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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEGUCIGALPA, HONDURAS Date: DEC 10 2010

IN RE: Applicant: [redacted]

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

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,

Tariq Syed
for
Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras who was found to be 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 having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and stepchild.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Field Office Director,* dated March 5, 2008.

On appeal, counsel for the applicant states that United States Citizenship and Immigration Services (USCIS) erred in denying the applicant's waiver application and failed to evaluate all of the evidence. *Form I-290B, Notice of Appeal or Motion*; *Attorney's brief.*

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; country conditions reports; health insurance plans; a retirement plan for the applicant's spouse; credit card statements; wireless service bills; an apartment lease; medical documentation for the applicant's spouse and her child; statements from family members and friends; and an employment letter for the applicant's spouse. The record also includes several emails in the Spanish language unaccompanied by certified translations. Accordingly, the AAO will not consider these documents. *See* 8 C.F.R. § 103.2(b)(3). The entire record, with the exception of the Spanish language documents, was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) 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.

In the present case, the record indicates that the applicant entered the United States in March 2001 and returned to Honduras in August 2007. *Consular Memorandum, Embassy of the United States of America, Tegucigalpa, Honduras*, dated August 17, 2007. The applicant, therefore, accrued unlawful presence from March 2001 until he departed the United States in August 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of his August 2007 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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

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 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).

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.

If the applicant's spouse joins the applicant in Honduras, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in Honduras. *Birth certificate*. She states that she left Honduras when she was three years old and is no longer

accustomed to the culture, the community, or the environment. *Statement from the applicant's spouse*, dated March 26, 2008. Counsel notes that the applicant's spouse has no family support in Honduras. *Attorney's brief.* With the exception of a few distant relatives, all of her family lives in the United States. *Id.* The applicant's spouse has a child from a previous relationship. *Birth certificate.* The applicant's spouse asserts that her child has asthma and fears that her child would not be properly cared for in Honduras. *Statement from the applicant's spouse*, dated March 26, 2008. She notes that the polluted air would exacerbate her condition. *Id.* Medical documentation included in the record notes that the applicant's spouse's child suffers from asthma and receives treatment in the United States. *Medical records and prescriptions for the applicant's spouse's child.* A medical statement notes that the applicant's child has persistent asthma, and is on a controller medication Budesonide twice a day and on the rescue medication albuterol to manage her asthma. *Statement from* [redacted] dated March 18, 2008. Triggers for her asthma are dust, humidity and air pollution as well as viral illnesses. *Id.* When she gets ill with asthma, she needs to seek medical care at a facility that is close by. *Id.* It is in her licensed healthcare professional's understanding that the rural area of Honduras where the applicant lives is humid and dusty, and four hours from an emergency room, and that the nearest city, San Pedro Sula, is massively polluted. *Id.* The AAO notes that the record fails to include evidence showing how the licensed healthcare professional is familiar with the country conditions in Honduras. While the applicant's spouse's child is not a qualifying relative for the purposes of this case, the AAO acknowledges the added responsibilities in caring for a child with documented health conditions in a foreign environment. The applicant's spouse also has a medical history of anemia and obesity. *Medical records for the applicant's spouse.* While the AAO notes that the applicant's spouse has health insurance coverage for her and her child, it is through her place of employment in the United States and does not address whether this coverage would continue in Honduras. *Health insurance plan.* Counsel asserts that the applicant's spouse would have a difficult time finding work to support herself and her child in Honduras. *Attorney's brief.* Country conditions reports included in the record note that the daily minimum wage scale in Honduras ranged between $2.88 for unskilled labor and $7.13 for workers in financial and insurance companies. *Honduras, Country Reports on Human Rights Practices – 2007, U.S. Dept. of State*, dated March 11, 2008. According to government statistics, the minimum wage with the increases covered only 64 percent of the cost of feeding a family of five. *Id.* The applicant's spouse asserts that there is a lot of crime in Honduras. *Statement from the applicant's spouse*, dated March 26, 2008. Country conditions reports note that preliminary Honduran police statistics for 2006 indicate that 3,020 homicides occurred in Honduras with approximately 7 million inhabitants, while New York City, with just over 8 million inhabitants, registered fewer than 600 homicides in the same time frame. *Honduras 2007 Crime & Safety Report, Overseas Security Advisory Council*, dated March 7, 2007. The AAO notes that Honduras is currently listed as a country whose nationals are eligible for Temporary Protected Status (TPS) due to the damage done to the country from Hurricane Mitch and the subsequent inability of Honduras to handle the return of its nationals. 75 Fed. Reg. 24734-24736 (May 5, 2010). Under the TPS program, citizens of Honduras are allowed to remain in the United States temporarily due to the inability of Honduras to handle the return of its nationals due to the disruption of living conditions. *Id.* As such, requiring the applicant's U.S. citizen spouse to relocate to Honduras in its current state would constitute extreme hardship to her. Additionally, the AAO notes other hardship factors including the length of time the applicant's spouse has resided outside of Honduras, her lack of family ties to Honduras, her child's documented health condition and the additional responsibilities

the applicant's spouse would face in caring for this child in Honduras, and the financial difficulties as well as crime rates as documented by published reports.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse left Honduras when she was three years old. *Statement from the applicant's spouse*, dated March 26, 2008. With the exception of a few distant relatives, all of her family lives in the United States. *Attorney's brief.* The applicant's spouse has a child from a previous relationship. *Birth certificate.* She notes that she cannot attend school and support her child at the same time. *Statement from the applicant's spouse*, dated March 26, 2008. If the applicant does not return to the United States, she asserts that she cannot continue to support her child on the income she is earning. *Id.* She requires the applicant to help her and provide for their family. *Id.* A statement from the employer of the applicant's spouse notes that she is employed 40 hours a week at a rate of pay of $13.62 an hour. *Employment letter for the applicant's spouse*, dated July 11, 2007. The record also includes credit card statements, wireless service bills, and an apartment lease documenting the various expenses of the applicant's spouse. *See credit card statements, wireless service bills, and an apartment lease.* Additionally, medical documentation included in the record notes that the applicant's spouse's child suffers from asthma and receives treatment in the United States. *Medical records and prescriptions for the applicant's spouse's child.* A medical statement notes that the applicant's child has persistent asthma, and is on a controller medication Budesonide twice a day and on the rescue medication albuterol to manage her asthma. *Statement from* [redacted] dated March 18, 2008. A statement from a family member notes that caring for a child with such health problems as a single parent has truly been difficult for the applicant's spouse and her child. *Statement from* [redacted] dated March 25, 2008. The applicant's spouse must work full-time to support herself and her child, and when her child has experienced asthma attacks or breathing difficulties, it is quite terrifying and very difficult for one person to balance a full time job and a sick child. *Id.* The applicant's spouse asserts she cannot imagine living without the applicant. *Statement from the applicant's spouse*, dated March 26, 2008. Additionally, the applicant's spouse states that she is currently unable to have additional children without the applicant's presence, they do not want an age gap between her child and their future child, and it is important that she and the applicant start trying to have kids soon because she has a history of miscarriage in her family. *Id.* She details her and her family's history of miscarriages. *Id.* When looking at the aforementioned factors, particularly the documented financial difficulties, the difficulties in being a single parent of a child with health conditions, the inability to attend school and the family planning issues, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The adverse factors in the present case are the applicant's 2001 entry and his prior unlawful presence for which he now seeks a waiver. The favorable and mitigating factors are his United States citizen spouse and stepchild, the extreme hardship to his spouse if he were refused admission, and his lack of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant were 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.