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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

H1

DATE: JAN 18 2012 Office: MEXICO CITY, MEXICO File: [redacted] [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(g) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(g) and 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico. 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. He 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 admission within 10 years of his last departure from the United States. He was also found inadmissible under section 212(a)(1)(A)(iii)(I) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii)(I), as an alien classified as having a physical/mental disorder with associated behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others. The Field Office Director also found the applicant inadmissible pursuant to section 212(a)(2)(A)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(II), as an alien who has been convicted of a crime or who admits having committed or who admits having committed the essential elements of a law relating to controlled substances. The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(g) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(g).

The Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (Form I-601) on August 24, 2009.

On appeal, counsel for the applicant asserts the Field Office Director erred in concluding the applicant was inadmissible pursuant to section 212(a)(2)(A) and failed to consider all of the hardship factors impacting the applicant's spouse in the aggregate. *Attachment, Form I-290B*, received September 29, 2009.

The record reflects that the applicant is inadmissible under section 212(a)(1)(A)(iii)(I) of the Act as an alien classified as having a physical/mental disorder with associated behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others.

The record includes, but is not limited to, counsel's brief; a statement from the applicant and the applicant's spouse; copies of bank statements from the applicant's spouse; copies of the birth certificates for the applicant's daughters; a copy of the custody agreement between the applicant's spouse and former husband; and copies of unemployment benefits payment statements for the applicant's spouse.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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

> (a) Classes of Aliens Ineligible for Visas or Admission.--Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.--

(A) In general.-Any alien-

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others . . . is inadmissible.

(B) Waiver authorized.--For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

The record reflects that the panel physician who conducted the applicant's medical examination referred the applicant to a psychologist for an evaluation after he reported that he was arrested on two occasions for alcohol related offenses. The psychologist classified the applicant as having a Class A medical condition, Alcohol Abuse, with associated Harmful Behavior. The Field Office Director found the applicant inadmissible under section 212(a)(1)(A)(iii) of the Act on this basis.

Section 212(g) of the Act provides, in pertinent part:

(g) The Attorney General may waive the application of—

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the [Secretary], in the discretion of the [Secretary] after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

Regulations at 8 C.F.R. § 212.7(b) govern aliens with certain mental conditions, who are eligible for immigrant visas but require the approval of waivers of grounds of inadmissibility. The regulations require that the applicant submit the waiver application and a statement to the appropriate USCIS office indicating that arrangements have been made to provide the alien's complete medical history, including details of any hospitalization or institutional care or treatment for any physical or mental condition; the alien's current physical and mental condition, including prognosis and life expectancy; and a psychiatric examination. 8 C.F.R. § 212.7(b)(4). "For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery." *Id.* The medical report must then be forwarded to the U.S. Public Health Service for review. *Id.* These regulations further

provide:

> (ii) *Submission of statement*. Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or [USCIS] office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:
>
> (A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.
>
> (B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;
>
> (C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished:
>
> (*1*) The report evaluating the alien's mental status within 30 days after the alien's arrival; and
>
> (*2*) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.
>
> (D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(g) of the Act. The record contains a Centers for Disease Control (CDC) form 4,422-1, Statements in Support of Application for Waiver of Inadmissibility. Part I of CDC form 4,422-1 reflects that the Department of Health and Human Services Public Health Service (PHS) received the required medical documentation regarding the applicant's present condition. Part II of CDC form 4,422-1 shows that, pursuant to 8 C.F.R. § 212.7(b)(4)(ii), the applicant obtained the required statement from a licensed psychologist, at a PHS-approved facility, Yolo County Chemical Dependency Program. The applicant's wife completed Part III of Form CDC 4,422-1, attesting that necessary arrangements for further examination of the applicant will be made upon his entry to the United States. On March 6, 2009, [redacted] approved the applicant's Form CDC 4,422-1, thus certifying PHS's opinion that appropriate follow-up care will be provided upon the applicant's entry to the United States, and that PHS has no objection to his entry. Therefore, the

