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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

H4

DATE: OCT 18 2011

OFFICE: TEGUCIGALPA, HONDURAS

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, 8 U.S.C. § 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

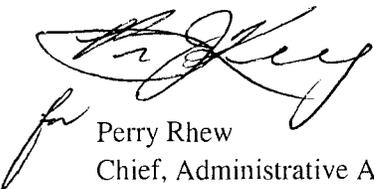
ON BEHALF OF APPLICANT:

[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.

Thank you.



Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Honduras 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 ten years of his last departure from the United States, and also inadmissible pursuant to section 212(a)(6)(B) of the Act for having failed to attend his removal proceedings. The applicant is married to a United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks 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, and Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated June 15, 2009.

On appeal, counsel for the applicant asserts that the applicant has established that his U.S. citizen spouse is experiencing extreme hardship. *See Form I-290 and supplementary attachments.*

The record includes, but is not limited to, statements from the applicant's spouse describing the hardship claim; statements from the psychologist treating the applicant's spouse; medical documentation relating to the applicant's spouse; financial information, including a list of family expenses, income tax returns, and household bills; statements from friends and family describing the applicant as a person of good moral character and the hardship claimed; country conditions materials and media articles on Honduras; and counsel's briefs and attachments. The entire record was reviewed and considered in arriving at 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.

In the present application, the record indicates that the applicant entered the United States on March 10, 2005, without inspection. He was apprehended on March 10, 2005, placed in removal proceedings, and

released. On June 27, 2005, an immigration judge ordered the applicant removed to Honduras, *in absentia*. On September 17, 2007, the applicant was returned to Honduras.

The applicant accrued unlawful presence from March 10, 2005, the date he entered the United States without inspection, until September 17, 2007, the date he was removed from the United States. As the applicant is seeking admission to the United States within ten years of his 2007 departure, he is inadmissible 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.

Section 212(a)(6) of the Act provides, in pertinent part:

(B) Failure to attend removal proceeding.

(1) In general.-Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

The record reflects that the applicant was released from immigration custody on his own recognizance on March 12, 2005. On that date, he was issued a Notice to Appear (Form I-862), which ordered him to appear before an immigration judge at [REDACTED] at a date and time to be set. The Form I-862 reflects that at the time of his release the applicant did not provide an address where he could be reached.

On June 27, 2005, an immigration judge ordered the applicant removed *in absentia*. The removal order indicates that a notice for the hearing was not issued to the applicant because he had failed to provide the immigration court with his address as required under section 239(a)(1)(F) of the Act after having been advised of that requirement in the Notice to Appear.

Counsel contends that the applicant timely submitted a change of address to the immigration court, but that the court failed to provide him with a notice of the hearing. In support of this claim, counsel submits a U.S. Postal Service Express Mail receipt, issued to the applicant on March 26, 2005, for a delivery to the Immigration Court, [REDACTED]

The Express Mail Receipt does not indicate what the applicant sent to the immigration court on March 26, 2005. However, the AAO finds it to establish that the applicant contacted the court well ahead of the date of his removal hearing and, therefore, to preclude a finding that his failure to attend his hearing was without reasonable cause. As the AAO does not find the record to clearly demonstrate that section 212(a)(6)(B) of the Act applies in this case, we withdraw the Field Office Director's findings in this regard.

The AAO now turns to a consideration of whether the record establishes the applicant's eligibility for a waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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 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 an applicant or other family members can be considered only insofar as it results in hardship to the qualifying relative. The applicant's 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-Morales*, 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.

Counsel asserts that the applicant's spouse is suffering emotional hardship without the applicant and her suffering and mental health issues far exceed those experienced by the average person who is separated from a spouse. Counsel asserts that the applicant's spouse has experienced severe and traumatic losses in recent years, which have left her depressed and anxious, and unable to cope with stresses that healthy people might find acceptable. He notes that the applicant's spouse's sister died from diabetes in 2001 and her mother in an accident in 2003. He also notes that other factors have contributed to the applicant's spouse's depression and anxiety, including the business failure that led to her divorce from her first spouse and her financial ruin, and her estrangement from her deceased sister's husband and her nephews. Counsel also asserts that the applicant's spouse is suffering financial hardship without the applicant's contribution towards expenses. Counsel states that the applicant's spouse's monthly expenses of approximately \$2,670.88 exceed her monthly net income of \$2,454.

The applicant's spouse states that the applicant's absence has resulted in months of stress, sadness, anxiety and confusion. She asserts that she has not recovered from the loss of her mother and sister, and the applicant brought "some tranquility" to her life. She states that as a single parent, the loss of her mother and sister has become more unbearable and that, instead of healing from their deaths, she has begun to relive these moments. The applicant's spouse further contends that she has problems caring for their child because she suffers from an anal fissure which is painful and flares up when she exerts herself, such as when she lifts her son. She states that she takes medication to manage her pain and has tried every available treatment except surgery without success. The applicant's spouse asserts that she has not been able to focus on her health and care for herself because of the demands on her to manage her finances, her daily routine, and maintain her job. The applicant's spouse also notes that due to financial difficulties she has had to leave her apartment to live with her 86-year-old grandmother.

The record establishes that the applicant's spouse has an anal fissure for which she takes medication. A medical letter from [REDACTED] dated September 3, 2008, indicates that the applicant's spouse has a chronic anal fissure from which she has suffered for ten years and has been treated to relieve the pain. A July 10, 2009 letter from [REDACTED] indicates that he continues to treat the applicant's spouse in connection with her anal fissure and that her past treatments have included topical nitroglycerin, a Botox

injection during an endoscopic procedure, and Diltiazem cream. He reports that the applicant's spouse will receive a second Botox injection on July 23 in the hope of healing the fissure.

