

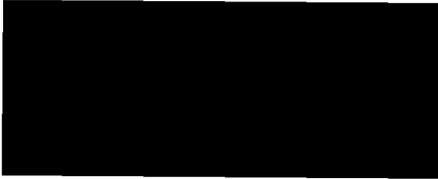
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



H6

Date: MAY 08 2012

Office: MEXICO CITY (CIUDAD JUAREZ)

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

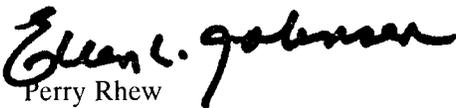
ON BEHALF OF APPLICANT:



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 Acting District Director, Mexico City. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO will reopen the matter on its own motion and the underlying waiver application will be granted.

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 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; section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien who was ordered deported and who departed the United States while a deportation order was outstanding; and section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend his deportation proceeding. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside with his wife and children in the United States.

The field office director found that there is no waiver available for a finding of inadmissibility under section 212(a)(6)(B) of the Act, that the applicant's application should be denied as a matter of discretion given the applicant's disregard and disobedience to the laws of the United States, and that the applicant failed to establish extreme hardship to a qualifying relative. The acting district director denied the application accordingly. *Decision of the Acting District Director*, dated September 23, 2008. The AAO subsequently dismissed the appeal, also concluding that there is no waiver available for a finding of inadmissibility under section 212(a)(6)(B) of the Act.

Counsel contends the AAO erred in applying section 212(a)(6)(B) of the Act to the applicant's case because the applicant was in deportation proceedings, not removal proceedings.

The AAO finds counsel's contention to be persuasive. As counsel correctly points out, the effective date of section 212(a)(6)(B) of the Act is April 1, 1997. In the instant case, the Order to Show Cause placing the applicant in deportation proceedings was issued on December 9, 1996, prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Therefore, the applicant is *not* inadmissible under section 212(a)(6)(B) of the Act and is eligible to apply for a waiver of inadmissibility.

The record contains, *inter alia*: a marriage certificate of the applicant and his wife, [REDACTED], indicating they were married on June 12, 1999; a copy of the birth certificates of the couple's three U.S. citizen children; declarations from the applicant; letters and a declaration from [REDACTED]; letters from [REDACTED] physicians and copies of her medical records and prescription medications; a psychoemotional evaluation of [REDACTED]; an Individualized Education Plan ("IEP"), a psychosocial evaluation, and a letter from the special education department chair addressing the couple's daughter's auditory processing deficit; copies of tax returns, bills, and other financial documents; copies of photographs; a letter from the applicant's employer; letters of support; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

(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.

Section 212(a)(9)(A)(ii) of the Act provides, in pertinent part:

Any alien not described in clause (i) who--

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

In this case, the record shows, and counsel concedes, that “[t]here is no dispute that the applicant is inadmissible under INA § 212(a)(9)(B)(i)(II) and § 212(a)(9)(A)(II). . . .” *Letter from Vilma L. Guerrero*, dated February 16, 2012. Specifically, the record shows that the applicant entered the United States without inspection in 1990, was placed in deportation proceedings, and ordered removed *in absentia* by an immigration judge on June 4, 1997. The applicant remained in the United States until his departure in September 2007. Therefore, the record shows that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and section 212(a)(9)(A)(ii) of the Act as an alien who was ordered deported and who departed the United States while a deportation order was outstanding.

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.

