

*Administrative Appeals Office
U.S. Citizenship and Immigration Services
Washington, DC 20529-2090*

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

H6



Date: JUN 08 2012 Office: MEXICO CITY, MEXICO



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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico, and 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 and seeking readmission within ten years of his last departure from the United States.¹ The applicant is married to a U.S. citizen and is the father of two U.S. citizen stepchildren. He is a beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and stepdaughter.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated March 23, 2010.

On appeal, the applicant's wife claims that she is suffering extreme hardship without the applicant's presence. *Form I-290B, Notice of Appeal or Motion*, filed April 22, 2010. The applicant's wife submits new evidence of hardship on appeal.

The record includes, but is not limited to, statements from the applicant and his wife, letters of support, a psychological evaluation for the applicant's wife, medical documentation for the applicant's wife and stepdaughter, employment documents for the applicant and his wife, school records for the applicant's stepdaughter, photos, financial documents, and household and utility bills. The entire record was reviewed and considered in arriving at a decision on the appeal.

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.

....

¹ A Department of State consular officer also initially found the applicant inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Act. The Field Office Director, however, upon review of the administrative and arrest record, determined that the applicant is not subject to inadmissibility under section 212(a)(2)(D)(i) of the Act.

- (v) Waiver.-The [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present case, the record reflects that the applicant entered the United States in June 1986 without inspection. On an unknown date, the applicant departed the United States and reentered on May 26, 1996 without inspection. *See Form I-130*, filed July 30, 2007. In September 2008, the applicant departed the United States. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful-presence provisions under the Act, until September 2008, when he departed the United States. The applicant is attempting to seek admission into the United States within ten years of his September 2008 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking admission within 10 years of his departure from the United States. The applicant does not dispute this finding.

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 stepdaughter 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 United States Citizenship and Immigration Services (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 of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. *Supra* at 565. 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 stepdaughter 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 stepdaughter will not be separately considered, except as it may affect the applicant's spouse.

In a statement dated April 19, 2010, the applicant's wife states she cannot move to Mexico because her employment in the United States provides her and her daughter with health and retirement benefits. In a statement dated March 9, 2009, the applicant's wife claims that she will not be able to work in Mexico as a registered nurse and will not be able to manage her own and her daughter's medical care there. Medical documentation in the record establishes that the applicant's wife has been diagnosed with depression and diabetes, and she takes medication to treat her medical conditions. The applicant's wife

states her daughter is on an antipsychotic medication, and without her health insurance, the medication would be very expensive. Documentation in the record establishes that the applicant's stepdaughter is on an antipsychotic medication. Additionally, medical documentation in the record establishes that the applicant's stepdaughter, who is 24 years old, is developmentally delayed and has psychological issues, a mood disorder, attention deficit disorder, and hyperactivity disorder. In a statement dated March 7, 2009, [REDACTED] states the applicant's stepdaughter has "multiple conditions stemming from multiple birth defects," including fecal incontinence, which requires daily enemas, and a neurogenic bladder. [REDACTED] states that "[d]ue to her physical and mental conditions, she requires 24 hour supervision." In a statement dated March 6, 2009, [REDACTED] reports that the applicant's stepdaughter cannot work, live on her own, and she is financially and emotionally dependent on the applicant's wife. The applicant's wife states it would be difficult for her to manage her daughter's medical needs in Mexico.

The applicant's wife states she wants to further her education but she cannot do that in Mexico. In an undated statement, the applicant states there are "big differences" in education, wages, and employment opportunities in Mexico compared to the United States. The applicant's wife states all her family resides in the United States and she is very close with them, including her elderly father, who has a heart condition. She also states that she is anxious and depressed thinking about moving to Mexico.

The applicant's wife states she does not speak Spanish or understand the Mexican culture because she has never lived outside the United States. The applicant states Mexico is dealing with "extreme violence, insecurity, [and] crime." The AAO notes that on February 8, 2012, the Department of State issued a travel warning to U.S. citizens about the security situation in Mexico. The warning states that "the Mexican government has been engaged in an extensive effort to counter [Transnational Criminal Organizations] which engage in narcotics trafficking and other unlawful activities throughout Mexico.... As a result, crime and violence are serious problems throughout the country and can occur anywhere." The warning states U.S. citizens have been the victims of "homicide, gun battles, kidnapping, carjacking and highway robbery." The warning also states that the rise in "kidnappings and disappearances throughout Mexico is of particular concern."

