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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

[redacted]

H6

Date: APR 13 2011 Office: [redacted] 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.

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 must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Hurmuzy

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, [redacted] Service Center. 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 the [redacted] 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 more than one year and seeking admission within 10 years of his last departure from the United States.[1] The applicant 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 return to the United States to join his U.S. citizen spouse and child.

The Director found that the applicant failed to establish that extreme hardship would be imposed on her qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated August 11, 2008.

On appeal, counsel asserts that the applicant's spouse is suffering extreme hardship as a result of his inadmissibility. *Statement on Notice of Appeal (Form I-290B)*, dated September 7, 2008.

The record contains, but is not limited to, the applicant's marriage certificate, the applicant's child's birth certificate, the applicant's spouse's naturalization certificate, financial documentation, statements from the applicant and his spouse, conviction records, photographs, and letters from the applicant's friends. The entire record was reviewed and considered in rendering this decision.

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.

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[1] The record reflects that on March 14, 2000, the applicant was convicted upon a plea of guilty in the [redacted] Criminal Court of endangering the welfare of a child in violation of [redacted] Penal Law § 260.10 and was given a sentence of conditional discharge [redacted] This offense is a Class A misdemeanor, punishable by a term of imprisonment not exceeding one year. *See* New York Penal Law § 70.15. Aliens who have been convicted of crimes involving moral turpitude are inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Since the applicant is eligible for the "petty offense" exception to inadmissibility arising under section 212(a)(2)(A)(i)(I) of the Act, we need not address the issue of whether his offense is a crime involving moral turpitude. *See* Section 212(a)(2)(A)(ii)(II) of the Act.

. . . .

> (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 reflects that the applicant was admitted to the United States on December 20, 1996 as a B-2 visitor with a period of authorized stay until June 19, 1997. A petition for nonimmigrant worker (Form I-129) was filed on the applicant's behalf and he was granted status as an R-1 temporary nonimmigrant religious worker from June 11, 1997 until June 10, 1999. On December 22, 2001, the applicant was apprehended by a border patrol agent and placed in removal proceedings. *Record of Deportable/Inadmissible Alien (Form I-213).* On May 1, 2002, the applicant was ordered removed from the United States. On June 1, 2002, the applicant departed the United States. The applicant accrued unlawful presence from June 11, 1999 until his June 1, 2002 departure from the United States, a period of almost three years. The applicant is seeking admission within ten years of his June 2002 departure from the United States. The applicant is, therefore, 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 more than one year.

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 child 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 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 U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta 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.

On appeal, counsel asserts that the [redacted] "has been plagued with problems" and the "economic situation is grim." Counsel states that the applicant and his wife would find it impossible to obtain gainful employment in the [redacted] Counsel contends that the [redacted] is extremely unsafe. Counsel notes that the applicant and his spouse will be viewed in the [redacted] as "suspect to many employers who will be unwilling to hire people from the USA." Counsel states that the applicant is self-employed. Counsel contends that it "would not be an option" for the applicant's spouse and daughter to relocate to the [redacted] Counsel indicates that the applicant's daughter would "lose the benefit of the good education and medical facilities that are available to her in the USA." *Statement on Notice of Appeal (Form I-290B)*, dated September 7, 2008.

As a preliminary matter, the AAO notes that we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. 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.

The AAO notes that the record reflects that the applicant's 38-year-old spouse is a native of the [redacted] She should thus have less difficulty adjusting to the culture, language and customs of the country. The AAO observes that counsel's assertions regarding the crime and economic problems in the [redacted] are unsupported by the record. The record does not contain country condition reports, or any other articles, discussing the specific economic and safety issues identified by counsel. The applicant has not indicated his profession, where he is self-employed, or how much he earns. Nor has he explained where he resides and whether he has been a victim of crime. Moreover, counsel's assertion that the applicant's spouse would face financial hardship upon relocation is inconsistent with the bank statements submitted on appeal, reflecting that the applicant has been sending his spouse significant remittances from the [redacted] *See* [redacted] *Bank Statements*. While the assertions of counsel have been considered, they cannot be given any weight without supporting evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges that the relocation of the applicant's spouse and daughter may result in a reduction in their standard of living, including access to school systems and medical facilities in the United States. However, the record does not show that the applicant's spouse or daughter have particular medical needs that would result in hardship to them if they relocated. Nor has the applicant or his spouse asserted that their daughter would be unable to adjust to the school system in the Dominican Republic. The AAO notes that a reduction in standard of living does not necessarily result in extreme hardship. *See Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) ("the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens

fulfill their dreams or continue in the lives which they currently enjoy."). While the AAO will give some weight to hardships associated with relocation, the applicant has not demonstrated that these hardships are atypical or beyond the norm.

All elements of hardship to the applicant's spouse, should she relocate to the [redacted] have been considered in the aggregate. Based on the foregoing, the AAO finds that the applicant has failed to establish extreme hardship to his spouse upon relocation to the [redacted]

On appeal, counsel contends that the applicant's spouse has been suffering emotionally for several years. Counsel states that having the applicant in the United States would "help her cope with her health" and raising their child. Counsel contends that the applicant does not want his child to be raised without a father. *Statement on Notice of Appeal (Form I-290B)*, dated September 7, 2008.

The applicant's spouse asserts that her husband helps support her financially, emotionally and spiritually. She states that that she wants to be in the United States with her husband as a family. She indicates that if and the applicant "are forced to live separate lives" her marriage may suffer. *Affidavit of* [redacted], dated September 17, 2006.

The applicant asserts that he loves his spouse and child. He states that he wants his spouse and child to "have a happy family again and to give them a life with honor and values." *Applicant's Letter*, dated June 13, 2007. The record contains letters from the applicant's friends and family members attesting to the applicant's strong relationship with his spouse.

The AAO acknowledges that the applicant's spouse and child are suffering emotionally as a result of their separation from the applicant. The separation of family members often results in significant psychological hardship. The supporting letters in the record demonstrate the applicant's strong family bond and interests in keeping his family unified. As noted, 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. However, in this case, the applicant and his spouse married in the [redacted] after the applicant was removed from the United States. She knew that she would be separated from the applicant after their marriage should she choose to return to the United States. As stated in *Matter of Cervantes-Gonzalez*, the applicant's removal from the United States "goes to the [applicant's] wife's expectations at the time they were wed" and undermines the applicant's argument that his wife will suffer extreme hardship if they remain separated. 22 I&N Dec. 560, 566-567 (BIA 1999). While every case will present some emotional hardship upon separation, the record here does not show that it is beyond the common hardship experienced by most aliens separated as a result of inadmissibility.

Finally, counsel has indicated that the applicant's presence in the United States will "help her cope with her health," and raising their child. However, counsel has not provided evidence that the applicant's spouse is suffering from any type of medical condition that has resulted in hardship as result of her separation from the applicant. As stated, without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported

assertions of counsel do not constitute evidence. Accordingly, the AAO cannot give such claim any weight.

All elements of hardship to the applicant's spouse, should she remain in the United States separated from the applicant, have been considered in the aggregate. Based on the foregoing, the AAO finds that the applicant has failed to establish extreme hardship to his spouse if they remain separated.

Accordingly, the applicant has not established that denial of the present waiver application "would result in extreme hardship" to his spouse, as required for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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. *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. The waiver application is denied.