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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: MEXICO CITY, MEXICO (PANAMA CITY, PANAMA) Date: JAN 05 2011

IN RE: Applicant: [redacted]

APPLICATIONS: 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); and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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 Acting District Director, Mexico City, Mexico, and 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 Colombia 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 readmission within ten years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and the father of a United States citizen child. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 reside in the United States with his United States citizen wife and child.

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated February 12, 2008. On March 14, 2008, the applicant, through counsel, filed a combined motion to reopen and reconsider the Acting District Director's decision. On March 17, 2008, the Acting District Director dismissed the applicant's motion to reopen and reconsider.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Service (USCIS) erred in denying the applicant's waiver application and the "qualifying relative has met all factors including health issues, extreme financial and emotional hardship (raising an infant on her own with a teacher salary and high demand job), the unsafe country conditions of [Colombia], etc." *Form I-290B*, filed April 14, 2008.

The record includes, but is not limited to, counsel's appeal brief; statements from the applicant and his wife; letters of support for the applicant and his wife; a letter from [redacted] regarding the applicant's wife's medical issues; medical documents for the applicant's wife; a letter from the applicant's wife's employer; bank statements, wage and tax documents, mortgage documents, retirement documents, credit card bills and household bills; documents pertaining to the applicant's immigration proceedings; articles on raising children; newspaper articles on violence in Colombia; and travel warnings for Colombia. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
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> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
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> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily

> departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
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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.
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> (iii) Exceptions.-
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> (II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.
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> . . . .
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> (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.

In the present case, the record indicates that the applicant entered the United States on February 28, 2001 on a B-2 nonimmigrant visa with authorization to remain in the United States until August 27, 2001. On September 7, 2001, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On May 16, 2003, an immigration judge ordered the applicant removed from the United States. On June 3, 2003, the applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (Board). On July 14, 2004, the Board dismissed the applicant's appeal. On October 14, 2004, the applicant filed a motion to reopen the Board's decision. On December 6, 2004, the Board denied the applicant's motion to reopen. On September 12, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On November 31, 2005, the applicant filed a second motion to reopen with the Board. On March 7, 2006, the Director, Missouri Service Center, administratively closed the applicant's Form I-485. On May 4, 2006, the applicant was removed from the United States. On July 31, 2006, the Board denied the applicant's second motion to reopen.

The record establishes that the applicant accrued unlawful presence from December 6, 2004, the date the Board denied the applicant's first motion to reopen, until May 4, 2006, when he was removed from the

United States.[1] The AAO notes that the applicant filed his application for adjustment of status with United States Citizenship and Immigration Service (USCIS). However, he was in removal proceedings and jurisdiction over this application type was with the immigration judge. *See 8 C.F.R. 245.2.* As he did not properly file his application, the period of time that his application for adjustment of status was pending is not an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See* 8 C.F.R. § 245.2(a). 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 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 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).

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[1] The AAO notes that the applicant's second motion to reopen was not related to his asylum case and therefore did not toll his unlawful presence while it was pending.

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.

The first prong of the analysis is to review hardship upon relocation to Colombia. In counsel's appeal brief dated April 11, 2008, counsel claims that the applicant's wife is "suffering an extreme level of hardship." Counsel states the applicant and his wife could not support themselves in Colombia "because of the absence of job opportunities for both of them." The AAO notes that the applicant's wife is a tenured elementary school teacher. Additionally, the AAO notes that the record establishes that the applicant's wife suffers from various medical conditions, including high blood pressure, back pain, hypothyroidism, migraines, and anxiety. Counsel states the applicant's wife "could not relocate herself and her young infant to such a notoriously unsafe, unstable, and fundamentally culturally different country like [Colombia] where she has no family members and does not speak the language." Counsel states all of the applicant's wife's family ties are in the United States, including her parents who are in their seventies. The AAO notes the claims made by counsel regarding the difficulties the applicant's spouse would face in relocating to Colombia.

The AAO notes in a travel warning issued on November 10, 2010, the U.S. Department of State warns United States citizens of the dangers of traveling to Colombia. The U.S. Department of State reports that "[w]hile security in Colombia has improved significantly in recent years, violence by narco-terrorist groups continues to affect some rural areas as well as large cities." *U.S. Department of State, Travel Warning – Colombia*, dated November 10, 2010. Additionally, the U.S. Department of State notes that "[t]errorist activity remains a threat throughout the country.... While the Embassy possesses no information concerning specific and credible threats against U.S. citizens in Colombia, they are strongly encouraged to exercise caution and remain vigilant." *Id.* Further, the U.S. Department of State notes that kidnapping remains a serious threat and "U.S. citizens have been the victims of violent crime, including kidnapping and murder." *Id.* However, the AAO notes that the report indicates that the "incidence of kidnapping in Colombia has diminished significantly from its peak at the beginning of this decade." *Id.* The AAO notes the general safety issues in Colombia.

