identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

H6

[redacted]

DATE: MAR 05 2012 OFFICE: GUATEMALA CITY FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and for Permission to Reapply for Admission under Section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Guatemala 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. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with his U.S. citizen spouse. He was also found inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

The field office director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of the Field Office Director,* dated October 6, 2009. As a matter of discretion, he also denied the Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212).

In support of the appeal, the applicant's counsel submits a brief containing legal argument. Besides the appeal brief, the record contains documents including, but not limited to: statements of the applicant and his wife; a counselor's letter; letters of support; a 2006 tax return and W-2 forms; bills and other evidence of expenses; a removal order and removal warrant; and information regarding an asylum claim. 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.
>
> . . . .
>
> (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...

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

> 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 who 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 alien 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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

The record in this case reflects that the applicant was granted voluntary departure with an alternate order of removal, which the BIA affirmed on appeal, allowing him 30 days to depart. The applicant, however, failed to depart within the allotted time, and remained in the United States accruing unlawful presence until he was removed on October 12, 2005. He is, therefore, inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for 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 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).

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 applicant's wife contends that she will suffer emotional and financial hardship if she remains in the United States while the applicant resides abroad due to his inadmissibility. Regarding emotional hardship, she claims the applicant is her soul mate and a perfect father figure for her children and grandchildren. *Statement of* [redacted] dated November 24, 2007. In the same document, the qualifying relative reports her doctor referring her to a cardiologist for shortness of breath, chest pains, and heart palpitations. The record contains no written referral, nor the name of the referring or the referred doctor, and the applicant's wife says she did not follow through by meeting with the heart specialist. The record shows that a counselor diagnosed her as depressed and anxious, and concluded after two sessions that she would benefit from further counseling. *Letter of* [redacted] *Licensed Professional Counselor*, dated October 1, 2007. The counselor's report also establishes that the applicant's wife was not on medication, but rather was coping with her condition by continuing to work two jobs. The report does not explain the diagnostic basis for its conclusion, except to mention psychotherapy as being warranted, and lacks details such as the session length or manner of tests employed.

The AAO notes that the record contains little evidence concerning emotional hardship, other than the applicant's wife's own claims of emotional fragility and statements of a family member in support of the waiver request. These statements do not satisfy the applicant's evidentiary burden. There is no evidence the applicant's wife sought either the counselor's recommended treatment or alternative treatments suggested by her doctor. The AAO notes that a record showing the U.S. presence of the qualifying relative's children and grandchildren evidences a support network to help her cope with separation from the applicant. *See Statement of* [redacted] dated June 25, 2007; *cf. Statement of* [redacted] Nor has it been established that she is unable to travel to Guatemala to visit her husband to lessen the impact of separation. The record has not been updated to provide current evidence of the applicant's wife's emotional state; thus, the most recent evidence dates to 2007. Under these circumstances, the applicant has not established emotional hardship beyond the common result of separation due to inadmissibility or deportation.

As for the claimed financial hardship, there is no evidence that the applicant contributed earnings to household maintenance. The 66 year-old applicant has submitted no details regarding his current income, expenses, assets and liabilities, or overall financial situation to establish that, without his physical presence in the United States, his qualifying relative will experience financial hardship. The W-2 statements provided show that the applicant's wife accounted for all the earned income reported on the one joint tax return in the record. Nor has it been established that the applicant is unable to support himself in Guatemala. Further, the record contains no documentation supporting the applicant's stepdaughter's claim that her mother sends the applicant money in Guatemala.

The record contains no documentary evidence of counsel's assertion that the applicant "made substantial and continuous financial payments towards his wife's expenses" when they lived together. *See Appeal Brief.* The only information regarding the applicant's assistance is his wife's reference to having to hire workers to help with all the things the applicant could attend to, such as clearing snow and cutting grass, were he still in the home they shared; there is no documentation supporting the applicant's claim to have made financial contributions toward household expenses. *Cf. Statement of* [redacted] June 27, 2007. The applicant's wife states that in her husband's absence, her adult daughters have stepped in to help manage her finances. *See Statement of* [redacted] August 10, 2007.

The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. Although the specifics of each qualifying relative's background may be unique, the situation of the applicant's wife, if she remains in the United States, is typical of individuals facing separation as a result of removal and does not rise to the level of extreme hardship based on the record. It is the applicant's burden to provide evidence connecting his wife's situation to the claimed hardship.

As regards establishing extreme hardship in the event the qualifying relative relocates abroad based on the denial of the applicant's waiver request, the record contains a letter of support from one of his wife's children attesting that the applicant has become an integral member of their mother's extended family in the United States, which includes four adult children and six grandchildren. *See Statement of* [redacted] Although details are lacking about the qualifying relative's current living situation, her 2007 statement that her daughters were urging her to sell her house and live with them shows significant family ties to the United States. In addition, the record reflects that the applicant's wife worked two cleaning jobs, but was uncertain how long she would continue to do so.

The record shows the applicant's wife is bilingual in English and Spanish and indicates she has family ties to New Jersey, where she lives, as well as to Puerto Rico, where she was born and where her mother still lives. While the evidence does not address the applicant's wife's ties to Guatemala, we see no indication she has any connection to that country other than her husband. The applicant's wife claimed her husband was having trouble finding steady work in Guatemala, and counsel asserts that the applicant's wife, who is nearly 69 years old, is unlikely to find work there due to her age.

The documentation in the record, considered in its totality, reflects that the applicant has established his wife would suffer extreme hardship were she to relocate to Guatemala. Fluency in the local language of a country where she has no ties other than the applicant does not outweigh the hardship that would be imposed by removing her from her home where she has extended family and friends. Accordingly, the AAO concludes the applicant has established that a qualifying relative would suffer extreme hardship were she to relocate abroad to continue residing with the applicant. Although the applicant has established that his U.S. citizen spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant, the evidence fails to establish that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant resides abroad. The record demonstrates that the applicant's spouse faces no greater hardship than

the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or refused admission.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id., also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

The applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. *Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964), held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. Because his Form I-601 waiver application is denied and he remains inadmissible for unlawful presence, no purpose would be served in the favorable exercise of discretion to grant the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is inadmissible to the United States, the Form I-212 was properly denied.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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 and permission to reapply are denied.