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



U.S. Citizenship  
and Immigration  
Services

DATE: JUL 18 2013 Office: ANAHEIM

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the International Affairs Support Branch on behalf of the Field Office Director, Ciudad Juarez, 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 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 more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and two U.S. citizen children.

In a decision dated August 27, 2012, the field office director found that the applicant had failed to establish that his U.S. citizen spouse would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

On appeal, the applicant's spouse states that the field office director should exercise her discretion to grant the applicant's case, and that her situation meets the criteria in *Matter of Cervantes-Gonzales*, 22 I&N Dec. 560, 565 (BIA 1999). She also states that because the applicant left on his own without orders from the government, his waiver application was denied in error.

Section 212(a)(9) of the Act 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(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.

In the present case, the record reflects that the applicant entered the United States without inspection in August 2001. The applicant was placed into removal proceedings in December 2008 after being charged with domestic abuse in Florida. He completed a Deferred Prosecution Program and, on February 6, 2009, the charge was *Nolle Prosequi*. On September 2, 2010 an immigration judge granted the applicant voluntary departure. The applicant departed the United States on December 2, 2010. We note that whether the applicant departs the United States on his own or through law enforcement is of no consequence to the unlawful presence provisions under the Act as it is the departure itself, not the circumstances surrounding it, that triggers the inadmissibility. The applicant is therefore inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure. The applicant's qualifying relative is his U.S. citizen spouse.

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 contains references to hardship the applicant’s child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an applicant’s children as a factor to be considered in assessing extreme hardship. In the present case, the applicant’s spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(i)(v) of the Act, and hardship to the applicant’s children will not be separately considered, except as it may affect the applicant’s spouse.

The record of hardship includes: two statements from the applicant’s spouse, financial documentation, medical documentation, a psychological evaluation, numerous letters from family and friends, photographs of the family, educational documentation concerning the applicant’s children, photographs of living conditions in Mexico, and news articles concerning conditions in the area of Mexico where the applicant is residing.

The applicant’s spouse states that without the applicant she is suffering emotionally and financially. The record indicates that the applicant’s spouse and the applicant’s two children, twins born in 2007, are living in a rental property, costing \$560 per month. The applicant’s spouse states that both her parents work in agriculture, her mother has diabetes, and she can no longer rely on her family for help. The applicant’s spouse states that she recently accepted a position as an

English as a Second Language (ESOL) teacher in a local elementary school and that before this position she worked as a substitute teacher, earning \$10.67 per hour. She states that when the applicant was in the United States he earned \$14 per hour, but now only makes \$50 every two weeks as a laborer in Mexico, which is not enough to support her and her children. The applicant's spouse also states that she is concerned with her children's well-being, as their behavior in school has changed since the applicant's departure, and she suffers from chronic depression, for which she takes prescription medication. The record includes medical documentation indicating that the applicant's spouse has been diagnosed with anxiety and depression and has been prescribed Celexa. Medical documentation in the record also indicates that the applicant's spouse and children suffer from allergies and asthma and when the children have an asthma attack, they need a nebulizer machine. Statements from family members also support that the applicant's spouse is suffering without the applicant.

In regards to relocation, the applicant's spouse states that she fears for her safety in the area where the applicant is living and to relocate there would mean that she and her children would be restricted to spending much of their time in their home. She also states that relocation would mean financial ruin for her family and that she would be concerned for the health and education of her children. The record indicates that the applicant is living in Tuxpan, Michoacan, Mexico.

The current U.S. State Department travel warning for Mexico states that non-essential travel to the state of Michoacán should be deferred, except the cities of Morelia and Lázaro Cardenas where caution should be exercised. The warning also states that attacks on Mexican government officials, law enforcement and military personnel, and other incidents of Transnational Criminal Organization-related violence, have occurred throughout Michoacán. News articles in the record also indicate that Michoacán is home to two rival criminal gangs who are fighting for control of the area and are causing violence throughout the state. One article states that there has been a wave of violence seen in rural Michoacán, with municipalities along Mexico's Federal Highway 15 being seriously threatened by criminal violence. We note that Federal Highway 15 passes through Tuxpan.

We find that the applicant's spouse will suffer extreme hardship as a result of separation and as a result of relocation. The record indicates that the applicant's spouse is suffering depression as a result of separation and is struggling to raise her two small children without the applicant. The record also shows that the applicant's spouse would suffer extreme hardship upon relocation to Mexico. The record indicates that the area of Mexico where the applicant is living is experiencing a high level of violence; that the applicant's spouse's fears regarding her and her children having to be restricted in their movements is reasonable; and she would suffer significant emotional hardship as a result. The record also indicates that the applicant's spouse would suffer extreme financial hardship as a result of relocation as she would have to leave her employment and would no longer have health insurance to obtain affordable healthcare for her family. Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if his waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable

discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). .

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*Id.* at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include, as supported by numerous statements in the record, the applicant's attributes as a loving and supportive father and husband and the hardship his spouse and two children would face if he were not granted a waiver of his inadmissibility. The unfavorable factors include the applicant's illegal entry into the United States, the applicant's unlawful presence in the United States, and the applicant's record of an arrest.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.