

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



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Date: NOV 06 2012

Office: SAN BERNARDINO

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 (the 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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

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. He is married to a U.S. citizen, is the beneficiary of an approved Petition for Alien Relative (Form I-130), and is seeking a waiver of inadmissibility in order to reside in the United States with his wife and children.

The field office director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of the Field Office Director, July 5, 2011.*

On appeal, counsel for the applicant asserts that USCIS misapplied the legal standard regarding undue hardship and offers new evidence, including school records, financial information, and medical prescriptions. The record also contains hardship and supportive statements, psychological reports; medical records, naturalization and birth certificates; photographs; utility bills; and proof of other expenses. *The entire record was reviewed and considered in rendering this decision.*

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...

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 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 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 shows that the applicant entered the United States from Mexico in the custody of his parents without inspection or parole in January 1989 when he was less than two years old. He voluntarily departed the country in November 2007, having accrued one year or more of unlawful presence since he turned 18 on [REDACTED]. On September 22, 2009, in Mexico, he married the mother of his two children and seeks to immigrate based on her petition.

The applicant's wife contends she has suffered, and will continue to suffer, emotional and financial hardship if she remains in the United States while the applicant resides abroad due to his inadmissibility. She claims to be depressed by separation from the applicant and that her emotional state has declined due to the stress of being a single parent. A June 2011 psychological evaluation reports the qualifying relative suffering from insomnia, headaches, weight gain, a spastic colon, and depression. The report notes that the applicant's wife made a serious attempt to commit suicide when she was 17, is taking anti-depressant medication, and has struggled to balance parenthood with earning income while educating herself in hopes of making a better life for her family. The psychologist notes the applicant's support helped his then-girlfriend recover from the suicide attempt, but wonders how long the qualifying relative will be able to cope with life's pressures without his help. The record also reflects her care providers' concern for her abdominal pains of unknown origin. Medical documents, together with support statements from friends and relatives, show the emotional impact of her husband's absence has been increased by the speech impediment of her first child.

The record shows that the qualifying relative was a teenager when she moved in with the applicant and his parents and dropped out of high school when she became pregnant by him. The elder of her two children, now seven years old, is underperforming in school due to problems articulating language. The psychologist observes that raising a child with a speech defect adds stress to her mother's living situation. The totality of the circumstances establishes the qualifying relative's strong emotional bond to the applicant.

While there is insufficient evidence that the applicant contributed financially to the household or that his absence has caused financial hardship, the record indicates his wife is having difficulty paying her bills and other living expenses. The evidence on record, when considered in the aggregate, establishes that the emotional hardship the applicant's wife is experiencing by remaining in the United States without the applicant causes the overall hardship from separation to rise to the level of extreme.

The record also shows that the qualifying relative would suffer extreme hardship in the event that she relocated to Mexico to reunite with the applicant: she immigrated on a sibling's petition in 2004, earned a high school equivalency diploma, pursued further education after her husband's departure, and is earning a modest wage. Although suggesting her estrangement from one or both parents since they separated, the record reflects the qualifying relative's ongoing ties to siblings with families in the United States, as well as to members of her husband's family who have legalized their status here. Among the hardships of moving back to Mexico are lack of remaining ties there, poor job prospects due to difficult economic conditions, and lack of speech therapy for her child. The chief hardship is narcotics-related violence in the Mexican state of Michoacán, where the applicant lives with his parents. U.S. government sources confirm that drug cartel operations mean that relocating would expose his wife and their children to criminal activity, including murder, gunfights, kidnapping, carjacking, and highway robbery. *See Travel Warning—Mexico*, U.S. Department of State, February 8, 2012.

The record reflects that the cumulative effect of the applicant's wife's ties to the United States and absence of ties back home, her residence in the United States and loss of employment, and exposure to violence, were she to relocate, rises to the level of extreme. The AAO thus concludes that, if the applicant is unable to reside in the United States due to his inadmissibility, a qualifying relative would suffer extreme hardship by relocating to Mexico to reside with her husband.

Review of the documentation in the record, when considered in its totality, reflects that the applicant has established his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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-Moralez, 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 favorable factors in this matter are the extreme hardships the applicant’s wife would face if the applicant were to continue residing in Mexico, regardless of whether she joined the applicant or remained in the United States; the applicant’s lack of any criminal record; his education and fulfillment of family obligations in the United States; and the fact that he was an infant when his parents brought him unlawfully into the country nearly 24 years ago. The only unfavorable factor in this matter is the applicant’s unlawful presence.

Although the applicant’s violation of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factor. Given the gravity of the emotional loss to the family, the passage of time since the applicant’s violation of immigration law, and his more than five years outside the country, the AAO finds that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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