

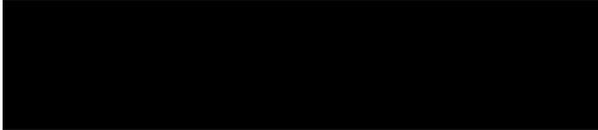
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U.S. Citizenship  
and Immigration  
Services

HH



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 06 2007

MSC 05 188 31899

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Brazil 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 is the husband of a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with his wife.

The director found that the record failed to establish that the applicant's spouse would suffer hardship beyond that normally experienced as a result of the removal of a family member. He denied the application accordingly. *Decision of the Director*, dated April 14, 2006.

On appeal, counsel states that the Citizenship and Immigration Services (CIS) misapplied the waiver provisions of section 212(a)(9)(B)(v) of the Act and that the applicant has established that his spouse would suffer extreme hardship if he were to be removed from the United States. *Form I-290B*, submitted May 9, 2006.

The record indicates that the applicant was admitted to the United States on December 2, 1999 as a B-2 nonimmigrant. When his visa expired on June 1, 2000, the applicant remained in the United States. On August 17, 2000, he filed the Form I-485, Application to Register Permanent Resident or Adjust Status based on the Form I-130, Petition for Alien Relative, filed by his first wife. The Form I-485 was terminated on February 21, 2002 after the applicant failed to appear for interview. On February 3, 2004, the applicant filed a second Form I-485 based on the Form I-130 filed by his second wife and, on the same date, applied for advance parole. The applicant left the United States for Brazil during the period March 12, 2004, the date on which the advance parole was authorized, and October 15, 2004, the date on which he was paroled back into the United States. The applicant has not again departed the United States. On April 6, 2005, he filed a third Form I-485, based on the Form I-130 filed by his second wife.<sup>1</sup>

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, 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 [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

For the purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II), the proper filing of an affirmative application for adjustment of status has been designated as a period of stay authorized by the Attorney General (now Secretary). See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. Therefore, the applicant in the present case accrued unlawful presence for the period beginning June 2, 2000, the date on which he ceased to hold nonimmigrant status until August 17,

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<sup>1</sup> The second Form I-485 filed by the applicant was denied on November 19, 2004.

2000, when he filed the first Form I-485, and, again, from February 21, 2002, the date on which the first Form I-485 application was terminated until February 3, 2004, the date he filed the second Form I-485. These periods of unlawful presence total in excess of one year. In applying for adjustment of status, the applicant is seeking admission within 10 years of his 2004 departure from the United States and is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act.

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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from 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 U.S. citizen or lawfully resident spouse and/or parent of the applicant. Hardship the alien himself or other family members experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. [*Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted)].

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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Brazil or if she remains in the United States, as she is not required to reside outside of 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.

The record on appeal contains two letters from the applicant's spouse, [REDACTED] dated October 11, 2005 and May 20, 2006. In both letters, [REDACTED] states that she has responsibilities to her sister who suffers from severe athetoid cerebral palsy and other medical conditions that have left her severely disabled. [REDACTED] indicates that although her mother is the primary care giver, she must be close enough to assume responsibility for her sister on several hours notice if her mother becomes sick or is injured. [REDACTED] claims that in such circumstances she would become the primary care giver for her sister. The AAO notes that the record includes a signed notarized statement from [REDACTED]'s mother giving her power of attorney in the event that she becomes disabled and a will in which she nominates [REDACTED] as the guardian of her younger daughter in the event of her death. The record also includes a May 21, 2004 order issued by the Circuit Court for the City of Charlottesville, Virginia designating [REDACTED]'s mother as the legal guardian of her younger daughter. The order notes both that [REDACTED] younger sister is "incapacitated to such an extent that she is unable to care of her person, or to make medical decisions and is unable to make decisions regarding her estate" and that, other than her mother, she has only three known relatives, her father, [REDACTED], her maternal grandmother, and [REDACTED]. Two letters from [REDACTED] dated September 20, 2005 and May 11, 2006, the doctor who cares for both [REDACTED]'s mother and sister, offer further evidence that [REDACTED]'s sister is severely and permanently disabled and that the applicant and [REDACTED] are the primary sources of support for [REDACTED] mother, providing respite care when needed. [REDACTED] notes that the only other source of support for [REDACTED] mother is [REDACTED]'s maternal grandmother, who is dying of cancer. He also indicates that [REDACTED]'s mother has required numerous sessions of physical therapy to allow her to continue lifting her younger daughter without debilitating pain or injury and that she is "potentially one lift away from not being able to care for [her daughter]."

