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U.S. Citizenship
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FILE:

Office: PHILADELPHIA, PA

Date: NOV 13 2009

IN RE:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil 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 her last departure from the United States. The applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their United States citizen children.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the District Director*, dated November 15, 2006.

On appeal, counsel for the applicant states that the denial was improperly made, with insufficient weight given to submitted evidence and medical reports. *Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO)*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a statement from [REDACTED] dated May 25, 2006; medical records for the applicant's son; tax statements; W-2 forms for the applicant and her spouse; bank statements; apartment leases; a mortgage loan commitment statement; a car insurance policy; a vehicle registration; a utility bill; health insurance cards; a business license and articles of incorporation; earnings statements for the applicant's spouse; an employment letter for the applicant's spouse; and a telephone bill. The entire record 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 gained admission to the United States on November 26, 2001 with a B-2 visa valid until May 25, 2002. *Form I-94, Departure Card*. The applicant remained in the United States and on May 30, 2003 she filed a Form I-485, Application to Register Permanent Resident or Adjust Status. *Form I-485, Application to Register Permanent Resident or Adjust Status*. On July 22, 2003 her Form I-131, Application for Travel Document was approved. *Form I-131, Application for Travel Document*. Although the record does not specify her actual departure date from the United States, the AAO notes that the applicant was paroled into the United States on September 3, 2003. *Form I-94, Departure Card*. 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 the bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant, therefore, accrued unlawful presence from May 26, 2002, the day after her nonimmigrant visa expired, until May 30, 2003, the date she filed the Form I-485 application. In applying to adjust her status, the applicant is seeking admission within ten years of her departure, which occurred between July 22, 2003, the date her Form I-131 was approved, and September 3, 2003, the date she was paroled into 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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or her children would experience as a result of her inadmissibility is not directly relevant to the determination as to whether she is eligible for a waiver. The only directly relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. Hardship to a non-qualifying relative will be considered to the extent that it affects the applicant's spouse. If extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in Brazil or the United States, as he is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse travels with the applicant to Brazil, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. The record does not address whether he has any familial or cultural ties to Brazil, nor does the record address his language abilities and how that may affect his adjustment to Brazil. According to the psychological evaluation included in the record, if the applicant's spouse goes to Brazil, he would clearly face a difficult situation in that he would be giving up his business and going to a country where he would be unfamiliar with the culture. *Evaluation from [REDACTED]* dated May 25, 2006. Almost certainly, there would be short-term stress and anxiety. *Id.* This could lead to a diagnosable mental disorder related to depression or anxiety. *Id.* However, there is no way to predict whether or not this would occur. *Id.* The psychologist states that the applicant's spouse would lose the social support provided by his friends and family and that he would be less available as an emotional support for his brother who apparently is experiencing difficulty. *Id.* The psychologist further asserts that the applicant's two children would be deprived of the educational, health care, and employment benefits available to them as citizens of the United States. *Id.*

The AAO notes that the psychologist states that the applicant's spouse was essentially free from psychopathology or mental disorders at the time of his evaluation. *Id.* Further, although the psychologist indicates that relocation could possibly lead to a mental disorder related to depression or anxiety for the applicant's spouse, he also states that he has no way to predict whether such a mental health problem would develop. Accordingly, the AAO does not find the record to establish the emotional impact of relocation on the applicant's spouse.

While the psychologist asserts that the applicant's children would experience educational, health care and employment deficits if they were to move to Brazil, the AAO notes that the record does not include documentation, such as published country conditions reports, to establish that the children would be subject to substandard education or health care in Brazil. Neither does it demonstrate how their ultimate employment opportunities would be affected by relocation. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the applicant's children are not qualifying relatives for the purposes of this case and the record fails to document how any hardship they might encounter upon relocation would affect their father, the only qualifying relative. The

record also fails to include published country conditions reports documenting the economic situation in Brazil that demonstrate that the applicant and her spouse would be unable to obtain employment. When looking at the record before it, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Brazil.

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 was born in the United States. *Birth certificate*. His mother lives in the United States while his father has moved to Portugal to care for the applicant's spouse's grandmother. *Form G-325A, Biographic Information, for the applicant's spouse; Evaluation from [REDACTED]*, dated May 25, 2006. In his evaluation, the psychologist finds that the applicant's spouse is essentially free of psychopathology or mental disorders. *Id.* He notes that if the applicant's spouse were to be separated from the applicant, he would probably experience the short-term sadness, anxiety, and grief related to the loss of his marriage. *Id.* The loss may retrigger feelings about his parents' divorce, increasing the intensity of his grief. *Id.* The grief would be even greater if the children accompanied the applicant, meaning that the applicant's spouse would have limited contact with them. *Id.* This could even result in the development of a mental disorder such as depression, although there is no way to predict whether or not this would occur. *Id.* He further notes that if the children remain with the applicant's spouse, they would be subject to the extreme stress of losing their mother. *Id.* Such a loss would make them extremely vulnerable to childhood and adult mental disorders, as well as to future educational, legal, and substance abuse problems. *Id.* If the children accompanied the applicant to Brazil, the children would be subject to the trauma of losing their father, again with implications for their future mental health and emotional functioning. *Id.* Counsel asserts that the applicant's spouse is only able to maintain his businesses due to the applicant and that if he were separated from her, he would become a single parent without an extended family structure for support. *Attorney's brief*. The AAO notes that the psychological evaluation reports that the applicant works in a convenience store owned by her spouse. *Evaluation from [REDACTED]* dated May 25, 2006.

As previously noted, the applicant's children are not qualifying relatives for the purposes of this case and the record fails to document how any hardships the applicant's children might experience as a result of the applicant's absence would affect their father, the only qualifying relative. The AAO also notes that the psychological evaluation in the record only speculates on the possible emotional impacts of separation on the applicant's spouse, making no specific findings, and, therefore, is of limited evidentiary value to a determination of extreme hardship. While the AAO acknowledges counsel's assertions regarding the assistance provided by the applicant to her spouse, it notes that the record fails to include documentation that establishes that the applicant assists her spouse with his businesses or that there is no one else who could take her place.

The AAO acknowledges the difficulties faced by the applicant's spouse. However, U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In

addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Separation from a loved one is a normal result of the removal process. The AAO recognizes that the applicant's spouse will endure hardship as a result of his separation from the applicant. However, the record does not distinguish his situation, if he remains in the United States, from that of other individuals separated as a result of removal. Accordingly, it does not establish that the hardship experienced by the applicant's spouse would rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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.