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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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**U.S. Citizenship
and Immigration
Services**



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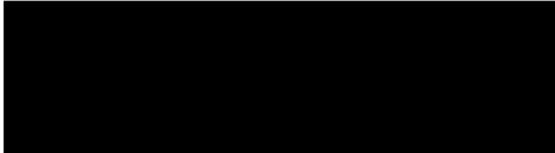
DATE: **FEB 17 2012** Office: HARLINGEN, TX

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,

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, Harlingen, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico. The applicant states she entered the U.S. on October 1, 1997 with a border crossing card. She remained unlawfully in the U.S. until December 2001, at which time she returned to Mexico. The applicant states that she reentered the U.S. in January 2002. She has not departed the country since that date. The applicant 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 U.S. for more than one year and seeking readmission within 10 years of her departure from the U.S. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). She 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 live in the U.S. with her spouse and family.

In a decision dated September 18, 2009, the director concluded the applicant had failed to establish that her husband would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that section 212(a)(9)(B)(i)(II) of the Act applies only to aliens who have been previously removed from the U.S. Counsel asserts that the provision does not apply to the applicant because she departed the U.S. in 2001 of her own volition. On this basis, counsel concludes the applicant is not inadmissible. In the event that the applicant is found to be inadmissible, counsel asserts that the evidence establishes her husband will experience extreme emotional, financial and physical hardship if she is denied admission into the United States. To support these assertions counsel submits affidavits, financial and medical evidence, as well as evidence relating to her two sons, photos, and letters attesting to the applicant's good character. 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) [A]ny 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or

paroled.

Counsel asserts on appeal that section 212(a)(9)(B)(i)(II) of the Act applies only to aliens who have been previously removed from the U.S., and that because the applicant departed the U.S. in 2001 of her own volition, section 212(a)(9)(B)(i)(II) of the Act does not apply to her. Specifically, counsel indicates that the general heading for section 212(a)(9) of the Act is, “Aliens Previously Removed” and that the general heading necessarily extends its scope to all of the provisions contained in section 212(a)(9) of the Act. Counsel asserts any other reading of the statute would be contrary to rules of statutory construction and would reward dishonesty. Counsel cites to general case law discussing construction of statutory provisions. She does not cite case law specifically holding that section 212(a)(9)(B)(i) of the Act applies only to aliens that have been removed.

The AAO is unpersuaded by counsel’s assertions. In its decision, *In re Lemus-Losa*, 24 I. & N. Dec. 373 (BIA 2007), the Board of Immigration Appeals (BIA) clearly held that the heading of section 212(a)(9) does not limit the application of the text of section 212(a)(9)(B)(i)(II). The BIA stated in pertinent part:

We reject the respondent's contention that the bar to admissibility in section 212(a)(9)(B)(i)(II) does not apply to him because the title of section 212(a)(9) refers to “Aliens previously removed.” In that regard, it is well settled that the heading of a section cannot limit the plain meaning of the text, and it is of use only when it sheds light on some ambiguous word or phrase. *See, e.g., Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). While some of the provisions of section 212(a)(9) do explicitly refer to previously removed aliens, *see, e.g.,* sections 212(a)(9)(A)(i), (ii)(I), and (C)(i)(II) of the Act, the plain language of section 212(a)(9)(B)(i)(II) also renders inadmissible an alien who has at least 1 year of unlawful presence and “who again seeks admission within 10 years of the date of [his] *departure or removal* from the United States.”

[W]e construe the plain language of section 212(a)(9)(B)(i)(II) of the Act to encompass any “departure” from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding. . . . [T]he use of the term “departure” in that section appears to be designed as a shorthand means of incorporating both types of departure (i.e., voluntary departure and all other departures) that are set forth immediately above in section 212(a)(9)(B)(i)(I) [T]he heading of section 212(a)(9) does not limit the application of the text of section 212(a)(9)(B)(i)(II)

Id. at 376-77.

In the present matter the record supports a finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act in that the applicant states in a July 21, 2009, adjustment of status related sworn statement, as well as on her Form I-601, that she entered the U.S. in October 1997 and remained unlawfully in the U.S. until December 2001, at which time she departed the U.S. She subsequently reentered the U.S. in January 2002, and she has remained in the U.S. since that time.

Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. In the present matter, the applicant was unlawfully present in the U.S. for over one year between October 1997 and December 2001.¹ She has remained outside of the U.S. for less than ten years. She is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

Waiver.-The Attorney General 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.

The applicant is married to a U.S. citizen. Her spouse is a qualifying relative for section 212(a)(9)(B)(v) of the Act, waiver of inadmissibility purposes.

