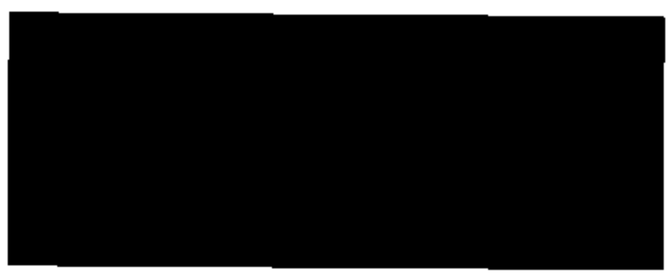
identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY



#6

Date: MAY 04 2012 Office: MEXICO CITY FILE: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

for 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 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 Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure.[1] He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and son.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director,* dated September 29, 2009.

On appeal, the applicant asserts that his wife and son will suffer extreme hardship should he continue to reside outside the United States. *Statement from the Applicant on Form I-290B,* dated October 23, 2009.

The record contains, but is not limited to: briefs from the applicant's former counsel; psychological evaluations and copies of prescriptions for the applicant's wife; documentation regarding the applicant's son's academic progress and special education services; statements from the applicant, the applicant's wife, the applicant's sister-in-law, and others in support of the application; documentation regarding the applicant's and his wife's employment and financial status; a letter from a mental health specialist regarding counseling services that the applicant's wife and son received; and documentation in connection with the applicant's criminal conviction. The entire record was reviewed and considered in rendering this decision.

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-
>
> . . . .

[1] The record also shows that the applicant was convicted of one count of theft under California Penal Code § 484(a) for his conduct on or about September 5, 1998. While the record does not contain complete documentation of this conviction or explanation of the facts that led to the charge, offenses under California Penal Code § 484(a) often constitute crimes involving moral turpitude. However, the applicant's conviction meets the "petty offense" exception in section 212(a)(2)(A)(ii)(II) of the Act, and he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

> (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 shows that the applicant entered the United States without inspection in or about December 1997. He did not depart until or about July 2008. Accordingly, he accrued over 10 years of unlawful presence in the United States. He now seeks admission as an immigrant pursuant to his marriage to his U.S. citizen wife. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal. He requires a waiver under section 212(a)(9)(B)(v) of the Act.

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 the applicant or his son can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative under section 212(a)(9)(B)(v) of the Act. 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-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Id. The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The applicant has provided numerous documents that show that his wife has endured significant emotional hardship during the approximately four years that they have resided apart, including comprehensive psychological evaluations in October 2008 and October 2009. Numerous psychological tests were administered to the applicant's wife, and a licensed clinical psychologist concluded that she was suffering major depressive disorder and an anxiety disorder, and she required immediate treatment. The record supports that, as of September 26, 2008, the applicant's wife was enrolled in a counseling program with their son in which they received counseling two times each week. The applicant's wife was also prescribed medication for anxiety in August 2011. The AAO finds that the applicant's wife's history of treatment for mental health issues, beginning soon after the applicant's departure from the United States and encompassing over three years, supports that she is suffering unusual psychological difficulty as a result of the applicant's absence.

The applicant has also shown that his son has exhibited developmental delays which have required evaluation and special education services in the United States. It is evident that this circumstance contributes to the applicant's wife's hardship as she addresses their son's needs without the applicant's participation or support.

The AAO has examined the tax, employment, and other financial records of the applicant and his wife. The applicant has not shown that his wife is unable to meet her and their son's needs in the United States without his contribution. However, we acknowledge that acting as a single parent for a young child involves considerable financial needs, including child care expenses which the applicant has demonstrated through documentation. Due consideration is given to the economic strain the applicant's absence creates for his wife.

The applicant has also shown that his wife will suffer extreme hardship should she join him in Mexico. It is evident that the applicant's wife would be separated from the mental health professionals who presently provide her required care in the United States. Her emotional burden would be exacerbated due to her son's inability to continue the special education services he presently receives. The applicant's wife would be separated from her family, community, and employment in the United States.

The applicant expressed concern for conditions in Mexico and the risk they pose to his family. He provided articles to support that there are environmental risks and drug cartel violence. The record suggests that the applicant is currently residing in the northern border region including Ciudad Juárez. The AAO takes notice that the United States Department of State issued a Travel Warning for Mexico, warning that crime and violence are serious problem, and that bystanders, including U.S. citizens, have been injured or killed in violent incidents in various parts of the country, especially, but not exclusively, in the northern border region. *United States Department of State Travel Warning: Mexico*, dated February 8, 2012. The applicant's wife faces a risk of harm, and it is evident that she would endure additional psychological hardship due to concern for the safety of herself, her son, and the applicant.

All elements of hardship to the applicant's wife have been considered in aggregate. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his wife, as required for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for over 10 years without a legal immigration status. The applicant was convicted for an act of theft for his conduct on or about September 5, 1998.

The positive factors in this case include:

The record does not reflect that the applicant has committed a crime since 1998, in over 13 years: the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States; the applicant's U.S. citizen son will face significant hardship should the applicant reside outside the United States; the applicant has shown a propensity to work and pay taxes, and to support his wife and son; and the record supports that the applicant has provided meaningful emotional support to his wife and children, and he has cultivated a close family unit.

The applicant's violation of U.S. immigration law cannot be condoned. His act of theft calls into question his moral character and respect for the laws of the United States. However, the record only shows that he committed a single crime that meets the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act. The record does not show that the applicant has a propensity to engage in further criminal conduct. As the applicant has remained outside the United States and attempted to adhere to legal requirements to gain a lawful immigration status, the record supports that he has discontinued his violation of U.S. immigration law.

Accordingly, the benefits of reuniting the applicant's family in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

In proceedings regarding a 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, and he has shown that he warrants a favorable exercise of discretion. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.