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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, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H6

DATE: JUL 23 2012

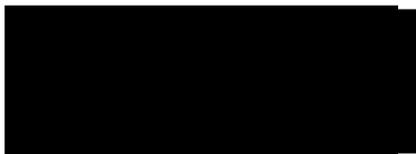
Office: BOISE, ID

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that 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. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated February 3, 2012.

On appeal, counsel asserts that the United States Citizenship and Immigration Services (USCIS) erred in finding the applicant to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act as more than ten years have passed since her 1998 departure from the United States triggered the unlawful presence provisions of the Act. Counsel alternately contends that the evidence presented by the applicant establishes that her spouse would suffer extreme hardship if she is forced to return to Mexico. *Form I-290B, Notice of Appeal or Motion*, dated March 5, 2012; *see also Counsel's Brief*, dated March 5, 2012.

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; statements from the applicant, her spouse, her older son, her adult stepchildren, and her brother and sister; documentation relating to the applicant's and her spouse's financial circumstances; medical records relating to the applicant's spouse and children; a psychological evaluation of the applicant's spouse; school records for the applicant's children; published articles concerning the impact of removal on children; statements from school counselors and a teacher at the children's schools; statements of support from family and friends of the applicant; and country conditions information on Mexico. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

The record contains a May 24, 2000 statement from the applicant in which she indicates that she first entered the United States without inspection in February 1995 and remained until July 23, 1998, when she voluntarily departed for Mexico. The record also reflects that, on August 28, 1999, the applicant was admitted to the United States in K-1 nonimmigrant status and on October 29, 1999 married her U.S. citizen spouse. She filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on December 13, 1999. On April 6, 2000, the applicant departed the United States under a grant of advance parole. She returned on April 22, 2000 and was paroled into the United States to pursue adjustment of status.

The legacy U.S. Immigration and Naturalization Service (now USCIS) denied the applicant's Form I-485 and Form I-601 on June 27, 2001 and the applicant appealed the denial of the Form I-601 to the AAO. On September 16, 2003, the AAO dismissed the appeal. The applicant remained in the United States, filing a new Form I-485 on May 23, 2011.

Based on the preceding history, the AAO finds that the applicant accrued unlawful presence beginning April 1, 1997, the effective date of the unlawful presence provisions under the Act, until she departed the United States on July 23, 1998, a period in excess of one year. Accordingly, her 1998 departure triggered the ten-year bar under section 212(a)(9)(B)(i)(II) of the Act.

On appeal, counsel contends that applicant's ten-year period of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act expired on July 23, 2008 and that she is no longer barred from admission to the United States. He asserts that while the applicant resided in the United States for nearly all of the ten years, there is no statutory requirement that the period of inadmissibility have been spent outside the United States. To support the applicant's claim that she is no longer subject to section 212(a)(9)(B)(i)(II) of the Act, counsel submits copies of letters from former [REDACTED] and [REDACTED] dated July 14, 2006 and January 26, 2009 respectively; two AAO decisions dated January 31, 2005 and February 22, 2005; and a November 25, 2008 decision issued by immigration [REDACTED] all of which discuss circumstances under which an applicant's period of inadmissibility will continue to "run" despite that individual's return to the United States.

The letters written by former [REDACTED] and [REDACTED] state that an alien's period of inadmissibility begins on the date of his or her departure and continues to run in the event that he or she returns to the United States under advance parole or with a nonimmigrant visa issued in compliance with the provisions of section 212(d)(3) of Act, as long as there are "no intervening periods of un-lawful reentry or unauthorized presence in the United States." The decision issued by the AAO on February 22, 2005, the only one of the three submitted decisions that provides sufficient information for us to determine the specific facts of the case, reflects this interpretation. In that decision, the AAO noted that the applicant had been paroled into the United State to pursue adjustment of status and that the three-year bar to his admission under section 212(a)(9)(B)(i)(I) of

the Act had expired prior to our consideration of his waiver application, i.e., while the applicant was still awaiting a final decision on his adjustment application and, therefore, not unlawfully present in the United States. Accordingly, we found that he was no longer inadmissible to the United States and, therefore, that his waiver application was unnecessary. In the present case, however, the circumstances are reversed, with the applicant's authorized presence in the United States ending several years prior to the expiration of the ten-year bar.

