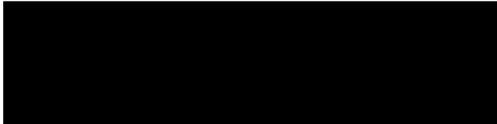


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **SEP 30 2011**

Office: ALBUQUERQUE

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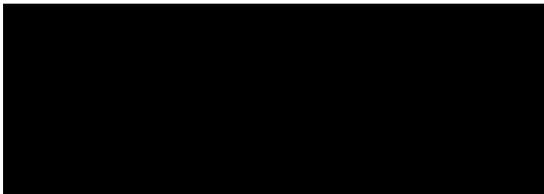
IN RE:

Applicant: 

APPLICATION:

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

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,

Perry Rhew
Chief, Administrative Appeals Office

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

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 again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

In a decision dated April 20, 2009, the Field Office Director found that the applicant failed to establish that his qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director* dated April 20, 2009.

On appeal, the applicant's attorney submitted a brief in support of the applicant's waiver application. The applicant's attorney asserted that qualifying spouse would suffer medical and financial hardships if the applicant were to return to Mexico due to his inadmissibility. Further, the applicant's attorney also contended that the qualifying spouse would face medical hardships upon relocation, and that she has close ties or "roots" to the United States but has no ties to Mexico.

The record contains an approved Petition for Alien Relative (Form I-130), an Application for Waiver of Grounds of Inadmissibility (Form I-601), a Notice of Appeal (Form I-290B), affidavits from the qualifying spouse, medical documentation regarding the qualifying spouse, financial documentation regarding the qualifying spouse's personal and business issues, documentation regarding the qualifying spouse's legal disputes, briefs in support of the applicant's waiver, affidavits from the qualifying spouse's daughter, letters from the qualifying spouse's doctor, a birth certificate for the qualifying spouse, an affidavit from the applicant and documentation submitted in conjunction with the Application for Adjustment of Status (Form I-485).

Section 212(a)(9)(B) 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.

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.

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. 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 applicant’s qualifying relative in this case is his wife, who is a United States citizen. The record indicates that the applicant entered the United States without inspection in September 2001, and remained until November 2006, when he voluntarily departed. The applicant accrued unlawful presence from September 2001 to November 2006, a period in excess of one year. In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States.¹ The applicant has not disputed his inadmissibility. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year.

The documentation submitted relating to the potential hardships facing the applicant’s spouse includes Form I-601, Form I-290B, affidavits from the qualifying spouse, medical documentation regarding the qualifying spouse, financial documentation regarding the qualifying spouse’s personal and business issues, documentation regarding the qualifying spouse’s legal disputes, briefs in support of the applicant’s waiver, affidavits from the qualifying spouse’s daughter, letters from the qualifying spouse’s doctor, an affidavit from the applicant and documentation submitted with Form I-485.

As previously stated, the applicant’s attorney asserted that the qualifying spouse would suffer medical and financial hardships if the qualifying spouse were to remain in the United States without the applicant. Further, the applicant’s attorney also contended that the qualifying spouse would face

¹ The applicant returned to the United States on December 11, 2006 on Humanitarian Parole.

medical hardships upon relocation, and that she has close ties to the United States but has no ties to Mexico.

The AAO finds that the applicant has established that the qualifying spouse would suffer extreme hardship as a consequence of being separated from him. With respect to the medical hardships claimed by the applicant's attorney, the record contains affidavits and letters from the applicant and the qualifying spouse, the qualifying spouse's doctor, and the qualifying spouse's daughter. The record also consists of a letter from the qualifying spouse's insurance company, confirming her disability status, and medical documentation, including two neurological evaluations. The qualifying spouse indicates that she is "completely dependent on my husband to care for me and to provide me with transportation." The record established that the qualifying spouse has been diagnosed with Toxic Brain Syndrome, and has had several other medical conditions. The doctor's letter indicates that the qualifying spouse has "debilitating chemical sensitivity, and becomes severely ill whenever she is exposed to everyday chemicals." Further, he states that she "requires constant care and supervision" as she continues to have "incapacitating episodes." The record also established that the qualifying spouse is currently receiving immunotherapy for her illness, and that she continues to have reoccurrences of similar problems related to her diagnosis of Toxic Brain Syndrome.

The applicant's attorney also asserts that the qualifying spouse is suffering financially due to the applicant's inability to currently work in the United States. The record contains financial documentation including tax returns and a letter from the qualifying spouse's accountant. The applicant's attorney also provided more current financial information on appeal relating to the qualifying spouse's termination of disability benefits due to her age, and her debt to the insurance company. It appears that the qualifying spouse was primarily living off her disability payments, along with some contributions by the applicant. However, the qualifying spouse is no longer receiving disability benefits and her medical issues make it difficult for her to work outside the home. The applicant has demonstrated that the qualifying spouse needs financial assistance to pay for her expenses. Furthermore, on appeal, the applicant's attorney also provided documents demonstrating that the qualifying spouse may lose her home to foreclosure. The applicant provided sufficient evidence to establish that the qualifying spouse would suffer extreme hardship, in light of her medical and financial hardships, if she were to remain in the United States without the applicant.

The AAO also finds that the qualifying spouse would suffer extreme hardship in the event that she relocates to Mexico. The applicant's attorney asserted that the qualifying spouse would encounter medical issues if she were to relocate to Mexico. The record contains medical documentation, such as letters from her doctor and medical records, confirming that the qualifying spouse could potentially suffer due to her medical issues if she relocates. Further, the record reveals that the qualifying spouse has had past problems due to her medical condition when she traveled to Mexico. The qualifying spouse's doctor states that "her risks of severe reaction or death are far higher [in Mexico]" due to its pollution. The letter from the qualifying spouse's doctor also indicates that her immunotherapy treatments, which she receives in the United States, are not available in Mexico. Moreover, the applicant's qualifying spouse has lived in the United States for her entire life, and has

three United States citizen children. Therefore, the qualifying spouse will suffer extreme hardship in the event that she relocates to Mexico.

Considered in the aggregate, the applicant has established that his wife would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States, his support from the qualifying spouse and her

family. The unfavorable factors in this matter are the applicant's accrual of unlawful presence in the United States.

Although the applicant's violation of the immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.