

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE **APR 22 2013** OFFICE: MONTERREY

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, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:
[REDACTED]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long, sweeping underline.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Monterrey, Mexico. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and this matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the prior decision of the AAO will be affirmed, and the underlying application will remain denied.

The applicant 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 and seeking readmission within 10 years of her last departure from the United States. The applicant is a beneficiary of an approved Petition for Alien Relative, as a spouse of a U.S. citizen, who seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative. The Field Officer Director denied the application accordingly. *See Decision of the Field Office Director*, dated February 24, 2011. On appeal, the AAO determined that the applicant had demonstrated extreme hardship to her spouse upon relocation, but not separation, and dismissed the appeal accordingly. *See Decision of the AAO*, dated October 22, 2012.

The applicant has submitted a motion to reopen or reconsider the dismissal of her appeal. Based on the new facts in the record concerning the applicant's spouse's medical condition, the motion to reopen will be granted. In the applicant's motion to reopen or reconsider, counsel for the applicant asserts that the applicant has submitted sufficient evidence demonstrating that the applicant's spouse is suffering extreme medical, emotional, and financial hardship upon separation from the applicant.

In support of the applicant's motion to reopen and reconsider, the applicant submitted an updated letter from her spouse's physician, a letter from her aunt, and a profit/loss statement from the applicant's spouse concerning his business in the United States. The entire record was reviewed and considered in rendering this decision.

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

(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.

.....

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant is a native and citizen of Mexico who claims to have entered the United States without admission or parole in 1992. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status on October 16, 1998. This application was denied due to abandonment on June 24, 2004. The applicant was placed into immigration proceedings and filed a second Form I-485 before an immigration judge, dated March 25, 2008. The applicant withdrew that application and was granted voluntary departure by an immigration judge on October 3, 2008. The applicant departed from the United States pursuant to voluntary departure order on January 20, 2009. The applicant accrued unlawful presence in the United States from April 1, 1997, effective date of the unlawful presence provisions, until the filing of her first Form I-485 on October 16, 1998. The applicant also accrued unlawful presence from June 24, 2004, the date of the denial of her Form I-485, until the filing of her second Form I-485 in immigration court. Accordingly, she accrued over one year of unlawful presence in the United States, and she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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, parent, son or daughter of the applicant. Hardship to the applicant 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).

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 reflects that the applicant is a 49-year-old native and citizen of Mexico. The applicant's spouse is a 56-year-old native of Guatemala and citizen of the United States. The

applicant is currently residing in Ciudad Juarez, Mexico and her spouse is currently residing part-time in Phoenix, Arizona and part-time in Ciudad Juarez, Mexico, with the applicant.

The AAO previously determined that the applicant has demonstrated that her spouse would suffer extreme hardship upon relocation to Mexico. Based upon the record, the AAO found that the applicant's spouse would be leaving behind his home and landscaping business in the United States if he relocated to Mexico to reside with the applicant. The AAO also noted that the applicant's spouse had been receiving consistent care in the United States for his medical conditions, had never previously resided in Mexico, and feared for his safety upon relocation. The AAO's prior decision references U.S. Department of State travel warnings concerning the area of Mexico in which the applicant currently resides. In the aggregate, the AAO determined that the record contained sufficient evidence to find that the applicant's spouse would suffer hardship beyond the common consequences of inadmissibility or removal if he relocated to Mexico. *See Decision of the AAO*, dated October 22, 2012. It is noted that the applicant's spouse is currently residing in Mexico on a part-time basis and the applicant has submitted evidence indicating that the applicant's spouse is still receiving treatment for his medical conditions in the United States and that his family lives on the money that he earns while residing in the United States.

The applicant's spouse asserts that he is now residing in Mexico on a part-time basis because he needs the applicant to care for him. The applicant's spouse contends that he has not been able to control his medical condition, which has worsened since the applicant began to reside in Mexico. The record contains an updated letter from the applicant's spouse's physician stating that the applicant's spouse still suffers from diabetes mellitus II and hyperlipidemia. It is noted that the applicant's spouse's physician, in his November 2012 letter, states that the applicant's spouse most recently suffers from insomnia and gastritis, likely due to anxiety. However, it is also noted that the applicant's spouse's affidavit from June 2010 states that he has been diagnosed with gastritis and has been prescribed sleeping pills.

The applicant's spouse's physician states that the applicant's diabetes is not well controlled with oral medications, so that he has been started on insulin injections, which will hopefully control his condition. The applicant's spouse's physician also states the applicant's spouse requires exercise and a specific diet and if his conditions are not well controlled, they could lead to problems in his heart, kidneys, and other organs. It is noted that the applicant's spouse's physician has stated that the applicant's spouse's ailments are chronic conditions. Though the applicant's spouse's physician states that the applicant's spouse has started insulin injections because his diabetes is not well controlled with oral medication, there has been no statement that the applicant's spouse's conditions have worsened due to the lack of diet and exercise guidance provided by the applicant. Further, there is still no indication as to why the applicant's spouse is unable to monitor his diet and exercise without the applicant. Counsel asserts that the applicant's spouse is suffering extreme hardship in his efforts to reside part-time in Mexico, but these are hardships that he is incurring due to his choice to relocate on a part-time basis. The record does not contain an updated psychological evaluation concerning the applicant's spouse since his prior diagnoses of nightmare disorder, transient tic disorder, acute stress disorder, and panic attack

without agoraphobia. There is also no evidence concerning any psychological treatment the applicant's spouse sought or received since his diagnosis.

The applicant's spouse asserts that he is experiencing extreme financial hardship because he has been earning less money in the United States, as he has been residing in Mexico part-time. The record contains a profit/loss statement from the applicant's spouse concerning his landscaping business, stating that he had a net income of less than \$17,000 in 2012, as compared with \$23,000 in 2011. The record also contains a letter from the applicant's aunt stating that the applicant's spouse pays her rent to reside with her in Mexico. The applicant's spouse asserts that he is also continuing to pay his mortgage in the United States. It is noted that the applicant's 2012 accounting only includes the months of January through October. Further, there is no indication that the applicant's spouse has been unable to maintain his financial responsibilities, including his housing-related payments in both Mexico and the United States and travel expenses to Mexico. In the aggregate, there is insufficient evidence in the record to find that the applicant's spouse is suffering from a level of hardship beyond the common results of separation from a spouse.

In this case, the record contains sufficient evidence to show that the hardships faced by the qualifying relative, in the aggregate, would rise to the level of extreme hardship if he relocated to Mexico. The record, however, does not contain sufficient evidence to show that the hardships faced by the qualifying relative upon separation, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. Cf. *Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also cf. *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. As the applicant has not

established extreme hardship to a qualifying family member, no purpose would be served in balancing positive and negative factors to determine whether the applicant merits this waiver as a matter of discretion.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decision of the AAO will be affirmed and the underlying application will remain denied.

ORDER: The motion is granted, the prior decision of the AAO is affirmed, and the underlying application remains denied.