Further documentation of the claimed hardships is found in a report from psychologist [REDACTED] dated June 29, 2009. [REDACTED] indicates that she previously evaluated the applicant's spouse in June 2008, assigning a primary diagnosis of Anxiety Disorder Not Otherwise Specified, subtype Mixed Anxiety-Depressive Disorder, DSM IV; Partner Relationship Problem. [REDACTED] notes that she finds the applicant's spouse's anxiety and depression to be related to the absence of the applicant; and the loss of her mother in 2003 and her sister in 2001. She also indicates that after seven bi-weekly psychotherapy sessions, the applicant's spouse discontinued treatment for financial reasons.

[REDACTED] reports that in May 2009 the applicant's spouse contacted her again, and started another course of bi-weekly psychotherapy sessions. [REDACTED] indicates that the applicant's spouse reported increasing irritability and decreasing frustration tolerance, and being too defensive with others; and that she was focusing on the absences of her mother, sister, and especially the applicant, whom she saw as her only source of real support, longed for them and cried. [REDACTED] states the applicant's spouse's reaction to the applicant's absence is unusually intense and colored with helplessness and hopelessness. [REDACTED] concludes that fundamental to the Mixed Anxiety-Depressive Disorder is the applicant's spouse's "relative lack of healthy ways of coping with loss, separation, and the complications of relationships." [REDACTED] recommends treatment to include continuing psychological therapy and supporting pharmacotherapy, and notes that the presence of the applicant would help stabilize his spouse and could give her the practical, emotional, and financial support she needs to deal better with her problems and pursue an optimal treatment.

The record also includes several statements pertaining to the applicant's spouse's emotional hardship. Included in the record is a letter from the applicant's spouse's father which describes her reactions to the personal losses she has endured, including her divorce and loss of her mother and sister. A statement from the applicant's spouse's brother, states that she has continued to struggle with the deaths of their mother and sister, and has had to deal with problems from her prior marriage and a failed business; and that she is exhausted taking care of her child

Financial documentation in the record of evidence includes a 2007 income tax return; a 2007 W-2 form; an August 14, 2008 earnings statement; and various household bills, including utility and telephone bills, and receipts, including grocery receipts for items such as baby food. The record also includes a settlement agreement in connection with the applicant's spouse's divorce which indicates that she is responsible for debts resulting from her failed business.

The AAO finds that when the hardship factors are considered in the aggregate, the applicant has established that his spouse would experience extreme hardship if she continues to reside in the United States without him.

Counsel also asserts that if applicant's spouse relocates to Honduras due to the applicant's inadmissibility, she will experience significant hardship. Counsel states that the applicant's spouse's family are all in the United States and that she does not have family in Honduras. Counsel references country conditions reports for Honduras and points to the high level of poverty, the lingering ravages of

Hurricane Mitch, substandard health care and education systems, low employment, and the high level of crime.

The applicant's spouse states that she cannot join the applicant in Honduras as she would not be able to get a job there because of high unemployment in the country; she would not be able to pay her bills and support her family; and she suffers from an anal fissure and would not be able to get the medical treatment she requires. She states that she and her family would live in extreme poverty; that it would be difficult for her to adjust socially; her child would be deprived of a quality education; and that she would be required to abandon her obligation to her brother as the trustee for his inheritance from their mother.

In support of claims made by counsel and the applicant's spouse, the record contains a range of country conditions materials, which include a May 29, 2007 Department of Homeland Security announcement of the extension of Temporary Protected Status for Honduras through January 5, 2008; the Honduras 2008 Crime and Safety Report issued on April 11, 2008 by the Overseas Security Advisory Council, Department of State; the section on Honduras from Country Reports on Human Rights Practices – 2007, published by the Department of State on March 11, 2008; and copies of public announcements from the American embassy in Honduras for late June-early July 2009 recommending that U.S. citizens defer all nonessential travel to Honduras as a result of the unstable political and security situation following the removal of then Honduran President [REDACTED]. The record also contains media articles on violence, poverty and healthcare in Honduras.

The AAO notes that the 2008 report on crime and safety in Honduras indicates that crime and violence are integral parts of life in Honduras and that a high level of vigilance is required when visiting Honduras to decrease the risk of becoming a victim. We also observe that Honduras' designation for Temporary Protected Status, which allows citizens of that nation to defer departure from the United States due to the infrastructure damage Honduras suffered during Hurricane Mitch, has been extended through January 5, 2012. When the conditions in Honduras and the hardships normally created by relocation are considered in the aggregate, the AAO finds that it would constitute an extreme hardship for the applicant's spouse if she relocates to Honduras.

The record establishes that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility. Accordingly, the applicant is statutorily eligible for a waiver under section 212(a)(9)(B)(v) of the Act.

However, the grant or denial of the waiver does not turn only on the issue of extreme hardship. It also hinges on the discretion of the Attorney General (now Secretary) and pursuant to such terms, conditions and procedures as may be prescribed by regulation.

The favorable factors in this matter are the applicant's U.S. citizen spouse and child; the extreme hardship his spouse would suffer if the waiver application is denied; the absence of a criminal record; the applicant's compliance with the terms of his immigration bond; and the statements from the applicant's friends and his spouse's family attesting to his character. The unfavorable factors in this matter are the applicant's entry without inspection, and his unlawful residence and employment in the United States.

While the AAO does not condone the applicant's actions, we find that the mitigating factors in the applicant's case outweigh the unfavorable factors. Therefore, a favorable exercise of the Attorney General's (now Secretary's) discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v), 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, 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 (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) 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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On June 27, 2005 the applicant was ordered removed from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal of the Form I-601 is sustained and the application is granted. The Form I-212 is also granted.