



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: DEC 01 2014

Office: DENVER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Denver, Colorado. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 for one year or more and seeking readmission within ten years of her last departure. The applicant's spouse and child are U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated April 11, 2014.

On appeal, counsel asserts that the applicant is no longer inadmissible, because the inadmissibility period resulting from her unlawful presence has passed. Alternatively, counsel claims the applicant's spouse would experience extreme hardship if the waiver application is denied. *Brief in Support of Appeal*, dated May 2, 2014.

The record includes, but is not limited to, counsel's briefs; statements from the applicant, her spouse, friends, and family; medical records; financial records; educational records; photographs; and country-conditions information about 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 [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 [Secretary] regarding a waiver under this clause.

The record reflects that applicant entered the United States with a border crossing card in April 1996 and departed the United States in December 1998. She states that she re-entered the United States with a border crossing card in February 1999. The record does not include evidence of the date that her authorized period of stay expired. She therefore accrued unlawful presence between April 1, 1997, the effective date of unlawful-presence provisions under the Act, and December 1998. The applicant 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 one year or more and seeking readmission within ten years of her December 1998 departure from the United States.

Counsel asserts that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, as a departure from the United States is required to trigger the unlawful-presence inadmissibility. The record reflects that the applicant departed the United States in December 1998, after accruing one year or more of unlawful presence. Although the applicant may have remained in the United States unlawfully after she lawfully re-entered in 1999, that period of time is not considered for purposes of her inadmissibility and the instant waiver application, because the record lacks evidence of her subsequent departure. The applicant currently is in the United States.

Counsel asserts that in another case, we found that an individual who accrues unlawful presence, departs, then lawfully re-enters the United States is not inadmissible after the period of the unlawful presence bar expires, even though the applicant is in the United States during its pendency. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding. The case counsel cites is an unpublished decision that has no precedential authority.

In *Matter of Rodarte-Roman*, the Board of Immigration Appeals (BIA) analyzed congressional intent in the construction of section 212(a)(9) of the Act:

The unifying theme of section 212(a)(9) is that all its subparagraphs seek to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter. We deem it evident that Congress made departure (rather than commencement of unlawful presence) the event that triggers inadmissibility or ineligibility for relief, because it is departure which marks the culmination of the alien's prior immigration violation and which makes the alien a potential *recidivist*. It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent.

23 I&N Dec. 905, 909 (BIA 2006).

We find that the terms and intent of section 212(a)(9)(B) of the Act require that an individual be subject to the inadmissibility bar until he or she has remained outside the United States for the required period. Congress enacted section 212(a)(9) of the Act with the purpose of penalizing aliens who have accrued one year or more of unlawful presence in the United States and to deter them from subsequent unlawful presence in the United States. The penalty for aliens who accrue unlawful presence and depart is that they must remain outside the United States for a specified period of time before they will be admitted. An alien who re-enters the United States before the specified period of time has elapsed without permission to do so seeks to defeat the punitive and preventive intent of the law. Allowing an alien to serve any portion of this period of inadmissibility in the United States while simultaneously accruing additional unlawful presence would reward recidivism and is contrary to the purpose of the enactment of section 212(a)(9) of the Act. In this case the applicant lawfully re-entered the United States with a border crossing card in February 1999, and she began to accrue unlawful presence when her period of admission expired.

The applicant's last departure from the United States was more than 10 years ago; however, the applicant has not satisfied the 10-year period of inadmissibility stated in section 212(a)(9)(B)(i)(II) of the Act. We find that allowing an alien to serve any portion of the period of inadmissibility in the United States while simultaneously accruing additional unlawful presence would reward recidivism and is contrary to well-established principles of statutory construction and the congressional intent underlying the creation of section 212(a)(9) of the Act.

Lastly, counsel cites to *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) in asserting that the applicant is no longer inadmissible, as 10 years have passed since she departed the United States. The case cited does not address section 212(a)(9)(B)(i)(II) of the Act and therefore does not support counsel's claim.

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 her child can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. 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.

We will first address hardship to the applicant's qualifying relative upon relocation to Mexico. Counsel states that the applicant's spouse is African-American and, because mixed-race marriages are viewed negatively in Mexico, he and the applicant would experience discrimination there. Moreover, counsel states that the applicant and her spouse do not have the means to relocate, and "it

would not be easy to obtain . . . comparable employment in Mexico considering their ages and physical limitations.” Counsel also states that the applicant's spouse has children from a previous relationship, and he is obligated to financially support them. The applicant submits evidence showing that the 2013 federal tax refund she and her spouse earned was applied to his child-support debt.

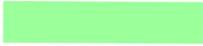
Addressing other types of hardship that the applicant’s spouse would experience upon relocation to Mexico, the applicant's spouse states that Mexico is a very dangerous place right now. The record also includes a 2012 Department of State human-rights report for Mexico. The applicant states that her spouse does not speak Spanish; his family and friends are in the United States; and the economy is not good in Mexico. Moreover, the applicant's spouse's medical records reflect that he sought treatment for back and chest pain in 2009 and had surgery in 1995 related to a leg fracture.

The record does not include supporting documentary evidence to corroborate claims of hardship that the applicant's spouse would experience in Mexico. Specifically, the applicant submits no evidence to corroborate claims of discrimination against interracial marriages or difficult economic conditions in Mexico as they relate to employment. Moreover, the record is not clear about where the applicant's spouse would reside in Mexico and if that area is dangerous. The record also does not include evidence of current medical issues for the applicant's spouse. The applicant's spouse may experience some hardship due to language issues, ties to the United States, and lack of ties in Mexico. However, we find that there is insufficient documentary evidence of emotional, financial, medical or other types of hardship that, considered in their totality, establish that he would experience extreme hardship upon relocation to Mexico.

Addressing the hardships the applicant’s spouse would experience if he remained in the United States without her, counsel states that the applicant's spouse has known the applicant for 10 years. The applicant's spouse states that he needs the applicant by him, he loves her, and they are raising her daughter together.

Counsel asserts that the applicant's spouse would experience financial hardship without the applicant. She states that he works as a furniture mover; he was injured in 2009; and “the family would be financially adrift” if he becomes the only wage earner and is injured. The record includes auto insurance, electric and cell phone bills; a lease for the applicant and her spouse; and evidence of child-support obligations for the applicant's spouse. The applicant's spouse's Form W-2, Wage and Tax Statement, reflects an income of \$23,537.50. The family’s 2012 joint tax return reflects a total income of \$47,743. The applicant's paystubs reflect her bimonthly net pay of approximately \$1,000.

The applicant's sister states that her spouse passed away; the applicant helps raise her son; the applicant, her spouse and her daughter live with her; and the applicant provides her financial and emotional support. The record is unclear as to the degree of hardship that the applicant’s spouse would experience due to hardship that the applicant’s sister, daughter, and nephew would experience without the applicant.



The record reflects that the applicant's spouse may experience some emotional and financial hardship without the applicant. As he is living with the applicant's sister, nephew and daughter, he may experience some hardship based on hardship that they would experience without the applicant. However, the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would experience extreme hardship upon remaining in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. Therefore, we find that no purpose would be served in discussing whether she merits a waiver as a matter of overall discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.