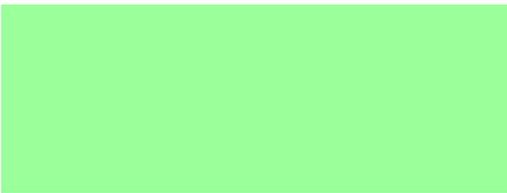


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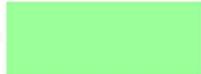
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090

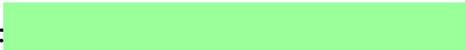


U.S. Citizenship
and Immigration
Services



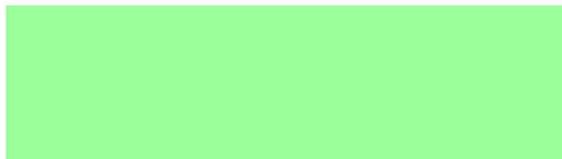
DATE **MAY 24 2013** OFFICE: SAN DIEGO, CALIFORNIA

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, 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.

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".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Diego, California, denied the waiver application. The applicant, through counsel, appealed the Field Office Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is before the AAO on motion in accordance with 8 C.F.R. § 103.5. The motion will be granted. The previous decision of the AAO will be affirmed.

The applicant is a native and a 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 admission within 10 years of his last departure from the United States. The Field Office Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO affirmed the Field Office Director's decision on appeal.

On motion, counsel contends the AAO made several legal and factual errors in its decision dismissing the appeal of the denial of the applicant's waiver application. The AAO "applied the wrong legal standard by seemingly equating extreme hardship with the far higher exceptional and extremely unusual hardship standard." Moreover, the AAO applied an unclear burden of proof, given that "the evidence of hardship was far greater than clear and convincing" and "made numerous errors of fact" in making findings that are not supported by the record. Counsel also asserts that additional documentary evidence will "highlight the errors of fact." *Form I-290B, Notice of Appeal or Motion (Form I-290B)*, dated January 17, 2013; *Brief in Support of Motion*, dated February 13, 2013.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant has submitted new documentary evidence to support his claim and asserted reasons for reconsideration, the motion will be granted.

The record includes, but is not limited to: a brief, motion, and correspondence from counsel; letters of support; identity, medical, employment, and financial documents; Internet articles; photographs; and documents on conditions in Mexico. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(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 [now 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. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary] regarding a waiver under this clause.

The record establishes the applicant accrued unlawful presence from December 2008 until September 2010; a period in excess of one year. Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. On motion, the applicant does not contest this finding of inadmissibility; rather he seeks a waiver under section 212(a)(9)(B)(v) 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 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 U.S. citizen spouse is the only demonstrated 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 of Immigration Appeals (BIA) 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 U.S. 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 BIA 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 BIA 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; *In re 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 BIA 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., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *In re 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.

On motion, counsel contends: the BIA “has always held that health issues are a significant hardship factor”; the applicant’s spouse has physical and psychological health issues, including cellulitis, gastritis, and depression; “the AAO ignores the clear medical records” and it “has no reason to question the diagnosis made by trained medical personnel,” as the “diagnostic method has no relevance to the finding”; the credentials of the diagnostician are not at issue, “and it may be presumed that he performed [his] duties according to the proper medical standards”; “the AAO cites to no authority whatsoever wherein it could substitute its own judgment for that of a licensed medical professional”; “the AAO appears to suggest that the [m]edical [d]octor who prescribed

medication to treat the depression violated ... both his oath and the terms of his license”; “now two separate written medical opinions relat[e] the depression to the separation of the applicant from his spouse”; the AAO’s conclusion that the presence of the applicant would not affect his spouse’s depression is “absurd” and “contrary to the facts”; and “the medical records are clear as a bell in every material respect,” showing that the applicant’s spouse’s “depression emanates from the separation,” that she has rashes, and that her pregnancy involves complications; and “plain language printouts defining cellulitis and gastritis were included with the evidence which explain both the symptomology and treatment necessary for these diseases.” In support of these contentions, the motion includes a medical letter from [REDACTED] and medical laboratory results.

On motion, counsel also contends: “the AAO misstate[s] the evidence ... that ‘the record does not include any studies or research demonstrating the effect of the absence of a parent on a child,’ and “errs when it suggests that it may ignore a fact which every court has presumed to be true for pretty much the entire history of mankind”; and “separation of a family is hardship AS A MATTER OF LAW [sic].” In support of these contentions, counsel cites *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987). The AAO adds that in *Salcido-Salcido v. INS, supra*, the Ninth Circuit held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted.) The AAO acknowledges the holdings of the Ninth Circuit, and as the present case arises within the jurisdiction of the Ninth Circuit, due consideration is given to family separation in the present matter.

