

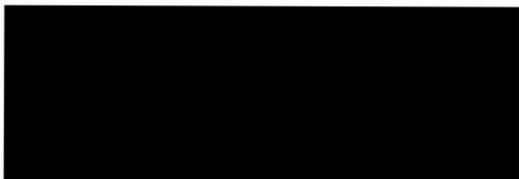
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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H4

FILE: [REDACTED]

Office: LIMA

Date: JUL 28 2009

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, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Brazil, was found inadmissible to the United States under sections 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 sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her U.S. citizen spouse and stepchildren, born in 1998, 2000 and 2001.

The acting field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated February 2, 2009.

In support of the appeal, the applicant's spouse submits a letter, dated April 1, 2009, and referenced enclosures. The entire record was reviewed and considered in rendering this decision.

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

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...

Regarding the applicant's ground of inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act, the record establishes that the applicant entered the United States with a valid nonimmigrant visa in October 1997, with permission to remain until April 1998. The applicant did not depart the United States until February 2006. The acting field office director correctly found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, for unlawful presence. On appeal, the applicant does not contest this finding of inadmissibility.¹

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. 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,

¹ Section 212(a)(2) of the Act provides, in pertinent part:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(i) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The AAO notes that in her decision, the acting field office director made reference to the applicant's numerous arrests for larceny, in 2000, 2001 and 2003. The only conviction clearly apparent in the record is a conviction for larceny in 2000. No record of conviction has been submitted with respect to the arrests in 2001 and 2003. As such, it is unclear whether the applicant is also inadmissible to the United States under section 212(a)(2)(A)(i) of the Act, for having been convicted of crimes involving moral turpitude and/or whether the applicant qualifies for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. Irrespective of this issue, the AAO has determined that the applicant's unlawful presence in the United States automatically renders her inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant is eligible to apply for a section 212(a)(9)(B)(v) waiver.

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 held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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.

The applicant's spouse asserts that he will suffer extreme hardship were he to remain in the United States while the applicant resides abroad due to her inadmissibility. In a declaration he states that he would suffer extreme emotional hardship due to the close relationship he has with his wife and stepchildren. In addition, he notes that he fears for his family's safety while in Brazil, as documentation provided confirms that the applicant's brother was shot to death while walking down the street in July 2007; since said incident, the family is afraid to leave the house, as they have received threatening phone messages at home and feel that the police are corrupt and unable to help them. *Letter from* [REDACTED] dated October 26, 2006 and *Incident Report and Translation*, dated July 23, 2007.

Furthermore, documentation has been provided, in the form of psychological evaluations conducted by [REDACTED] confirming that the applicant's three children are experiencing psychological problems with respect to adapting to life in Brazil; they are suffering due to the absence of their friends, their stepfather, and their community. The psychologist recommends that the children return to the United States with their mother and siblings, to resume everyday life with their stepfather. The psychologist further recommends continuing psychotherapy for the children to address the issues presented by their mother's inadmissibility. *See Psychodiagnostic Evaluations and Translations for* [REDACTED] *and* [REDACTED] dated March 12, 2009.²

Finally, the record establishes that in the last 25 years, the applicant's spouse's parents have built a successful family business employing over 600 people, as they own 8 McDonald's franchises and 15

² The applicant's spouse notes that he is suffering extreme hardship due to his stepchildren's psychological problems while in Brazil. He and the applicant have thus decided that the children should relocate to the United States to reside with their stepfather. However, this new arrangement, the applicant's spouse asserts, will cause him to suffer extreme hardship as well, as the young children will be separated on a long-term basis from their mother, their primary caregiver, and due to the strain of raising three children on his own, while maintaining the business, as further discussed in detail below, without his wife's physical presence and support on a day to day basis. *Letter from* [REDACTED] dated April 1, 2009.

other food service venues in Massachusetts travel plazas. The applicant's spouse has expanded the family's business; he owns 6 McDonald's franchises and employs over 200. The applicant's spouse is also actively involved in the community, as he has served on the Board of Directors of the local Boys and Girls Club, has co-chaired a Juvenile Diabetes Research Fundraising effort, and has been an active supporter of many other local charities. The applicant's spouse's mother notes that her son needs his family in the United States so that he may continue to thrive, professionally, financially and personally. Their absence, she asserts, is causing her son professional, financial and emotional hardship.³ Letter from [REDACTED], dated March 1, 2009. She notes that she and her husband will be retiring soon due to health issues, and will thus need their son to successfully take over the family business.

