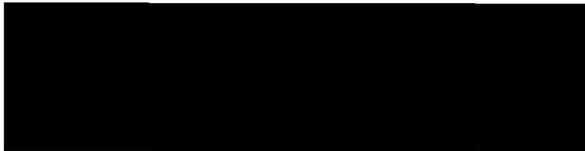




U.S. Citizenship
and Immigration
Services

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tho

Date: **SEP 28 2011**

Office: CIUDAD JUAREZ

FILE: 

IN RE: 

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:



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,

Michael Shumway

for Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Ciudad Juarez, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 admission within 10 years of her last departure from the United States. The applicant 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 in the United States with her U.S. citizen spouse.

The field office director concluded that the applicant had failed to establish that her bar to 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) accordingly.

On appeal, counsel asserts that the applicant has established extreme hardship to her spouse if her waiver application is denied.

In support of the application, the record contains, but is not limited to, a statement from the applicant, a statement from the applicant's spouse, medical documentation, financial documentation, the applicant's marriage certificate, the applicant's spouse's naturalization certificate, photographs, a letter from the applicant's church, evidence of remittances to the applicant, and statements from the applicant's friends and family members. The entire record was reviewed and considered in rendering a 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 [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 record shows that the applicant entered the United States without inspection in May 2002. The applicant remained in the United States until her departure in July 2007. The applicant accrued unlawful presence of over five years from May 2002 until July 2007. The applicant is attempting to seek admission to the United States within ten years of her July 2007 departure. The applicant is, therefore, inadmissible under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for a period of more than one year and seeking admission to the United States within ten years of her last departure. The applicant does not dispute her inadmissibility on appeal.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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-Moralez*, 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.

On appeal, counsel asserts that the applicant suffers from infertility and has poly-cystic ovarian syndrome. Counsel notes that the applicant receives medical benefits through her husband’s employment. Counsel states that the applicant and her spouse were able to use medical benefits to start infertility treatment while the applicant lived in the United States. Counsel states that according to the applicant’s physician in Mexico, the applicant and her spouse must reside together to receive fertility treatments. Counsel contends that the applicant’s spouse is suffering from financially supporting two households and the difficulty of visiting the applicant in Mexico. Counsel states that the stress from separation and attempts to conceive a child as well as the applicant’s spouse’s work schedule “has resulted in intolerable conditions.”

The applicant asserts in a letter dated January 4, 2009 that when she speaks with her spouse, he is tired and depressed. She states that they have suffered emotionally from not being able to have children. She notes that since their separation, the applicant has been able to visit her in Mexico on only three occasions.

The applicant’s spouse asserts in a letter dated January 8, 2009 that his wife has been receiving treatments for pregnancy, but now that they are separated it has become more difficult for them to have children. He states that he is sad and alone without the applicant. He notes that the applicant would help him with cooking, cleaning, and washing his clothes.

Counsel asserts that all of the applicant's spouse's friends and family reside in the United States. Counsel states that the applicant's spouse was raised in the United States, and has no ties to Mexico. Counsel notes that the applicant has established ties to his community in Iowa. Counsel states that the applicant's spouse worries that if he relocated to Mexico, he would not be able to find employment. Counsel states that the cost of living in Mexico is low, but it is difficult to find employment, health care and schooling. Counsel states that the applicant's spouse would need to sell all of his possessions in the United States and terminate his employment.

The record shows that the applicant's spouse is gainfully employed with [REDACTED] in [REDACTED] Iowa. An employment verification letter form [REDACTED] dated January 8, 2009 states that the applicant's spouse has been employed as a maintenance worker at the [REDACTED] Iowa since May 24, 2004. The letter notes that he is working 48 hours a week and earning \$17.00 per hour (or \$42,432 annually). As stated, the record reflects that the applicant's spouse is receiving medical benefits from his employment. Further, the record contains a letter from an [REDACTED] stating that the applicant's spouse graduated from the school and is a "productive, responsible citizen of the [REDACTED] Community." Finally, the record contains numerous supporting letters from the applicant's spouse's friends and family members, including the applicant's spouse's parents who reside in [REDACTED] Iowa.

The AAO acknowledges that the applicant's spouse is experiencing emotional hardship as a result of his separation from the applicant. The applicant and her spouse have described their strong family bond and interests in keeping their family unified. They have also discussed the emotional hardship they have suffered from not being able to conceive a child. The record contains a letter from the [REDACTED] Des Moines diagnosing the applicant with poly-cystic ovarian syndrome, and discussing the planned medical procedures to treat the applicant's infertility. An employee benefits statement from the applicant's spouse reflects that the applicant was receiving health benefits as his dependent, which counsel asserts was being used to start fertility treatments. The record shows that after the applicant returned to Mexico, she continued to seek fertility treatments, but was informed that the applicant's presence is necessary to for the treatment. A letter from the applicant's gynecologist in Mexico, [REDACTED] states that the fertility treatment "requires the coexistence of emotional and sexual stability." The record shows that the applicant's separation from her spouse has caused him to suffer emotional hardship because it has resulted in their inability to continue with fertility treatments to conceive a child. The loss of the applicant's spouse's employment and the severance of ties from his friends and family members would be a hardship he would suffer if he relocated to Mexico.

Accordingly, we find that the applicant has established that denial of the present waiver application would result in extreme hardship to her spouse, as required for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be

considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the applicant's unlawful entry and presence in the United States. The positive factors in this case include hardship to the applicant's spouse if the waiver application is denied. While the applicant's immigration violations cannot be condoned, we find that the positive factors outweigh the negative factors such that a favorable exercise of discretion is warranted 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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.