(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: APR 26 2013 Office: PANAMA CITY, PANAMA FILE:

IN RE:

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

ON BEHALF OF APPLICANT:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

In a decision, dated September 3, 2012, the field office director found that the applicant failed to submit sufficient evidence to support his waiver application and that the evidence that was submitted does not indicate that the applicant's spouse would suffer hardship rising to the level of extreme as a result of the applicant's inadmissibility.

On appeal, counsel states that the applicant's spouse is suffering extreme hardship as a result of her separation from the applicant in 2010 and will suffer extreme hardship as a result of relocation. Counsel states that the field office director failed to consider most of the relevant evidence submitted as part of the applicant's waiver application. Additional evidence of hardship has been submitted on appeal.

Section 212(a)(9) of the Act provides:

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> (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
>
> (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.
>
> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

> (v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record indicates that the applicant entered the United States on a B2 visitor's visa on May 29, 2007, with an authorized period of stay until August 27, 2007. On July 21, 2009, the applicant was granted voluntary departure by an immigration judge and was required to leave the United States by November 17, 2009. The applicant failed to comply with his voluntary departure and on February 17, 2010, a warrant of deportation was issued. The applicant departed the United States on June 3, 2010. Thus, the applicant accrued unlawful presence in excess of one year. The applicant is therefore inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States. The applicant's qualifying relative is his spouse.

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998)(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: a letter from counsel, a brief from counsel, two statements from the applicant's spouse, medical documents, a mental health evaluation, financial documentation, a letter from the applicant's spouse's senator's office, and a custody agreement between the applicant's spouse and the father of his spouse's child.

Counsel asserts that the applicant's spouse is suffering extreme emotional and financial hardship as a result of being separated from the applicant. Counsel states that the applicant's spouse's emotional state has recently worsened with her being taken to the emergency room while at work because she began to cry and tremble uncontrollably as a result of the applicant's situation. The record indicates that the applicant's spouse has suffered from depression before she ever met the applicant, but now is taking two medications to treat her anxiety and depression, including a much higher dose of her normal anti-depressant medication. In addition to her emotional stress, counsel states that the applicant is suffering physically as a result of stress from high blood pressure, headaches, and a skin rash. The applicant's spouse has also had hip replacement surgery for which she states her recovery has been slow and that she is not close with her family, relying on friends for support. The applicant's spouse also asserts that she is suffering financially because the applicant cannot find work in Colombia and she is fully supporting him.

We find that medical documentation in the record supports the claims regarding extreme emotional hardship. The record indicates that the applicant's spouse has suffered numerous bouts

of depression throughout her life and is currently suffering from depression and anxiety, which is affecting her daily functioning.

In addition, we find that the applicant's spouse would suffer significant emotional hardship as a result of relocation, as she would have to give up co-parenting her daughter. The record includes a court order stating that the applicant's spouse and her former husband have 50/50 custody of their daughter. The record shows that every other day and every other weekend the applicant's spouse cares for her daughter. Moreover, the applicant's spouse has lived in the United States her entire life and has been employed as a Marketing Specialist with for over seven years. Thus, taking these factors into the aggregate, we find that relocation would be an extreme hardship for the applicant's spouse. The applicant has established that his spouse would face extreme hardship if his waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The favorable factors include the extreme hardship the applicant's spouse would face if the applicant were denied a waiver of inadmissibility, the lack of any criminal record, and the applicant's role as a supportive husband. The unfavorable factors include the applicant's unlawful residence in the United States and the applicant's failure to comply with voluntary departure.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

The AAO notes that the field office director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, in a separate decision. Although the applicant filed another Form I-290B to appeal that decision, the record does not show that the field office received payment of the filing fee, though the applicant apparently submitted a "Customer Copy" of a cashier's check. Consequently, the appeal of the denial of the I-212 has not, as yet, been properly filed. Upon acceptance of the fee by USCIS, the AAO may consider the applicant's appeal from the Form I-212 denial.

We note, however, that 8 C.F.R. § 103.3(a)(2)(iii) allows a reviewing official to treat an appeal as motion to reopen or reconsider and take favorable action in lieu of forwarding a properly filed appeal to the AAO. A Service officer also may reopen a proceeding on his or her own motion and render a favorable decision pursuant to 8 C.F.R. § 103.5(a)(5)(i). As the Form I-212 was denied solely on the basis that the Form I-601 was denied, and the AAO has now sustained the applicant's appeal of the Form I-601 denial based on statutory eligibility and the favorable exercise of discretion, we perceive no impediment to the approval of the applicant's Form I-212.

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 rests with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden. Accordingly, the appeal is sustained and the waiver application is approved.

ORDER: The appeal is sustained.