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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

H6

[redacted]

FILE: [redacted] Office: MANILA, PHILIPPINES Date: DEC 09 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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. The applicant is married to a U.S. citizen and 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 reside with his wife and child in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Field Office Director*, dated July 15, 2008.

On appeal, counsel asserts that the applicant's spouse is suffering extreme hardship as a result of the applicant's inadmissibility.

The record contains, *inter alia*: a marriage certificate of the applicant and his wife, [redacted] indicating they were married on March 13, 2003; letters from the applicant; letters from [redacted] letters from [redacted] physician; an affidavit from [redacted]'s parents; letters from [redacted] mother's physician; letters from [redacted] father's physician; copies of medical records; a letter from the couple's child's physician; copies of receipts, tax records, and other financial documents; a letter from [redacted] employer; letters of support; articles addressing a shortage of nurses in the United States; a copy of the U.S. Department of State's Country Specific Information for the Philippines; photographs of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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 -
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> . . . .
>
> (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.

In this case, the record shows, and the applicant does not contest, that he entered the United States on February 20, 2001, using a B-2 visitor visa, with authorization to remain in the United States for six months until August 19, 2001. The applicant claims he remained in the United States until his departure on March 15, 2003. The applicant accrued unlawful presence of over one year. He now seeks admission within ten years of his March 2003 departure from the United States. Accordingly, he 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 admission to the United States within ten years of his last departure.

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 wife 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.

In this case, the applicant's wife, [redacted] states that she is at a major crossroad in her life. According to [redacted] her mammogram showed microcalcifications on both breasts and a nodularity on her left breast. She states she needs her husband to be with her while she makes life and

death decisions regarding her health as she is an only child and her parents are elderly and sick. In addition, [redacted] contends she is a registered nurse and has worked as a high-tech pediatric nurse for fourteen years. She contends she works a full-time job as well as a part-time job and that, as a result, she is unable to care for their U.S. citizen daughter who is currently living in the Philippines with the applicant. [redacted] states that the couple's daughter suffers from chronic asthma, eczema, allergic rhinitis, and allergies. She states their daughter was admitted to the hospital for six days in the Philippines and contends she fears for her daughter's health in the Philippines where suitable medical care is unavailable. Furthermore, [redacted] contends she suffers from an extreme form of anxiety, sleeps only three to five hours per night, and suffers from muscle aches, headaches, diarrhea, and constipation. Finally, [redacted] contends she cannot move to the Philippines to be with her husband because she fears for her safety as a U.S. citizen who has never lived in the Mindanao region of the Philippines. She also contends she could not find comparable employment in the Philippines as there are no pediatric care units. *Letter from* [redacted] dated August 12, 2008, and February 27, 2008; *Factors Supporting Extreme Hardship*, undated.

A letter from [redacted] physician confirms the results of [redacted] mammogram and states that she "has a high risk of developing breast cancer because her mother had breast cancer." According to the physician, [redacted] must be closely monitored for breast cancer for the rest of her life. The physician states that if the results of a biopsy and ultrasound exam show malignancy, she will require surgery, chemotherapy, and radiation. The physician states that the recovery period would be six months after surgery. In addition, [redacted] physician states she has been diagnosed with Anxiety Disorder and has regular psychotherapy sessions with a therapist. *Letters from* [redacted] dated August 5, 2008, and May 28, 2008.

A letter from [redacted] mother's physician states she had breast cancer and a mastectomy ten years ago. The letter also states that she has hypertensive cardiovascular disease and takes five prescription medications. *Letter from* [redacted] dated July 29, 2008; *see also Medical Certificate*, dated July 28, 2008 (stating [redacted] mother has been diagnosed with post gliotic seizure, acute cerebrovascular disease, hyponatremia, and hypertensive cardiovascular disease). A letter from [redacted] father's physician states that he has hypertensive cardiovascular disease and diabetes. *Letter from* [redacted] dated April 27, 1999. In addition, a letter from [redacted] daughter's physician states that she is allergic to numerous things, including eggs, chicken, dust, and pollen, and that she has had "several bouts of pneumonia, rhinitis, and . . . asthma." *Letter from* [redacted] undated.

Upon a complete review of the record evidence, the AAO finds that the applicant has established his wife has suffered, and will continue to suffer, extreme hardship if his waiver application is denied.

In this case, the AAO finds that [redacted] has suffered, and will continue to suffer, extreme hardship if the applicant's waiver application were denied. The record shows that [redacted] has a family history of breast cancer and that her recent mammogram showed calcifications and a nodularity in her breasts. According to [redacted] physician, if she currently has breast cancer, she would require surgery, chemotherapy, radiation, and six months recovery. However, her physician contends that even

if [redacted] does not yet have breast cancer, she must be closely monitored for the rest of her life. In addition, the record shows [redacted] has an anxiety disorder, works a full-time job as well as a part-time job, and has been separated from her daughter who is currently six years old. The record shows that the couple's daughter has had a history of health problems, including allergies, several bouts of pneumonia, and asthma, and has been hospitalized in the Philippines as a result of her medical conditions. Considering her health conditions, [redacted] reasonably worries about her daughter's health and well-being. Considering these unique factors cumulatively, the AAO finds that the effect of separation from the applicant on [redacted] goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility and rises to the level of extreme hardship.

Moreover, moving to the Philippines to avoid separation would be an extreme hardship for [redacted] reasonably contends she fears moving to [redacted] where her husband currently lives. The AAO notes that the U.S. Department of State has issued a Travel Warning, warning of the risks of terrorist activity in the Philippines, particularly in the southern Philippine islands of Mindanao and the Sulu Archipelago. The Travel Warning states:

> Terrorist attacks could be indiscriminate and could occur not only in the southern islands but also in other areas, to include Manila. Targeted sites may be public gathering places that are frequented by expatriates and foreign travelers, including American citizens. Such sites could include, but are not limited to, airports, shopping malls, conference centers and other public venues. . . . Travelers should exercise extreme caution if traveling in the central and western portions of the island of Mindanao.

U.S. Department of State, Travel Warning, Philippines, dated November 2, 2010. In addition, [redacted] the sole income earner for her family, fears she cannot find comparable employment in the Philippines, a contention supported by a letter from a hospital in Surigao del Sur, Mindanao, which states that during the entire year of 2008, the hospital had no openings for a registered nurse. *Certification from* [redacted] undated. Moreover, moving to the Philippines would disrupt the continuity of health care [redacted] has been receiving for her anxiety disorder and her possible breast cancer. Considering all these factors cumulatively, the AAO finds that the hardship [redacted] would experience if she had to move to the Philippines is extreme, going well beyond those hardships ordinarily associated with inadmissibility. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [redacted] aces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's unlawful presence in the United States. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's wife if he were refused admission; family ties in the United States including his U.S. citizen wife and U.S.

citizen child; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.