The applicant was paroled into the United States for the sole purpose of pursuing adjustment of status and, therefore, her authorization to remain in the United States ended on September 16, 2003, when the AAO dismissed the appeal of the Form I-601, thereby confirming the District Director's June 27, 2001 denial of her adjustment application. Her continuing residence in the United States was unlawful and she was not again in an authorized period of stay until she filed her second adjustment application on May 23, 2011. The period of inadmissibility for aliens barred under section 212(a)(9)(B) of the Act continues to run only if after nonimmigrant admission or parole, there are no intervening periods of unauthorized presence. As the applicant's authorized presence in the United States ended prior to the expiration of the ten-year bar and was followed by a period of unlawful residence, she remains inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.¹

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. Hardship to an applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

¹ The AAO notes that the applicant was also admitted to the United States as a K-1 nonimmigrant on August 28, 1999. We do not, however, find the record to establish that her nonimmigrant visa was issued in compliance with section 212(d)(3) of the Act, as required for the period of 212(a)(9)(B) inadmissibility to have continued to run while she was in the United States. To establish a K visa applicant's eligibility for consideration under section 212(d)(3) of the Act, the Foreign Affairs Manual at 9 FAM § 41.81 N9.3 requires Department of State consular officers to instruct K visa applicants to file a Form I-601 with USCIS. While the record indicates that information on the applicant's unlawful residence in the United States was available at the time her K-1 visa was issued, it contains no USCIS-approved Form I-601 filed by the applicant prior to her K-1 admission to the United States.

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 BIA 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 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).

However, 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.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of her inadmissibility.

On appeal, counsel states that the applicant's spouse is nearly 70 years old and that he would suffer emotionally if he and the applicant are separated. Counsel also asserts that the applicant's spouse would worry about the applicant's safety in Mexico, as well as the safety of his three children should they move to Mexico with the applicant. Counsel further contends that the applicant's spouse would also suffer if his children relocated with the applicant because of the lack of educational opportunities they would face in Mexico.

In a September 29, 2011 statement, the applicant's spouse contends that if the applicant is returned to Mexico, it likely that their three children would remain in the United States so that they continue with their studies and activities, and that he would be overwhelmed by the responsibilities of being a single parent. He indicates that although he currently lives in Wilder, Idaho, and the applicant and their children live in Boise where there are better schools, he would have to move to Boise because his children would want to continue to attend the same schools. The applicant's spouse maintains that moving to Boise would be difficult for him because it is a big city and his sister-in-law's house, where the applicant and his children already live, is filled with a great deal of noise and activity. He also states that his children are very active and that he would not have the time or energy to transport them to and from their activities. The applicant's spouse, notes, however, that moving his children back to Wilder would be worse because their educations would suffer and they would miss their friends.

The applicant's spouse further states that he depends on the applicant to help him remember things and stay organized. He also asserts that she helps him with his multiple health conditions and that her assistance is particularly important when he is ill. He reports that even though the applicant lives in Boise, he talks to her every day by telephone and generally sees her and his children on the weekends. Although the applicant's spouse indicates that he can take care of himself at present, he states that he will need more assistance as he grows older and that he would not be able to depend on his adult children from his previous marriage for that assistance as they have lives of their own. He reports that his son lives in Texas and that his daughter is a single mother with four children. The applicant's spouse also maintains that the stress created by the applicant's immigration problems is bad for his health and that it is only going to get worse.

The applicant's spouse also asserts that he is terrified by the prospect of the applicant living in the State of Michoacan, where her mother resides and where it is likely she would return if she is removed from the United States. The applicant's spouse states that there is a great deal of violence in Mexico, with shootings in the street and that even innocent people are killed.

In support of the preceding claims, the record contains medical records that establish the applicant's spouse has a number of serious chronic health problems including diabetes, hypertension,

hypothyroidism, obstructive sleep apnea, polymyalgia rheumatica, chronic obstructive asthma, and chronic constipation. This medical documentation further establishes that he is taking a number of medications in connection with these conditions and sees his doctors frequently.

