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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

Date: APR 2 4 2013 Office: MONTERREY, MEXICO FILE:

IN RE: Applicant:

APPLICATIONS: 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) and for Permission to Reapply for Admission After Deportation or Removal under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Monterrey, Mexico, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The motion will be granted and the underlying applications 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 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 one year or more and seeking readmission within ten years of his last departure from the United States, as well as pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for departing the country with an order of removal pending. The record indicates that the applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse and the father of their two U.S. citizen children. He seeks a waiver of inadmissibility and permission to reapply for admission, in order to reside in the United States with his wife and children.

The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), finding the applicant had not established that a qualifying relative would suffer extreme hardship were the waiver not granted, and thus also denied the applicant's Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) as a matter of discretion. *Decision of Field Office Director,* March 17, 2011. The AAO dismissed the subsequent appeal, finding that although the applicant had shown the requisite extreme hardship to a qualifying relative as a result of separation from the applicant, he had not shown that the qualifying relative would also experience extreme hardship if she relocated to Mexico to live with her husband. *Decision of the AAO,* October 24, 2012.

On motion, the applicant's counsel asserts the AAO erred in finding that the applicant's wife would not experience extreme hardship by moving to Mexico. Having previously found that separation from her husband would impose extreme hardship upon her, we do not reexamine that finding. Rather, we only revisit the issue of extreme hardship due to a qualifying relative's relocation to reside with the applicant overseas.

The applicant's counsel submits a brief contending that the applicant's wife would suffer extreme hardship by relocating to Mexico, and provides new evidence, including medical letters from her treating physician, as well as her father's, a list of medical prescriptions, and medical information. The record consists of the supporting documents submitted with the current motion, the Form I-601 and Form I-212, the appeal of the waiver denial, and pertaining to the applicant's removal proceedings. 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-
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> . . . .

> (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.
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> . . . .
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> (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...

The record reflects that on or about November 25, 1987, the applicant entered the United States without inspection at the age of 16. An Immigration Judge granted him voluntary departure on or before September 5, 1991, with an alternative order of deportation, but the applicant failed to comply with the terms of the voluntary departure and the deportation order became effective in September 1991. In August 2010, the applicant departed the United States, thereby accruing unlawful presence from April 1, 1997 to August 2010. As such, he is 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 ten years of his departure, as well as under section 212(a)(9)(A)(ii).

A waiver of inadmissibility under section 212(a)(9)(B)(i)(II) 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 other family members can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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-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 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

Previously, the AAO concluded that the applicant had established his wife would suffer extreme hardship if separated from her husband. We do not revisit that finding, but rather focus on whether the applicant has shown that his wife will experience extreme hardship by moving to Mexico.

As regards whether relocating to Mexico will impose extreme hardship on the qualifying relative, the updated record confirms the applicant's wife has been under medical care since 2011 for several chronic skin conditions. Her treating physician indicates that treatment is ongoing and documentation establishes that, as these conditions have a variety of potential causes, continuity of care and possible specialist involvement is required to arrest their possible evolution from inconveniences into serious medical problems, including malignancy. New documentation also establishes that the qualifying relative is the sole caregiver of her 62-year-old father who lives with her family, and that his conditions range from high blood pressure and high cholesterol to diabetes and bipolar disorder. Counsel states that these conditions render him incapable of taking care of himself and his daughter's care is essential for him to function, and documentation supports this contention. The qualifying relative confirms she is responsible for assuring he takes prescribed medications and transporting him to medical monitoring appointments.