Based on her safety concerns in Mexico; her minimal ties to Mexico; her separation from her family in the United States, including her elderly father; her medical issues and possible disruption of her treatment; lack of health insurance in Mexico; her employment issues; and the difficulty of caring for her developmentally delayed daughter either from or in Mexico, the AAO finds that the applicant's wife would suffer extreme hardship if she were to join the applicant in Mexico.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States, as noted above, medical documentation in the record establishes that the applicant's wife has been diagnosed with depression and diabetes. In a psychological evaluation dated April 10, 2009, [REDACTED] reports that the applicant's wife has had depression her whole life, avoidant behavior, and low self-esteem, and she is currently suffering from dysthymic disorder, a "serious form of depression" exacerbated by the applicant's departure. As noted above, the applicant's wife is taking an antidepressant. The applicant's wife states she is stressed dealing with her daughter alone, she is having difficulties managing her responsibilities, and she is unable to control her diabetes. She claims that when

the applicant was in the United States, he used to help her with managing her condition. Additionally, the applicant's wife notes that her mother also could not manage her illness and died from kidney failure related to diabetes. The applicant's wife is worried that as a result of her emotional and medical difficulties, she will lose her job, and in October 2009, she received a verbal disciplinary action because of her actions at work.

The applicant's wife states she works full-time and without the applicant's assistance, her daughter "is becoming more difficult to manage and keep safe in this world." As noted above, the record establishes that the applicant's stepdaughter is a 24 year-old developmentally delayed adult who requires 24-hour supervision. The applicant's wife states that before she married the applicant, her mother helped raise her daughter. After her mother died, the applicant helped monitor her daughter's activities, drove her daughter to her volunteer job, helped with her "explosive behavior," and her daughter listened to the applicant. She claims that without the applicant's assistance, her daughter takes the bus to work alone, and after work she "runs around the city." She states that because she works full-time, she does not know what her daughter is doing. The applicant's wife states her daughter meets men that she communicates with on the internet, and she is worried that she "will be kidnapped, raped or killed with the behavior that she is displaying in [the applicant's] absence." She claims that her daughter "is very trusting of people...and it is impossible for [her] alone to explain the dangers." In a statement dated March 9, 2009, [REDACTED], the applicant's stepdaughter's teacher, states the applicant's stepdaughter "has difficulty with anger control and will have tantrums." The applicant's wife states that when her daughter became violent in the past, the applicant was able to physically restrain her; however, she cannot do it alone, her walls have several holes in them, and she has called the police several times to intervene. As noted above, the applicant's stepdaughter is taking an antipsychotic medication. The applicant's wife states the applicant also helped her daughter with her medical treatments, including making sure that she took her daily enema. She states she only takes an enema once a week now, though she requires them daily. She claims that she is worried about her daughter's "health and hygiene" in the applicant's absence. The AAO notes that the applicant's stepdaughter is not a qualifying relative; however, the hardship she experiences will exacerbate the applicant's wife's hardship.

The applicant's wife claims that she makes a "decent wage," but she has many bills and medical costs for herself and her daughter. She states that her savings are depleted, and she is worried that she will not be able to pay all her bills. Financial documentation in the record establishes that the applicant's wife has approximately \$5,672 in monthly expenses, while her monthly income is approximately \$4,844. Documentary evidence establishes that the applicant's stepdaughter is financially and emotionally dependent on her mother, and she cannot live on her own.

The AAO finds that when the applicant's spouse's hardships are considered in the aggregate, specifically her financial, mental health issues, and having to care for her developmentally delayed adult daughter alone, the record establishes that the applicant's wife would face extreme hardship if she remained in the United States in his absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act.

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(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 "balance 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 include the applicant's entry without inspection, unlawful presence, and unauthorized employment. The favorable and mitigating factors are the applicant's U.S. citizen wife and stepdaughter; the extreme hardship to his wife and stepdaughter if he were refused admission; and his good moral character as described in several letters of support.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.