To support his contention regarding family unity and hardship to the applicant’s child, counsel submits on motion a copy of a report. See *Brief in Support of Motion, supra* (referencing International Human Rights Law Clinic et al., *In the Child’s Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* (March 2010)). While the AAO acknowledges the Ninth Circuit’s holdings regarding the significance of family unity, it is noted the policy brief concerns individuals, unlike the applicant in the instant case, who have equities as lawful permanent residents in the United States but are facing removal because of criminal-related matters.

Although the applicant’s spouse may experience some hardship in the applicant’s absence, the AAO finds the record does not establish the hardship goes beyond what is normally experienced by qualifying relatives of inadmissible individuals. In its previous decision, the AAO did not challenge [REDACTED] credentials as a licensed physician or his authorization to prescribe medication, and it did not conclude the applicant’s presence would not have an effect on the applicant’s spouse’s psychological condition. The AAO also notes it previously found that the medical records that were legible and discernible were sufficient to establish some of the applicant’s spouse’s medical history and treatment.

The AAO further notes the record includes a letter from licensed physician, [REDACTED]

indicating the applicant's spouse currently "has gastritis, colitis, hyperlipidemia, thrombocytopenia, bacteriuria, and an abnormal liver function test" and she is being treated with prenatal vitamins and is on a low cholesterol diet.¹ [REDACTED] also indicates the applicant's spouse has been diagnosed with major depression as defined in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV), and her depression is a result of the applicant's inadmissibility. Additionally, [REDACTED] indicates: the applicant's spouse is "very fearful" for the applicant's life due to the "widespread violence and terror" in Mexico; she is "unable to be treated with an antidepressant" for her depression; and "[s]he has been advised exercise and a healthy diet." *Medical Letter*, dated January 24, 2013. The AAO notes that [REDACTED] does not specifically discuss when his relationship with the applicant's spouse began or the frequency of their visits concerning her mental health. Also, the AAO notes the record reflects that the applicant's spouse's physical conditions are being treated through a low cholesterol diet, but the record is unclear concerning the applicant's spouse's inability to be treated with an antidepressant, as [REDACTED] references the antidepressant prescribed by [REDACTED] on August 3, 2011.

Moreover, in its previous decision, the AAO indicated the record was unclear concerning the applicant's spouse's current employment status, the record did not include sufficient evidence of the applicant's spouse's current financial obligations, and it did not include evidence of labor or employment conditions in Mexico and the applicant's inability to assist in the maintenance of his and his spouse's households. The AAO notes the motion does not include specific evidence to address these concerns, only counsel's general contention that the applicant's spouse "is suffering from extreme economic hardship as the sole provider for her family." The AAO is thus unable to conclude the record establishes the applicant's spouse's hardship would go beyond that which is commonly expected.

The AAO notes the concerns regarding the hardship the applicant's spouse may experience in the applicant's absence, but finds that even when this hardship is considered in the aggregate, the record fails to establish the applicant's spouse would suffer extreme hardship as a result of separation from the applicant.

On motion, counsel contends: "the qualifying relative has numerous health issues and ... she would not be able to obtain the care she needs for those health issues"; even without "specific evidence of the [applicant's] baby having become ill in Mexico while there, the statistics alone" support finding that their children's health "is endangered in Mexico"; and "consideration of all of these [*Cervantes-Gonzales*] factors strongly favor" approving the waiver. In support of these contentions, the motion includes a prescription from licensed podiatrist, [REDACTED] indicating a topical treatment for the applicant's daughter for a fungal nail infection on her feet.

In its previous decision, the AAO found the applicant's spouse would suffer extreme hardship if she were to relocate to Mexico due to her familial and social ties in the United States as well as the

¹ The record reflects the applicant's spouse also was pregnant at the time [REDACTED] wrote his letter and subsequently gave birth to her son. See *Birth Certificate*, dated February 6, 2013.

criminal and social conditions in Michoacán, Mexico.² The AAO notes the spouse's circumstances in this respect have not improved since the AAO's previous decision. Accordingly, the record continues to reflect the cumulative effect of the hardship the applicant's spouse would experience upon relocation due to the applicant's inadmissibility rises to the level of extreme.

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. In Re Pilch*, 21 I&N Dec. at 632-33. As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to his spouse in this case.

In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relative, considered in the aggregate, rises beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds the applicant has failed to establish extreme hardship to his 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 determining whether the applicant merits a 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 motion will be granted and the previous decision of the AAO will be affirmed.

ORDER: The motion is granted. The previous decision of the AAO is affirmed. The application remains denied.

² In its previous decision, the AAO erroneously indicated the record did not include specific evidence of medical conditions in Mexico. The AAO notes the record included evidence of maternal mortality rates, but finds its error to be harmless, as it concluded the applicant's spouse would suffer extreme hardship upon considering the relevant hardship factors in the aggregate.