Although born in Mexico, the applicant's wife has lived all but the first few months of her life in the United States, the last 10 as a U.S. citizen. While not denying speaking Spanish, she states that she neither reads nor writes the language fluently, is completely acculturated to the United States, and has had several bad experiences in Mexico. The AAO noted in its previous decision that a psychological evaluation from October 2010 reports the applicant's wife suffered trauma when she returned with her parents to Mexico at the age of 11 where she lived and attended school. The psychologist diagnoses the applicant's wife with posttraumatic stress disorder (PTSD) "manifested in clinically severe depression and secondary anxiety," and somatization disorder, and claims her mental health condition may worsen in Mexico. The evaluation observes that her history of low skilled jobs and limited educational background would make it difficult for her to secure employment in Mexico, and reports that she fears having no place to stay in Mexico and no health insurance for her family. Counsel claimed in his April 22, 2011 appeal brief that the applicant had been unable to secure employment, which worries his wife, and there is no new information that he has found a job. The psychologist diagnosed the children with PTSD, depression, and disorders reflecting the stress of missing their father. There is also evidence that they have medical issues, including asthma.

The evidence establishes that moving abroad would involve loss of the qualifying relative's contact with the family's primary care physicians, while also depriving her father of the care and support of his daughter and the extended family unit of which he is part. Official U.S. reporting confirms that while adequate medical care is available in major cities of Mexico, rural care is limited and payment in cash typically required prior to treatment (with U.S. domestic health insurance or Medicare/Medicaid not accepted by hospitals). *See Mexico—Country Specific Information,* U.S. Department of State (DOS), February 15, 2013. In addition, the U.S. government advises its citizens not to travel to portions of the country, including the province of Jalisco, where the applicant lives, and the province of Michoacán, where his wife was born, with the border area being particularly prone to instability, roadblocks, and armed violence between rival criminal organizations. *See Travel Warning—Mexico,* DOS, November 20, 2012. The qualifying relative reports having been robbed during a recent visit to see her husband, and that this experience left her and her children fearful of returning there. In addition to substantiating her safety concerns, the record suggests that her children's primary language is English and they are accustomed to life in the United States.

The evidence suggests that the safety and security concerns for her husband and children, as well as concern for her father's declining health, represent extreme hardships to the applicant's qualifying relative. We consider these family concerns, together with the medical, safety, and acculturation issues arising from the applicant's wife's relocation to Mexico. Based on the updated record, we find that moving to Mexico to live with the applicant will entail for the qualifying relative extreme hardship beyond those problems normally associated with relocating abroad.

The documentation on record, when considered in its totality, reflects the applicant has established that 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 reside in Mexico, regardless of whether she accompanied the applicant or remained here; supportive statements; passage of over 25 years since the applicant came to the United States as a minor; lack of a criminal record; and history of employment. The unfavorable factors in this matter involve the applicant's failure to depart voluntarily as ordered in 1991 and resulting unlawful presence.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the equities involved, including the passage of time since the applicant's violations of immigration law and the fact that he has resided outside the United States for nearly three years since departing, the AAO finds that a favorable exercise of discretion is warranted.

The AAO notes that the field office director also denied the applicant's Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) in the same decision as a matter of discretion based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the field office director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) provides, pertinent part:

> (i) Arriving Aliens. – Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal … is inadmissible.
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> (ii) Other Aliens. – Any alien not described in clause (i) who—
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> (I) has been ordered removed under section 240 or any other provision of law, or
> (II) departed the United States while an order of removal was outstanding,
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> and who seeks admission within 10 years of the date of such alien's departure or removal … is inadmissible.
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> (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 [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

On March 5, 1991, an Immigration Judge granted the applicant voluntary departure with an alternate order of deportation to take immediate effect if the applicant failed to depart as ordered. The applicant failed to depart by September 5, 1991 as ordered, the voluntary departure order converted to a deportation order, and the applicant finally left the country to apply for an immigrant visa in August 2010.

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 finds that the applicant's Form I-212 should also be granted as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility and for consent to reapply for admission, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden and, accordingly, the motion will be granted and the waiver application and application for permission to reapply for admission will be approved.

ORDER: The motion is granted. The prior decision of the AAO is withdrawn, the waiver application approved, and permission to reapply for admission granted.