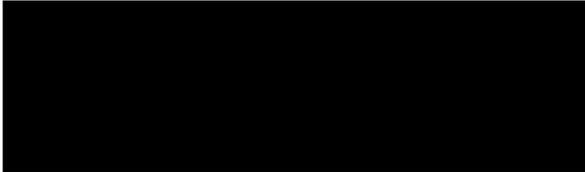


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090
**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



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DATE: JAN 06 2012 OFFICE: CHICAGO, ILLINOIS

FILE:

IN RE: Applicant:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, 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 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 readmission within 10 years of his last departure from the United States. The applicant through counsel does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and their children.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of Field Office Director, Chicago, Illinois*, dated July 24, 2009.

On appeal, counsel asserts that the United States Citizenship and Immigration Services (USCIS) erroneously denied the applicant's applications for waiver of grounds of inadmissibility and adjustment of status because the applicant has established that his U.S. citizen spouse would suffer extreme hardship upon considering the factors articulated by the Board of Immigration Appeals in *Matter of Cervantes-Gonzales*, 22 I&N Dec.560 (BIA 1999). *See Form I-290B, Notice of Appeal or Motion*, dated August 21, 2009.

The record includes, but is not limited to: a brief from counsel; biographic documents; a letter of support from the applicant's spouse; medical documents; employment documents; financial documents including bills; and country conditions information. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

...

(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 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. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary] regarding a waiver under this clause.

The record establishes that the applicant entered the United States with a Border Crossing Card and was inspected and admitted by U.S. immigration officials as a B-2 Visitor on October 13, 2002, and remained in the United States until on or about October 13, 2005, when he voluntarily departed the United States. And, the record establishes that the applicant was last admitted to the United States as a B-2 Visitor on October 19, 2005, valid until April 18, 2006. The applicant has remained in the United States to date. The record further establishes that the applicant filed with USCIS an Application to Register Permanent Residence or Adjust Status (Form I-485) as the spouse of a U.S. citizen on October 3, 2006. USCIS denied Form I-485 on July 24, 2009.

The applicant accrued unlawful presence from on or about April 12, 2003,¹ when his B-2 visitor status expired, until on or about October 13, 2005, when he voluntarily departed the United States.² The applicant is now seeking admission within 10 years of his October 13, 2005 departure. Accordingly, the applicant has accrued unlawful presence for more than one year, and as the applicant is seeking admission within 10 years of his last date of departure, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

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 or his children can be considered only insofar as it results in hardship to a qualifying relative. 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 the Service then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

¹ The AAO notes that the record is unclear concerning the exact date that the applicant's B-2 status ended.

² The AAO further notes that the applicant again accrued unlawful presence from April 19, 2006 because his B-2 visitor status expired, until October 3, 2006, when he filed his Form I-485. The applicant then accrued unlawful presence from July 25, 2009, the day after USCIS denied his Application to Adjust Status, through the present. *See* USCIS Memorandum, *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*, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009 at pages 25, 28, and 33-34.

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 record contains references to hardship the applicant's biological and step-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. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

Counsel contends that the applicant's spouse would suffer extreme hardship upon separation from the applicant because the spouse's children would reside with her and be separated from their father; her current employment does not provide sufficient income to maintain her current standard of living or to pay the bills and property that she and the applicant own in her name; and the applicant would be unable to find employment in Mexico that would be sufficient to assist the spouse. See *I-290B Brief in Support of Appeal*, dated August 13, 2007. In support of these contentions, counsel submitted a statement from the spouse in which she discusses the circumstances of meeting the applicant; the activities that she and the applicant do when they are together; her feelings of stress and depression; their jointly owned real and personal properties; their salaries and financial bills; and the pain that her children would feel if they were separated from the applicant. See *Letter of Support from [REDACTED]*, dated August 10, 2007. Also, counsel submitted a statement from the applicant's stepdaughter in which the stepdaughter discusses her relationship with the applicant; how the applicant supports her financially as she pursues her higher education; and how the applicant supports her mother and brother medically and emotionally. See *Email from [REDACTED]*, dated August 18, 2009.