Also included in the record is an October 6, 2011 psychological evaluation prepared by [REDACTED], who reports that the applicant's spouse's mental health has deteriorated as a result of his concerns about the applicant's removal. [REDACTED] indicates that the applicant's spouse informed him that he is losing his hair, having trouble sleeping, is nervous and depressed, and that his ability to concentrate has been diminished. [REDACTED] states that the applicant's spouse at their interview also reported that he does not feel well enough to care for his children by himself and that he is worried about the applicant's safety in Michoacan because of drug cartel activity. Based on his interview with the applicant's spouse and the results of a Patient Health Questionnaire, [REDACTED] finds the applicant's spouse to meet the criteria for Major Depressive Disorder, Single Episode, Mild (DSM-IV TR 296.21) and that given his chronic health problems, his mental health can be expected to decline even further.

To establish conditions in Mexico, the applicant has submitted copies of articles published by the Los Angeles Times, Reuters, the Associated Press, the Wall Street Journal, the BBC and The Guardian during 2010 and 2011, which describe the escalation of drug violence in Mexico and the State of Michoacan. The record also contains a Travel Warning for Mexico, issued by the U.S. Department of State on April 22, 2011, which advises U.S. citizens against travel to certain locations in Mexico, including the State of Michoacan, because of the incidence of drug-related violence. The AAO notes that the Department of State has updated its Travel Warning for Mexico as of February 8, 2012 and that it continues to identify the State of Michoacan as an area of particular concern.

Having reviewed the record, the AAO does not find it to establish that the applicant's spouse is not greatly dependent on the applicant, emotionally or physically. We do, however, note that the applicant's spouse is nearly 70, that he has suffered from multiple health problems for a number of years and that with the applicant's removal he would become a single parent for three children, aged 8, 10 and 15 years. We also acknowledge the applicant's spouse's concerns regarding the applicant's safety in Michoacan. Accordingly, we find that when the applicant's spouse's advanced age, his chronic multiple health problems and his understandable fears for the applicant's safety in Mexico are added to the range of new responsibilities he would face as a single parent for three children, the applicant has demonstrated that her spouse would suffer extreme hardship if the waiver application is denied and he remains in the United States without her.

To establish that the applicant's spouse would also experience extreme hardship if he relocated to Mexico, counsel asserts that the applicant's spouse was born in the United States, has never lived in Mexico, and does not have any family there. Counsel also contends that Mexico is a war zone and that the State of Michoacan, where the applicant's family would live, is one of the most violent areas in Mexico. Counsel further maintains that the economy in Mexico is poor and that the applicant's spouse would be unable to support his family if they moved to Mexico. He states that the Mexican educational system is weak and that the applicant's spouse would not have access to adequate medical care.

In his September 29, 2011 statement, the applicant's spouse asserts that he has never lived in Mexico, that he has medical issues and that the healthcare in Mexico is not as good as that in the United States. He further indicates that he is unsure as to whether he would continue to receive his Social Security benefits in Mexico.

Having reviewed the evidence as it relates to relocation, the AAO takes note of the applicant's spouse's age; the absence of any family ties to Mexico; the resulting separation from his two adult children; his multiple chronic health problems; the disruption that relocation would create in relation to his healthcare, including the loss of medical providers familiar with his conditions and medical history; and the drug violence throughout the State of Michoacan. When these specific factors are added to the normal difficulties and disruptions created by relocation, the AAO concludes that the applicant has also established that moving to Mexico would result in extreme hardship for her spouse.

As the record establishes that the applicant's spouse would suffer extreme hardship as a result of her inadmissibility, we now turn to a consideration of the applicant's eligibility for a favorable exercise of discretion under the Act.

In discretionary matters, the applicant 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(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 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 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 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 AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's entry without inspection in 1995, the unlawful presence for which she now seeks a waiver and her failure to depart the United States following the AAO's 2003 dismissal of her appeal. The mitigating factors in the present case are the applicant's U.S. citizen spouse and children; the extreme hardship to her spouse if the waiver application is denied; the general hardship that her removal would cause her children; the absence of a criminal record; the September 28, 2011 statement from the ESL counselor at the College of Western Idaho indicating that the applicant is enrolled in an English as a Second Language program; and the statements in the record from the applicant's friends and family describing her commitment to her family, particularly her children, and her community.

The AAO finds that the applicant's immigration violation was serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained

ORDER: The appeal is sustained.