AAO finds that the applicant has established eligibility for a waiver of the ground of inadmissibility arising under section 212(g) of the Act pertaining to aliens who have been classified as having a Class A medical condition.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The Field Office Director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act based on admissions to a doctor during a medical exam that he had used cocaine regularly and had smoked crack on at least 20 occasions. Counsel asserts that the applicant's admission of drug use to a medical examiner may not be used as a basis of inadmissibility because he had not been provided with a definition of the essential elements of any controlled substances violation prior to making his admission, and cites to *Matter of* K, 7 I&N Dec. 594, 597 (BIA 1957), and *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1215 (9th Cir. 2002). The AAO agrees. The record does not contain any evidence that the applicant has been convicted of any controlled substances crimes, or that he was provided with the definition of the essential elements of any controlled substance law prior to his statements. Based on these findings the AAO concludes that the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(II).

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-
>
> . . . .
>
> (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 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 [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 indicates that the applicant entered the United States in 1991 without inspection, and resided in the United States until March 2008, when he departed to Mexico. Therefore, the applicant was unlawfully present in the United States for over a year from April 1, 1997, the effective date of the unlawful presence provision of the Act until March 2008, and is now seeking admission within ten years of his last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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 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*, 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.

Counsel for the applicant asserts the applicant's spouse will experience emotional and financial impacts constituting extreme hardship if she relocates to Mexico with the applicant. *Brief in Support of Appeal*, received September 19, 2009. Counsel asserts that the applicant's spouse has family ties in the United States, including one of her daughters from a previous marriage who would not be able to relocate to Mexico due to a custody arrangement. Counsel notes that the applicant has resided in the United States since 1989 and that the applicant's children would lose their health insurance coverage if they relocated to Mexico.

The record includes sufficient documentation to establish that the applicant's spouse has two daughters, one by a previous marriage, and that the girl's father has custody rights which might preclude her from relocating to Mexico. The AAO also recognizes that the applicant's spouse has family ties in the United States, including her parents and a sister.

No documentation has been submitted to establish that the applicant's daughters are currently covered by health insurance, or that they would lose that health insurance upon relocation to Mexico. In addition, there record does not contain any evidence that the applicant's daughters suffer from any particular medical issue or require non-routine medical treatments.

The AAO recognizes that the applicant's spouse has significant family ties in the United States and that the applicant's spouse has resided in the United States for a long period of time. In addition, the AAO notes that the applicant's spouse would likely have to separate from one of her daughters if she relocates abroad with the applicant. When these factors are considered in the aggregate, the AAO finds that they rise above the common impacts associated with relocation to a degree of constituting extreme hardship.

With regard to hardship on separation, counsel for the applicant asserts that the applicant's spouse is experiencing financial and physical hardship due to the applicant's inadmissibility. *Brief in Support of Appeal*, received September 19, 2009.

Counsel asserts the applicant's spouse lost her job, had to move out of her apartment and is now residing with her parents in a one room living situation with her daughters. The record contains a bank account statement listing various charges and generically categorizing them into cost of living expenses, as well as copies of payments the applicant has received from her unemployment benefits. While these documents are sufficient to establish that the applicant's spouse is experiencing a financial burden due to the loss of her job, it does not establish that she would be unable to find other employment or be able to meet her financial obligations to mitigate the financial impact of the applicant's removal. As noted by the applicant's spouse in her October 21, 2009, letter she is currently residing with her parents. The applicant's spouse claims her daughter suffers from favoritism within the household, however there is no evidence to establish this, therefore, while the AAO acknowledges her claim it must give this consideration less evidentiary weight. Regardless of the applicant's spouse's claims of favoritism, the AAO must also give consideration to the fact that the applicant's spouse is residing with her parents, indicating that they are able to provide her a place to live. There is insufficient evidence to determine the extent of the financial impact on the applicant's spouse. When these facts are taken into consideration the AAO does not find the record to establish that the applicant's spouse is experiencing uncommon financial hardship.

The record does not contain any evidence to support that the applicant's spouse is experiencing uncommon emotional hardship. There is no evidence of any medical hardship or evidence that the applicant's spouse would be unable to find employment adequate to cover her financial obligations.

Nor does the record contain any evidence that the applicant would be unable to find employment in order to support his spouse and daughters from abroad.

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 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. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.