Based on the applicant's spouse's lack of family and employment ties to Mexico, her lack of Spanish language skills which will affect her ability to work and settle into Colombian society, leaving her employment in the United States, her medical issues, the emotional hardship of being separated from her family including her elderly parents, having to raise her child in Colombia, and the travel warning issued to United States citizens, the AAO finds that the applicant's wife would suffer extreme hardship if she were to relocate to Colombia to be with the applicant.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States without the applicant, counsel states the applicant's wife "is simply reaching 'the end of the rope' as her stress level in raising her family without [the applicant's] presence and support has taken a great toll on her physical and emotional health." In an undated statement, the applicant states "[t]his separation is causing [his] family and [him] so much anxiety." In a statement dated March 10, 2008, the applicant's wife states her son "has lived his whole life without [the applicant]" and she does not "know how [she] will bear ten years of [her son] asking [her] why [the applicant] can't live with [them]." In a statement dated March 5, 2008, the applicant's parents-in-law state they worry about the applicant's wife's health. The applicant's wife states "[p]hysically [her] health is rapidly deteriorating from this unusual amount of stress" and the "stress has manifested itself as tension in [her] upper and lower back." Counsel also states the applicant's wife suffers from migraines and high blood pressure. The AAO notes that medical documentation in the record establishes that the applicant's wife has been treated for high blood pressure, back pain, hypothyroidism, and headaches. In a letter dated March 10, 2008, [redacted] states the applicant's wife "suffers from severe migraine, and when it comes on she is unable to function [sic] her daily routines." [redacted] also states the applicant's wife suffers from a severe back problem, anxiety and high blood pressure, and he has prescribed her medications. The applicant's wife states she cannot afford the medication that her doctor prescribed for her back pain. [redacted] states "[i]t would be great help to [the applicant's wife] if [the applicant] was here to support her when she is suffering from her migraines and back pains." The AAO notes the applicant's wife's medical conditions.

Counsel states the applicant's wife "is the only financial provider of her family because [the applicant] has not been able to find a position in [Colombia] since his deportation." The AAO notes that the record establishes that the applicant's wife is a tenured elementary school teacher and has been teaching for the

Orange County Public Schools since 1999. *See affidavit from Elizabeth Prince, Ed.S.*, dated June 11, 2007. The applicant's wife claims her "monthly bills encompass 95% of [her] monthly net income." The AAO notes that the record establishes that in 2007, the applicant's wife's yearly salary was approximately $42,000. *See letter from Elizabeth Prince, Principal, Lake Whitney Elementary School*, dated May 18, 2007. The applicant's wife states "[f]inancially the last two years trying to survive on one income for the entire family, has ruined [her] credit rating and put [them] in debt worth $32,700.00, and that's not including two mortgages and an auto loan." The AAO notes that the record establishes that the applicant's wife's credit score was 747 on February 17, 2007, and then on March 1, 2008, her score was 666. *See Notices to Home Loan Applicant & Credit Score Disclosures*, dated February 17, 2007 and March 1, 2008. The applicant's wife states she "will not be able to pay off debts without [the applicant] here to contribute to [their] income." Additionally, she claims that as her son "gets older, the cost of taking care of him will only increase, as well as the rising costs of gas, food, and utilities." Further, she states that she has "no more sick leave days available" and if she has "to be out of work, it will be without pay." The AAO notes the financial concerns of the applicant's wife.

Considering the applicant's spouse's emotional issues, financial issues, raising a child without his father, her concern for her child, and the normal effects of separation, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she remained in the United States in his absence.

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 removal order, failure to depart when required, and his unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife and child, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, and letters of support.

The AAO finds that, although the immigration violations committed by the applicant are 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)(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 met that burden. Accordingly, the appeal will be sustained.

The AAO notes that the Acting District Director denied the applicant's Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the Acting District Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

On May 4 2006, the applicant was removed from the United States. He is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For similar reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained. The waiver application and permission to reapply for admission applications are approved.