And, counsel submitted evidence of the spouse's and the applicant's salaries and household expenditures of real estate mortgages and insurance totaling approximately \$1,277/month; a utility bill of \$70.84; a cable bill of approximately \$117/month; credit card minimum payments totaling approximately \$146/month; automobile insurance of approximately \$86/month; a mobile telephone bill of \$61/month; and medical bills totaling approximately \$871. See Wage and Tax Statements (Form W-2); see also *earnings statements; billing statements*. Counsel also submitted evidence of the spouse's and the applicant's accounts in arrears: residential mortgage, \$968.98; condominium assessment, \$879.19; credit cards totaling \$69; mobile telephone, \$1,126.88; medical bills totaling \$159.26; and Karate for Kids, \$125.00. See *Credit Report; see also billing statements; collections notices*.

Additionally, counsel submitted country conditions information, indicating that the area to which the applicant would return to in Mexico provides a legal, daily, minimum wage of the equivalent of \$4.46, which is not enough to provide a sustainable standard of living for a worker and a family

and that only a small fraction of the workers receive this minimum wage. See U.S. Department of State, *Country Reports on Human Rights Practices – 2006 (Mexico)*, available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78898.htm>.

Further, counsel submitted medical discharge instructions that the spouse received upon obtaining medical treatment for an ovarian cyst and urinary tract infection, and a medical prescription indicating that the spouse is depressed and needs counseling and anti-depression medication because of the applicant's immigration-related matters in the United States. See *Discharge Instructions Issued by the Adventist Hinsdale Hospital*, dated August 12, 2009; see also *Medical Prescription Issued by [REDACTED]* dated August 18, 2009.

The AAO finds that the record is sufficient to establish that the applicant's spouse would endure significant financial hardship due to separation from the applicant because of the applicant's inadmissibility. The financial documentation indicates that the spouse and the applicant have significant financial obligations and without the applicant's financial contribution as a residential and commercial painter, the spouse would be unable to meet those financial obligations. The spouse's employment records indicate that the spouse's income as an employee at Target has decreased significantly over the years in that she is working fewer hours each month, averaging approximately 36 hours/month at an hourly rate of \$13.08. Moreover, the spouse's income alone, taking into consideration her household size, demonstrates that the spouse would have an income below 125% of the poverty line.

Additionally, the AAO notes that the record includes employment and labor conditions information submitted as evidence of the applicant's inability to financially contribute to his spouse's household if he were to separate from the spouse and return to Ensenada, Baja California, Mexico, and seek employment. Although the country conditions information that was submitted references conditions in 2006, the AAO notes that the most recent report shows that conditions have improved only slightly: the legal, minimum, daily wage was the equivalent of \$4.65. See U.S. Department of State, *Country Reports on Human Rights Practices – 2010 (Mexico)*, available at: <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154512.htm>. Accordingly, the AAO recognizes that the applicant's spouse will endure financial hardship as a result of separation from the applicant.

The AAO also finds that the record is sufficient to establish that the applicant's spouse has suffered from an ovarian cyst and a urinary tract infection and because of these physical conditions and the emotional pain that the spouse has expressed, may experience some medical and emotional hardship in the applicant's absence from the United States. However, the record does not establish that the hardship that the spouse would experience goes beyond what is normally experienced by qualified family members of inadmissible individuals. The record only contains a general statement on a medical prescription that the spouse is depressed and needs some counseling and anti-depression medication, but the record does not include any evidence that the applicant's presence is necessary to assist the spouse with her physical and emotional conditions and any related hardships. Moreover, the record does not establish that the spouse would be unable to function without the applicant's presence. However, the AAO notes the applicant's

spouse's concerns regarding her medical conditions. Additionally, the AAO notes the spouse's concerns of raising her children without the daily presence of the applicant and how the applicant's absence may emotionally impact the children. However, the record does not establish that the spouse's concerns goes beyond what is normally experienced by qualified family members of inadmissible individuals.