In this case, the applicant's wife, *Ms. [REDACTED]*, states that although she was born in Mexico, she has lived in the United States since she was three months old. She states that her entire family lives in the United States and that although she speaks simple Spanish, she does not read or write well in Spanish. She states she is currently a preschool teacher for Head Start and that she is working on getting a teaching credential. She states she signed a contract with the MAESTRA program, committing herself to staying in Monterey County, California, to teach or else she must pay back the program approximately \$20,000. In addition, *Ms. [REDACTED]* contends she suffers from severe allergies for which she takes medications regularly. Moreover, *[REDACTED]* states that she and her husband have three U.S. citizen children together and that their daughter, Natalia, suffers from a learning disability and receives special education in school. *[REDACTED]* contends that *[REDACTED]* is a very fragile and sensitive girl and that she receives daily therapy and support from the school psychologist. According to *[REDACTED]*, her husband has been gainfully employed with the same employer for over ten years and they need both of their salaries in order to support their family. She states that since her husband's departure, she is only able to pay the mortgage and is in the negative as far as her family's other expenses. She contends that she is feeling distress, anxiety, exhaustion, weakness, and is devastated raising her children by herself.

After a careful review of the entire record, the AAO finds that if *[REDACTED]* continues to reside in the United States without her husband, she would suffer extreme hardship. The record contains a letter from *[REDACTED]*'s physician stating that *[REDACTED]* is suffering from depression, anxiety, and insomnia. A more recent letter from another physician states that *[REDACTED]* is exhausted, stressed, depressed, and extremely anxious, requiring medical treatment and medications. The record also contains a psycho-emotional evaluation of *[REDACTED]* diagnosing her with adjustment disorder with mixed anxiety and depression. Moreover, a letter from her physician corroborates *[REDACTED]*'s contention that she suffers from allergies. According to her physician, she suffers from allergies to pollens, molds, cat, and dust mites, and also possibly has asthma and gastroesophageal reflux disease. In addition, the record contains Natalia's Individualized Education Program ("IEP") and

letters from her school addressing her learning disability and corroborating Mrs. Cuna's claim that Natalia is receiving special education services. The psycho-emotional evaluation in the record also assessed Natalia and diagnosed her with generalized anxiety disorder and mixed receptive-expressive language disorder. According to the school psychologist and other school officials, as well as the psychotherapist, [REDACTED] needs the presence and support of her father. Furthermore, a letter from [REDACTED]'s employer states that she earns an annual salary of \$34,048. A copy of the couple's 2007 tax return shows that prior to the applicant's departure from the United States, their combined wages were \$64,222. The record also contains numerous copies of bills and an evaluation of [REDACTED]'s finances, showing that her salary alone is not enough to meet her regular monthly expenses. Considering all of these unique factors cumulatively, the AAO finds that the hardship [REDACTED] has experienced, and will continue to experience, if she remains in the United States is extreme, going beyond those hardships ordinarily associated with inadmissibility.

The AAO also finds that if [REDACTED] relocated to Mexico to avoid the hardship of separation, she would experience extreme hardship. According to [REDACTED] she moved to the United States when she was just three months old. [REDACTED] would need to adjust to a life in Mexico after having lived in the United States for almost her entire life. In addition, the record shows that Mrs. Cuna has worked for the same employer since 2002. Relocating to Mexico would mean leaving her employment of ten years and all of its benefits. Moreover, as stated above, [REDACTED] is receiving treatment for her allergies and Natalia is receiving special education services. Moving to Mexico would disrupt the continuity of [REDACTED] health care and [REDACTED]'s special education services. Based on these considerations, the AAO finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include the applicant's unlawful entry into the United States, the applicant's failure to appear at his deportation proceeding, the fact that the applicant was ordered removed by an immigration judge, and periods of unauthorized employment. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including his U.S. citizen wife and three U.S. citizen children; the hardship to the applicant's wife and children if he were refused admission; numerous letters of support describing the applicant as a caring and responsible hard worker who is dedicated to his family, friends, and employer; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violations 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.

The AAO notes that the acting district director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision as the Form I-601. The Form I-212 was denied as a matter of discretion. A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO withdraws the acting district director's decision and finds that the applicant's Form I-212 should also be granted as a matter of discretion.

**ORDER:** The November 17, 2011 decision of the Administrative Appeals Office is withdrawn and the underlying waiver application is approved.