also contends that if she moved to Brazil with the applicant, she would have no opportunities, as career and educational opportunities for women are almost nonexistent. She indicates that she is enrolled at Virginia Commonwealth University in the Forensic Science and Crime Scene Investigation program. also asserts that she would not be able to find employment if she relocated because Brazil's economy is bad and the unemployment rate is high.

While the AAO notes's claims with regard to the opportunities that would be denied her upon relocation, it does not find the record to include any evidence that would support her estimation of her inability to pursue educational opportunities or obtain employment in Brazil. However, it acknowledges the severity and extent of the medical disability of's sister, 's support role in her sister's medical care, and the obligation she feels to her sister and her mother, her sister's primary caregiver. Accordingly, it concludes that the severing of family bonds resulting from's relocation to Brazil would constitute an extreme emotional hardship for her, particularly as the only other family member assisting's mother, ' grandmother, has been diagnosed with terminal cancer.

The second part of the analysis requires the applicant to prove that would suffer extreme hardship if she remains in the United States without the applicant. In her statements, claims that she would die emotionally and mentally if separated from the applicant. She also notes that she and the applicant have recently purchased a home and that the mortgage requires both their incomes. She contends that if the applicant were removed from the United States, they would have to sell the house at a loss, she would not be able to pay all their bills and she would have to file for bankruptcy, damaging her credit score. also states that if the applicant is removed, she would have no place to live and that her family is not in a financial position to help her. A May 15, 2006 letter from's mother reiterates that neither she nor any other member of her family would be able to assist financially. also indicates that she is not physically able to take care of her sister on her own and that she needs the applicant's help, that it is hard for her to lift her sister by herself.

In support of's claim that she would be emotionally devastated by the applicant's removal, counsel submits a May 16, 2006 statement from's a Licensed Clinical Social Worker at Commonwealth Counseling in Virginia. reports that is undergoing counseling because of the level of stress she is experiencing as a result of the immigration problems facing the applicant. Her evaluation is based on two previous counseling sessions with and she notes that has been scheduled for a third session.

evaluation reports that was physically and sexually abused as a child by an older stepbrother and experienced significant depression as a teenager. It is only that upon meeting the applicant that has been able to develop a secure and trusting relationship. concludes that the separation of and the applicant would have an emotionally destabilizing impact on and that there is a risk that she would again experience a significant depression.

Again, the AAO has considered's claims regarding the financial impact of the applicant's removal, but finds them insufficient to establish extreme hardship in the absence of supporting evidence. It takes note, however, of the role the applicant plays in assisting to care for her sister, assistance that is documented in's letter of May 11, 2006, and's emotional vulnerability as a result of the

physical and emotional trauma she experienced as a child. Accordingly, the AAO finds that the removal of the applicant would constitute an extreme hardship for [REDACTED] if she chose to remain in the United States.

The AAO also 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). In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

[T]he presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

*See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. [*Id.* at 300. (Citations omitted)].

The adverse factors in the present case are the applicant's unlawful presence in the United States during the periods: June 2, 2000 to August 17, 2000, and February 21, 2002 to February 3, 2004. The favorable factors are the applicant's family ties in the United States, the extreme hardship to the applicant's spouse if he were removed, the letters of support from the applicant's family, friends and coworkers testifying to the applicant's good moral character, and the applicant's lack of a criminal record in this country.

The AAO finds that although the immigration violations committed by the applicant are serious in nature 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. Accordingly, the appeal will be sustained.

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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.