Nevertheless, in the aggregate, the AO finds that the record reflects that the cumulative effect of the financial hardship that the applicant's spouse would experience due to the applicant's inadmissibility, when considered with the medical and emotional hardships normally associated with separation from a loved one, rises to the level of extreme. The AAO thus concludes that were the applicant's spouse to remain in the United States without the applicant due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

Counsel also contends that the applicant's spouse would endure extreme hardship if the spouse were to relocate to Mexico because she would lose the benefit of having a home, employment, and healthcare, and her children would have limited access to healthcare and an education. *See I-290B Brief in Support of Appeal, supra*. In support of the contentions, counsel submitted a statement from the spouse in which she indicates that she would have to leave everything to go to Mexico to be with the applicant, and their children would not be given the same educational and professional opportunities in Mexico as in the United States. *See Letter of Support from [REDACTED]* Counsel also submitted a copy of a medical insurance card, indicating healthcare coverage for the spouse, the applicant, and their children. *See DefinityHealth Insurance Card*, dated March 2011. And, counsel submitted country conditions information concerning the social and healthcare conditions in Ensenada, Baja California, Mexico. *See Conteo de Poblacion y Vivienda 2005 Issued by the Instituto Nacional de Estadistica Geografia e Informatica*.

The record is sufficient to establish that the applicant's spouse would suffer extreme hardship if she were to relocate to Mexico because of the applicant's inadmissibility. As previously noted, the legal, minimum, daily wage in Ensenada, Baja California, Mexico, is about \$4.21; a wage that has been determined not to provide a sustainable standard of living for a worker and a family in that particular area of Mexico. *See U.S. Department of State, Country Reports on Human Rights Practices – 2006 (Mexico), supra*. This wage, taken into consideration that the spouse still has significant financial obligations in the United States, indicates that the spouse would experience hardship if she were to relocate to Mexico.

Also, the AAO notes that the applicant's spouse has been steadily employed at Target since September 17, 2004, and as a benefit of her employment, receives employment-based healthcare coverage for her, the applicant, and their children. And, the healthcare insurance includes 100% of coverage by the employer for preventive care. Contrastively, approximately 26% of the population of Ensenada, Baja California, Mexico does not have access to healthcare. *See Conteo de Poblacion y Vivienda 2005, supra*. The spouse's steady employment history and employer-based healthcare coverage in light of the social and healthcare conditions in Mexico indicate that the spouse would experience hardship if she were to relocate to Mexico.

Further, the AAO acknowledges the spouse's concerns for her children's limited educational and professional opportunities in Mexico as compared to opportunities in the United States. However, the record fails to demonstrate how the children's lack of opportunities would directly impact the spouse. Accordingly, the AAO does not find that the spouse would suffer significant hardship because of the children's limited opportunities if she and the children were to relocate to Mexico.

Nevertheless, the record reflects that the cumulative effect of the financial and healthcare hardships that the applicant's spouse would experience upon relocating to Mexico, when considered in conjunction with the normal hardships associated with relocation, rise to the level of extreme. The AAO thus concludes that were the applicant's spouse to relocate to Mexico due to the applicant's inadmissibility, the applicant's spouse would suffer extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Morales*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Morales at 300.

In *Matter of Mendez-Morales*, 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 stated 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 section 212(h)(1)(B) 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 case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; evidence of the applicant's and the spouse's efforts to satisfy their financial obligations; and no evidence of criminal convictions. *See Letter Issued by* [REDACTED] The unfavorable factors include the applicant's unlawful presence in the United States and work without authorization.

Although the applicant's violation of immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

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.

The AAO notes that the Field Office Director denied the applicant's Form I-485, application to adjust status, solely on the basis of the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. *Field Office Director's Decision*, dated July 24, 2009. Because the AAO finds that the applicant is eligible for a waiver of the ground of inadmissibility, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the Field Office Director

should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i) and issue a new decision.

ORDER: The appeal is sustained. The waiver application is approved. The Field Office Director shall reopen the denial of the Form I-485 application and continue to process the adjustment application.