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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

Date: SEP 27 2011 Office: BALTIMORE, MD FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under 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.

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 Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Trinidad and Tobago 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 applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated April 25, 2008, the district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and did not warrant the favorable exercise of the Secretary's discretion. The application was denied accordingly.

The record indicates that counsel filed a Motion to Reopen/Reconsider on May 23, 2008, in response to the district director's denial.

On July 22, 2008, the district director denied the applicant's Motion to Reopen/Reconsider stating that the applicant failed to demonstrate that the director's decision was based on an incorrect application of law of policy and that the applicant failed to provide new facts or evidence that would overcome the previous denial by the district director.

In a Notice of Appeal to the AAO (Form I-290B), dated August 18, 2008, counsel states that the applicant erred in denying the applicant's Motion to Reopen and Reconsider and that the district director did not give adequate weight to the evidence of record.

The record indicates that the applicant first entered the United States on September 2, 1992, as a C-1 visa, alien in transit, with authorization to remain in the United States until September 15, 1992. On September 8, 1994 the applicant changed his nonimmigrant status to an H-2 visa, valid until September 7, 1995. On September 7, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On January 19, 2001, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512), valid until January 18, 2002, and subsequently used the advance parole authorization to depart and reenter the United States on March 4, 2001. On January 8, 2002, the applicant was issued a second Authorization for Parole of an Alien into the United States (Form I-512), valid until January 8, 2003, and subsequently used this advance parole authorization to depart and reenter the United States on February 17, 2002, March 3, 2002, and May 17, 2002. The applicant's Form I-485 was denied on November 22, 2002 and in April 2003 he filed a motion to reopen the application, which was denied in 2007. On August 1, 2006, the applicant filed a second Form I-485, which was denied on April 25, 2008.

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.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009. The AAO finds that the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until September 7, 2000, the date of his proper filing of the Form I-485. Therefore, the applicant was inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within ten years of March 2001, the date of the departure that made the unlawful presence provisions arise in his case.

However, the applicant also accrued periods of unlawful presence from November 22, 2002, the date his Form I-485 was denied, until August 1, 2006, the dated of his proper filing of a second Form I-485, and from April 25, 2008, the date his Form I-485 was denied, to the present time. Although the applicant's departure occurred in March 2001, more than ten years ago, because the last ten years included periods of unlawful presence in the United States, the applicant's ten years of inadmissibility have not "run" and he is still inadmissible.

The AAO finds that to read the statute as providing an exception to the ten-year bar by virtue of subsequent periods of unlawful presence in the United States would be to allow one to avoid the punitive effects of a law by violating the law anew, an absurd result contrary to well-established principles of statutory construction. *See Armstrong Paint & Varnish Works v. Nu-Enamel Corporation,* 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where...the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."); *U.S. v. McKeithen*, 822 F.2d 310, 315 (2nd Cir. 1987) (quoting *United States v. About 151.682 Acres of Land,* 99 F.2d 716, 721 (7th Cir.1938)) ("[A]ll laws are to be given a sensible construction; and a literal application of a statute, which would

lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."). The AAO therefore holds that inadmissibility under section 212(a)(9)(B)(i) of the Act, which is triggered upon departure, remains in force until the applicant has been absent from the United States for three years under section 212(a)(9)(B)(i)(I) or ten years under section 212(a)(9)(B)(i)(II). Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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 his 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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record of hardship includes: counsel's brief, a letter from the applicant's U.S. citizen spouse, birth certificates for the applicant's two step children, the birth certificate for the applicant's son, copy of funeral service program for the applicant's spouse's grandmother, a letter from the applicant's brother-in-law, a letter from the applicant's spouse's best friend, and medical documentation concerning the applicant's spouse.

In his brief, counsel states that the district director erred in finding that various factors alone did not amount to extreme hardship and that the hardship factors to the applicant's spouse should have been taken in the aggregate. Counsel states that the district director failed to properly consider the applicant's spouse's substantial ties to the United States including her two children, stepson, and brother. In addition, counsel states that the district director erred in finding that the

applicant's spouse will only suffer emotional hardship as a result of his inadmissibility when the record supported a finding that she would suffer emotional, medical, and financial hardship. Furthermore, counsel asserts that in denying the applicant's decision the district director relied on two Board of Immigration Appeals cases *Matter of Shaughnessy* and *Matter of W-* , which he states are distinguishable from the applicant's case, in that the applicants in *Matter of Shaughnessy* and *Matter of W-* had several criminal convictions and other inadmissibilities other than unlawful presence. Finally, counsel asserts that the totality of the evidence supports a finding that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility.

In her statement, dated December 27, 2007, the applicant's spouse states that the applicant is her primary source of support in her life and that he is like a father to her two children. She states that she is having anxiety over the possibility of the applicant being removed to Trinidad and the effect his departure would have on her two children. She states that this anxiety keeps her up all night in that she is restless and feels hopeless. She states further that the applicant takes part in the everyday duties of taking care of her children and that she fears they would be deeply traumatized by losing the applicant.

The letter from the applicant's brother-in-law and the applicant's spouse's best friend support the anxiety and fears of the applicant's spouse. The applicant's brother-in-law also states that the applicant's spouse had two previous relationships where she was not treated well and she was unhappy and sad, but that her relationship with the applicant had changed his sister's life for the better.

In support of the applicant's spouse's emotional condition, the record contains a letter from a [redacted] dated May 21, 2008, which states that the applicant's spouse was going to be out of work for two days due to stress. The record also includes a prescription for Ibuprofen and Valium.

The AAO finds that the current record fails to establish that the applicant's spouse is suffering hardship that would rise to the level of extreme as a result of the applicant's inadmissibility. Counsel states that the applicant's spouse is suffering emotional, medical, and financial hardship, but the record only establishes that the applicant is suffering emotional and medical/physical hardship given her anxiety. The record does not include evidence of the applicant's spouse's financial situation nor does it contain the details necessary to establish emotional hardship that rises to the level of extreme. Moreover, the record is silent as to the applicant's spouse's ability to relocate to Trinidad with the applicant and what hardship would result from this relocation.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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) 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.