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

U.S. Citizenship and Immigration Services

H5

[redacted]

OCT 19 2010

FILE: [redacted] Office: LIMA Date:

IN RE: Applicant: [redacted]

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

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, Lima, Peru. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Brazil, entered the United States with a valid B2 nonimmigrant visa on May 21, 2000. In June 2000, shortly after entering the United States, she commenced unauthorized employment. The applicant did not depart the United States until January 2002. The applicant re-entered the United States with said visa in December 2002 and did not depart the United States until January 2006. *See Form DS-230 Application for Immigrant Visa and Alien Registration, Part 1,* dated February 10, 2008 and *Record of Sworn Statement in Proceedings,* dated April 15, 2006. In April 2006, the applicant attempted to enter the United States with the aforesaid B2 visa. She was ordered removed on April 15, 2006 and was removed from the United States on April 15, 2006. *See Determination of Inadmissibility,* dated April 15, 2006 and *Notice to Alien Ordered Removed/Departure Verification,* dated April 15, 2006.

The field office director found the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured entry into the United States by fraud and/or willful misrepresentation. The field office director also found the applicant 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 unlawful presence. Finally, the field office director found that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for unlawful presence after previous immigration violations. *Decision of the Field Office Director,* dated May 28, 2008.

The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse. In support of the appeal, the applicant's spouse submits a letter, dated June 17, 2008. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act, 8 U.S.C. § 1182(i), provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

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 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 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....

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year...

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud and/or misrepresentation as the record establishes that she commenced unauthorized employment shortly after entering the United States as a B-2, Visitor for

Pleasure[1] and under section 212(a)(9)(B)(v) of the Act, for unlawful presence. As for the field office

[1] The Department of State's Foreign Affairs Manual [FAM] provides, in pertinent part:

> Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa...
>
> "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:
>
> (1) The alien is excludable on the true facts; or
> (2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

9 FAM 40.63 N. 6.1.

The FAM states the following regarding the 30/60 day rule:

> a. In determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application or to an immigration officer when applying for admission. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either:
>
> (1) Apply for adjustment of status to permanent resident; or
> (2) Fail to maintain their nonimmigrant status (for example, by engaging in employment without authorization by DHS).
>
> b. To address this problem, the Department developed the 30/60-day rule. This rule is intended to facilitate adjudication of these types of cases consistent with the statutory mandates.

9 FAM 40.63 N4.7.

The FAM further states, in pertinent part:

> a. You should apply the 30/60-day if an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by:

director's finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, based on the applicant's entry and attempted entry after a previous immigration violation, specifically, unlawful presence, the AAO notes that although the applicant accrued unlawful presence on multiple occasions, by overstaying her B visa from 2000 until January 2002 and again from 2003 until January 2006, as discussed above, when the applicant re-entered the United States in 2003 and when she attempted re-entry to the United States in April 2006, she always presented a valid passport and U.S. nonimmigrant visa; she did not procure or attempt to procure entry without being admitted. As such, section 212(a)(9)(C)(i)(I) of the Act does not apply to the applicant.

Waivers of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act are 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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to

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> (1) Actively seeking unauthorized employment and, subsequently, becomes engaged in such employment....
> (4) Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.
>
> If an alien violates his or her nonimmigrant status in a manner described in 9 FAM 40.63 N4.7-1 within 30 days of entry, you may presume that the applicant misrepresented his or her intention in seeking a visa or entry.

9 FAM 40.63 N4.7-1, 7-2.

Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive. In this case, had the applicant disclosed that she intended to seek employment upon entry to the United States, the consular officer would have denied the visa request and/or the immigration officer would have denied the applicant entry to the United States, as the applicant would no longer have been statutorily eligible for the B-2 visa.

require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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 *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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also* [redacted] 224 F.3d 1076, 1082 (9th Cir. 2000) ([redacted] was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The applicant contends that her U.S. citizen spouse will suffer extreme hardship were he to remain in the United States while the applicant resides abroad due to her inadmissibility. The applicant explains that

her spouse suffers from many health issues and she, as his wife, is the only one that can help him. She further notes that her spouse has been employed in the plastics industry for almost 29 years, but in the past six years he has been laid off three times because of difficulties in the industry and has had to move in with his mother. The applicant contends that her financial contributions are critical to her spouse's livelihood and without her contributions, he will experience financial hardship. *Letter from* [redacted]

In support, a letter has been provided from the applicant's spouse's treating physician, confirming that the applicant's spouse has been under his care for kidney stones and has had multiple surgeries to treat the kidney stones on at least four different occasions. *Letter from* [redacted] In addition, the record establishes that the applicant's spouse has been diagnosed with [redacted] esophagus and an ulcer. *Patient Instructions,* dated October 22, 2007.

To begin, it has not been established that the applicant's spouse is suffering extreme emotional hardship due to his spouse's inadmissibility. Moreover, with respect to the applicant's spouse's referenced medical conditions, no documentation has been provided from the applicant's spouse's treating physician detailing the current severity of the applicant's spouse's medical conditions, the short and long-term treatment plan and the specific hardships he will face if the applicant is unable to reside in the United States. It has also not been established that the applicant's spouse is unable to travel to Brazil on a regular basis to visit his spouse, as he has been doing since marrying the applicant in Brazil in 2007. Moreover, no documentation has been provided establishing the applicant and her spouse's income and expenses, assets and liabilities, to establish that the applicant's spouse is experiencing extreme financial hardship due to the applicant's inadmissibility. Nor has it been established that the applicant is unable to obtain gainful employment in Brazil that would allow her to assist her spouse financially should the need arise. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO recognizes that the applicant's spouse will endure hardship as a result of continued separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. The AAO concludes that based on the evidence provided, it has not been established that the applicant's U.S. citizen spouse is suffering extreme hardship due to the applicant's inadmissibility.

Extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. With respect to this criteria, the applicant's U.S. citizen spouse asserts that he would suffer emotional hardship were he to relocate abroad, as he would be separated from his only child and his elderly mother. He further notes that he would suffer due to long-term separation from his community, where he has lived since 1979, his friends and his employment. In addition, he contends that he would suffer due to long-term separation from the medical practitioners familiar with his medical conditions, its severity and its short and long-term treatment plan. Moreover, the applicant's spouse references the medical hardship he would suffer in Brazil, due to substandard medical care, the lack of medical care coverage and the high costs of

medications. *Letter from* [redacted] Finally, the applicant contends that in Brazil, her spouse will be unable to obtain gainful employment. *Supra* at 1.

Were the applicant's U.S. citizen spouse to relocate to Brazil to reside with the applicant due to her inadmissibility, the record reflects that the applicant's spouse would encounter emotional hardship, due to long-term separation from his daughter and elderly mother, his community and his long-term gainful employment. He would also suffer physical and medical hardship as he would not be able to continue treatment with physicians familiar with his medical conditions and moreover, would not be able to afford the medications he needs. Finally, the U.S. Department of State confirms the very high levels of crime in Brazil. *Country Specific Information-Brazil, U.S. Department of State,* dated January 12, 2010. As such, the AAO concludes based on a totality of the circumstances, the applicant's U.S. citizen spouse would experience extreme hardship were he to relocate to Brazil to reside with the applicant due to her inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that although the applicant has established that her U.S. citizen spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant due to her inadmissibility, the applicant has failed to establish that her U.S. citizen spouse would suffer extreme hardship if she were not permitted to reside in the United States. The record demonstrates that the applicant's spouse faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or refused admission. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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 appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.