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



U.S. Citizenship
and Immigration
Services

DATE: JUL 18 2013

OFFICE: ST. PAUL, MINNESOTA

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.

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, St. Paul, Minnesota. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 country for more than one year and seeking readmission within 10 years of her departure from the United States. The applicant is married to a U.S. citizen and she is the beneficiary of an approved Form I-130, Petition for Alien Relative. She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §1182(a)(9)(B)(v), in order to live in the United States with her U.S. citizen husband.

In a decision dated September 23, 2011, the field office director determined the applicant had failed to establish that her U.S. citizen husband would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

On appeal, counsel asserted that the field office director erred in finding the applicant ineligible for a waiver, and the applicant's husband would experience extreme emotional, physical and financial hardship if the applicant were denied admission into the United States. In support of these assertions, counsel submitted country conditions evidence and two affidavits from the applicant's husband.

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

(i) [A]ny 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.

The record indicates that the applicant was admitted to the United States as a visitor for pleasure in September 2004, with authorization to remain in the United States through March 2005. The applicant departed the country in October 2008. On January 31, 2009, the applicant was admitted to the United States as a visitor, with authorization to remain in the country until July 30, 2009. She has remained in the United States since that time. Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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

Waiver.-The Attorney General [now, Secretary, Department 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 [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)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise favorable discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

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. I.N.S.*, 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. The applicant’s U.S. citizen husband is her qualifying relative under section 212(a)(9)(B)(v) of the Act.

On appeal, the applicant’s husband stated that he would experience extreme emotional and financial hardship if he relocated with the applicant to Mexico, because he was born and raised in the United States, and he has a 21-year-old U.S. citizen son from a previous marriage in the United States who attends college and whom he helps financially. He also stated that it would be difficult to find work in Mexico due to his age and his poor Spanish, and he fears for his family’s safety in Mexico. He indicated that the applicant’s sister was kidnapped in Matamoros in 2010 and that she was still missing, with the police in Mexico unable to assist in solving the case. He stated that he believed his family could be kidnapped if they move to Mexico and that his family could be harmed by their daughter’s biological father, who was convicted of murder and imprisoned for five years in Mexico.

Upon review, the AAO found that the evidence on appeal, when considered in the aggregate, established the applicant’s husband would experience hardship that rises above the common results of removal or inadmissibility if the applicant were denied admission into the United States and he relocated to Mexico. We stated that the applicant’s husband was born and raised in the United States, he would lose his employment in this country, and he would be separated from his 21-year-old son if he moved to Mexico. In addition, we also noted that the most recent U.S. Department of State travel warning confirmed the applicant’s husband’s concerns about crime and

violent conditions around Matamoros, Tamaulipas, where the applicant is from, and advised travelers to defer non-essential travel to the state of Tamaulipas. See http://travel.state.gov/travel/cis_pa_tw/tw/tw_5815.html.

In regards to hardship upon separation, the applicant's husband stated on appeal that he would experience financial and emotional hardship if their daughter obtained U.S. lawful permanent resident status and lived with him in the United States without the applicant, because to raise her alone, he would have to pay for daycare while he worked and supported the applicant financially in Mexico. In addition, the applicant's husband stated that the applicant's immigration situation caused him anxiety; difficulty concentrating at work; and depression. Counsel indicated in her brief that the applicant's husband's health had worsened since the applicant's waiver application was denied; he had lost weight and he had become sullen and depressed. We found on appeal that the applicant had not shown that the hardship her spouse would face upon separation would rise to the level of extreme.

We found, that the evidence in the record failed to establish the applicant's husband would experience extreme hardship if the applicant were denied admission and he remained in the United States. We stated that the applicant's husband's affidavits failed, without objective evidence, to corroborate assertions that he would experience emotional, physical and financial hardship if he remained in the United States, separated from the applicant. Specifically, we noted that the record lacked income and expense evidence to corroborate assertions that the applicant's husband would experience financial hardship if he remained in the United States. We also found that the record lacked medical evidence to corroborate assertions that the applicant's husband's health had deteriorated and he had suffered from anxiety due to the applicant's immigration situation, or that he would suffer anxiety or depression due to separation from the applicant. Finally, we noted that the record also lacked corroborative evidence to demonstrate that hardship experienced by their daughter would cause the applicant's husband to experience hardship that could be considered extreme.

On motion, counsel submits additional evidence of hardship upon separation, which includes: a new statement from the applicant's husband, a letter from the applicant's husband's psychological counselor, a letter from the applicant's sister-in-law, a statement from the applicant's husband's friend, and copies of prescription medication.

We now find that the applicant has shown her husband would suffer extreme hardship upon separation. Evidence submitted on motion indicates that the applicant's husband has been having suicidal thoughts, has seen a psychological counselor for his symptoms, and has been prescribed medication to help control his depression and anxiety. The record indicates that when the applicant's husband's suicidal thoughts began he sought treatment at the Walk-In Counseling Center, which after interviewing him referred him to the [REDACTED]. He went to an appointment at the [REDACTED] and doctors there prescribed him anti-depressants and anxiety medication. The record also indicates he attended a follow-up visit at the Walk-In Counseling Center. The letters from family members corroborate the applicant's husband's current mental health condition and that the source of these problems is the applicant's

immigration situation and the possibility of separation. Thus, we find that the record now supports a finding that the applicant's husband will suffer extreme emotional hardship as a result of separation.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 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-Morales*, 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-Morales at 300.

In *Matter of Mendez-Morales*, 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).

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 the extreme hardship her husband will face if she is not granted the waiver of inadmissibility; the hardship her daughter will face if she is not granted the waiver of inadmissibility; the lack of criminal record in the United States; and the applicant's attributes as a loving and supportive wife. The unfavorable factors in the applicant's case include her unlawful presence in the United States.

Although the applicant's violation 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. The applicant has now met that burden. Accordingly, the motion will be granted and the underlying application will be approved.

ORDER: The motion is granted and the underlying application is approved.