The record contains references to hardship the applicant's children 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 under section 212(a)(9)(B)(v) of the Act. Accordingly, hardship to the children will be considered only to the extent that it causes the applicant's spouse to experience hardship.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

¹ The applicant indicates in her sworn statement that she was in possession of an I-94 permit that allowed her to remain in the U.S. lawfully for 6 months from October 1997 through April 1998. There is no documentary evidence in the record to support this claim. It is further noted that such evidence would not change the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, as more than a year of unlawful presence occurred between April 1998 and December 2001.

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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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 BIA 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 BIA 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).

Though hardships may not be extreme when considered abstractly or individually, the BIA 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.

Through counsel, the applicant asserts on appeal that her husband will experience extreme emotional, physical and financial hardship if she is denied admission into the United States. Counsel asserts that the applicant provides emotional support to her husband and that she helps him to run their various businesses. Counsel indicates that the applicant is also the primary caregiver for their children, and that it would cause the children and the applicant's husband emotional hardship if the applicant were denied admission into the U.S. Counsel asserts further that the applicant is from Tamaulipas, Mexico and that country conditions in that part of Mexico are increasingly dangerous due to drug cartel violence and crime. Counsel indicates that if the applicant's husband moved with his family to Mexico, it would be difficult as well as dangerous for him to travel back and forth for work between the U.S. and Mexico. Counsel additionally indicates that the applicant's children would have inferior educational opportunities and resources in Mexico. In support of these claims the record contains affidavits, financial and medical evidence, as well as photos and hardship evidence relating to the applicant's two sons and letters attesting to the applicant's good character. The record additionally contains Mexico country-conditions information and general articles on dyslexia, attention deficit/hyperactive disorder in children and on the financial effects of divorce.

The applicant's husband states in an affidavit that he and the applicant have been married since 1997 and that they have two children together. The applicant's husband depends on the applicant for emotional support. She also helps him with accounting related to his construction company and with managing their restaurant. In addition, the couple recently purchased apartments they plan to rent out, which the applicant will help to manage. The applicant's husband is often away from home working on construction projects, and he relies on the applicant to be the primary caregiver for their children. He also indicates his sons would be emotionally affected if they became separated from their mother.

The record contains financial documentation reflecting that the applicant and her husband are property owners and that they own and operate a restaurant and a construction company. The record also contains a Speech, Language and Learning Center evaluation and school letter reflecting that the applicant's oldest son has dyslexia, and that in addition to the necessary resources provided to him through his school, the applicant is a valuable asset in helping her son receive all available help for his condition.

Psychological evaluation evidence contained in the record states that the applicant's husband shows symptoms of severe depression, hopelessness and anxiety due to his wife's immigration situation. The applicant's husband is diagnosed with major depressive disorder, single episode; and insomnia. The evaluation diagnoses the applicant's sons with adjustment disorder with mixed

anxiety and depressed mood. The applicant is diagnosed with major depressive disorder, single episode; and insomnia.

Upon review, the AAO finds that the evidence in the record, when considered in the aggregate, establishes the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the United States, and her husband remained in the U.S., separated from the applicant, or if he relocated with his family to Mexico.

The record reflects that the applicant is from Tamaulipas, Mexico, and that the applicant's husband fears for her safety in Tamaulipas. U.S. Department of State, Travel Warnings confirm the dangerous situation throughout the state of Tamaulipas, due to transnational criminal organization violence and crime, and confirm that extreme caution should be exercised when traveling in Tamaulipas. Psychological evaluation evidence contained in the record additionally reflects that the applicant's husband exhibits symptoms of depression, hopelessness and anxiety due to his wife's immigration situation and her possible relocation to Tamaulipas. The applicant's husband would experience additional emotional hardship if his children remained in the U.S. with him, because his wife has been the primary caregiver for their two sons, and he worries about the children's concern and anxiety about their mother. Financial and affidavit evidence indicates that the applicant's husband is often away from home working on construction projects, and that the applicant cares for their children when he is away. She also manages their family restaurant and an apartment rental. The applicant's husband would thus also experience financial hardship if the applicant were denied admission into the U.S. The applicant's husband also fears for the safety of his children and himself if he moves with his wife and family to Tamaulipas. Financial evidence contained in the record reflects further that the applicant's husband family-run businesses and properties would require him to travel back and forth between Mexico and the U.S. or suffer the loss of his businesses and livelihood.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). In evaluating whether section 212(a)(9)(B) of the Act relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the inadmissibility 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 and seriousness, and the presence of other evidence indicative of the 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 alien began residency at a young age), evidence of hardship to the alien and his family if s/he is excluded and/or deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in 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). *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The unfavorable factors in this matter are the applicant's accrual of unlawful presence in the United States. The favorable factors are the hardship the applicant's husband would face if the applicant is denied admission into the United States, the applicant's good moral character, and the applicant's lack of a criminal record. The AAO finds that although the immigration violation committed by the applicant is very serious in nature and cannot be condoned, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to her U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met her burden of proving eligibility for a waiver of her ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the Form I-601 appeal will be sustained.

ORDER: The appeal is sustained.