A letter from [REDACTED], confirming that the applicant's spouse has been referred to a psychiatrist for treatment for depression and panic disorder due to his family's relocation abroad has been provided. See Letter from [REDACTED] dated February 26, 2009. The applicant's spouse confirms that he is seeing both a social worker and a psychiatrist to help deal with his depression. *Supra* at 1.

The record establishes that the applicant's spouse plays an integral role in the thriving success of the family business, which employs hundreds of individuals and is a fixed and respected entity in the community. Said business, operated by the applicant's spouse and family, provides the sole basis for financial support to the applicant's spouse and family. It is evident that the applicant's spouse depends on the applicant for emotional and psychological support and encouragement so that he may properly fulfill his duties to the McDonald's franchise, his employees, his family and his community. Moreover, the record establishes that the applicant's spouse fears for his family's safety, due to recent traumatic events that lead to the death of the applicant's brother, and that such fears hinder his ability to perform his job duties effectively. Finally, it has been established that the applicant's spouse is suffering due to his stepchildren's psychological problems while in Brazil, which will not be alleviated should they relocate to the United States to reside with their stepfather due to long-term separation from their mother and the strain on him to raise them on his own while successfully continuing his business operations. As such, the AAO concludes that were the applicant unable to reside in the United States, the applicant's spouse would suffer extreme emotional, financial and professional hardship. The applicant's spouse needs the support that the applicant provides; her continued absence would cause him extreme hardship.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. The applicant's spouse

³ The applicant's spouse notes that on February 13, 2009, he discovered that his bookkeeper was writing fraudulent checks out of his bank account. Five days later, the applicant's spouse had the individual arrested and the applicant's spouse has lost over \$300,000; the Federal Bureau of Investigations (FBI) is handling the case. The applicant's spouse notes that due to his wife's immigration situation, he is "failing at every aspect of [his] personal and professional life..." *Supra* at 1. Documentation confirming this incident has been provided, in the form of an article published by the Telegraph Publishing Company, dated February 20, 2009.

asserts that the franchise agreement with McDonald's requires him to be available 24 hours a day, 7 days a week. He notes that "operating 6 restaurants as one man, is a challenging feat within itself.... My having to travel over 13 hours to visit my wife [the applicant] and kids takes its toll on me both physically and mentally.... Over the past year my business has suffered significantly due to the absences that I have had in order to travel to Brazil.... I have financed each of my franchises and it is obviously important that my business continue to function well in order to pay down my debt and increase my actual income and maintain my good standing with my franchisor, McDonald's. In fact, I could lose my franchises if I do not continue to give full time best efforts to my business. In addition the family business that my parents have worked so hard to build would no longer be viable. The only career that I have had is my McDonald's business and there is no way that I could relocate to Brazil since McDonald's there are owned by Brazilian nationals...." *Letter from [REDACTED]* dated February 7, 2008.

Based on the problematic country conditions in Brazil, long-term separation from his extended family, and the applicant's spouse's contention that the business created by his parents and expanded by the applicant's spouse will suffer due to his relocation abroad, the AAO finds that the applicant's spouse would suffer extreme hardship were he to relocate to Brazil due to the applicant's inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were he to relocate to Brazil to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 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 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[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 favorable factors in this matter are the extreme hardship the applicant’s U.S. citizen spouse and stepchildren and in-laws would face if the applicant were to remain in Brazil, community ties and the passage of over twelve years since the applicant’s immigration violation that lead to her inadmissibility. The unfavorable factors in this matter are the applicant’s unlawful presence and employment in the United States and her multiple arrests for Larceny, with at least one of her arrests leading to conviction in 2000.

While the AAO does not condone the applicant’s actions, the AAO finds that the hardship imposed on the applicant’s spouse as a result of the applicant’s inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary’s discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved. The acting field office director shall continue to process the immigrant visa application on its merits.