, who is his wife’s sister. He further stated that in November 2003 they started a romantic relationship and married on April 4, 2005. The applicant declared that he supported his wife while she studied, and that his wife cannot afford to visit him and has sent him money.

The applicant's wife conveyed in the letter dated August 30, 2007 that she has a close relationship with her husband and began living with him on May 1, 2004. The applicant's wife stated that she misses her husband and was at work when he was arrested. She indicated that she had to "stop attending school because of economic problems and because of emotional problems, being that I can't concentrate in the things that I do." The applicant's wife stated that they want to have children and a better lifestyle for their children; however, the professional positions which are required for this to happen are limited in Nicaragua.

stated in the letter dated May 7, 2009 that the applicant's wife has been under her care for psychiatric symptoms since January 2009. diagnosed the applicant's wife with major depressive disorder. She stated that the applicant's wife reported feeling anxiety, sadness, lack of energy, inability to concentrate, and having passive death wishes and excessive worries. indicated that the applicant's wife stated that her emotional problems began in 2006 when her husband was deported to Nicaragua and have increased due to their separation.

Lastly, the record contains receipts reflecting that the applicant received a total of approximately \$247 in money grams from his wife in 2008 and 2009, and \$90 in 2006. The record also contains invoices, one of which reflects that the applicant's wife has a loan balance of \$20,000. Medical records show that the applicant's wife was seen in 2003 for a neurological consultation for

The stated hardships to the applicant's wife are emotional and financial in nature. The record reflects that the applicant's wife received treatment from . However, besides the letter from the applicant has not submitted any other evidence consistent with his wife's assertions that separation from the applicant has affected her education and ability to concentrate. Further, the submitted invoices are not enough to demonstrate that the applicant's wife's income is not sufficient to meet her monthly financial obligations. While the AAO recognizes that the applicant's wife will experience emotional hardship due to separation from her husband, the applicant has not fully demonstrated that her hardship is more than the common or typical result of inadmissibility. Furthermore, while it is stated that the applicant's wife will experience hardship in Nicaragua due to its economic problems, no documentary evidence has been submitted in which to show economic conditions in Nicaragua and how those conditions would impact the applicant's and his wife's employment prospects. The applicant has therefore not shown that they will not be able to obtain a job in Nicaragua for which they are qualified and that will provide an adequate income to ensure a decent standard of living. Thus, when all of the hardship factors are considered together, we find they fail to demonstrate extreme hardship to the applicant's wife for purposes of relief under section 212(a)(9)(B)(v) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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 remains entirely with the applicant. See Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.