

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

[Redacted]

Date: **OCT 24 2012** Office: MEXICO CITY (PANAMA CITY) 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) and the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) were concurrently denied by the District Director, Mexico City, Mexico. On appeal, the Administrative Appeals Office (AAO) remanded the matter to the district director to determine the viability of the Form I-130 filed on the applicant's behalf. On remand, the Form I-130 approval was reinstated. The matter is now before the AAO on certification. The appeal will be dismissed. The waiver application is denied.

The record reflects that the applicant is a native and citizen of Venezuela who entered the United States in May 1995 with a valid nonimmigrant visa with permission to remain until November 30, 1995. The applicant remained beyond her period of authorized stay. In October 1996 the applicant was ordered deported in absentia. The applicant did not depart the United States until December 1999. The applicant was thus found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality 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 seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with her U.S. citizen spouse and child, born in 2002. In addition, the applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The district director concluded that "in reference to Section (a)(9)(C), your [the applicant's] multiple entries or re-entries after been (sic) ordered removed from the United States, there is no provision in the Law that provides for a waiver of these charges regardless of the circumstances.... [I]t is concluded that you are statutorily ineligible for the relief sought...." *Decision of the District Director*, dated July 27, 2007. The Application for Waiver of Grounds of Excludability (Form I-601) was denied accordingly.

On appeal, the applicant submits a memorandum and evidence of her B-2 entry in March 2000. The entire record was reviewed and considered in rendering a decision on the appeal.

The district director references that the applicant failed to disclose her previous unlawful presence and employment and removal, as outlined above, when she procured entry to the United States as a nonimmigrant in 2000. Despite this reference, the district director did not make a formal finding that the applicant was also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured entry to the United States by fraud or willful misrepresentation. Nevertheless, because the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver for fraud or willful misrepresentation under section 212(i), the AAO will not determine whether the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act.

With respect to the district director's finding that the applicant is statutorily ineligible or relief based on the finding that she is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §

1182(a)(9)(C)(i)(II), for having procured entry to the United States without being admitted in 2000 after having been ordered removed from the United States, the AAO notes that the record fails to establish that the applicant procured entry into the United States in 2000 without being admitted. The record contains a copy of a Form I-94 Card issued to the applicant, dated March 6, 2000, establishing her admission as a B-2 visitor. As such, the district director erred in concluding that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and is statutorily ineligible for a waiver for her other grounds of inadmissibility.

As noted above, the applicant re-entered the United States in March 2000 with a valid nonimmigrant visa. Pursuant to the record, she was "processed for removal on a reinstatement" in April 2005 and departed the United States on April 28, 2005. See *Form I-213, Record of Deportable/Inadmissible Alien*, dated April 4, 2005.

Section 241(a) of the Act provides:

(5) Reinstatement of removal order against aliens illegally reentering – If the Attorney General finds that an alien *has reentered the United States illegally* after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

8 C.F.R. § 241.8 provides, in pertinent part:

- (a) [A]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. . . .
- (b) [I]f an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.
- (c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

A review of the record reflects that the applicant in the present matter was not given a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. § 241.8(b). Consequently, the applicant's prior removal order was not reinstated. Further, as noted above, the

applicant did not re-enter the United States illegally in 2000 after having been ordered removed. As such, the applicant's deportation order could not have been reinstated. The applicant is eligible to file a Form I-601 Waiver of Grounds of Inadmissibility and the AAO will consider the merits of the Form I-601 application.

Section 212(a)(9) 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 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 the applicant or her child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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.

The applicant's U.S. citizen spouse contends that he will suffer emotional hardship were he to remain in the United States while the applicant continues to reside abroad due to her inadmissibility. In a declaration, the applicant's spouse explains that he is experiencing emotional pain as a result of long-term separation from his wife. He further explains that their daughter is in Venezuela with her mother and such an arrangement is causing him hardship as he misses his daughter very much. Although he visits them, he asserts that he wants them in his life on a daily basis. *Letter from* [REDACTED] [REDACTED] dated August 10, 2006. In a separate statement, the applicant contends that her daughter cries every night for her father. *Memorandum*, dated August 21, 2007.

To begin, no supporting documentation has been provided on appeal establishing the emotional hardships the applicant's spouse asserts he and his child are experiencing as a result of the applicant's inadmissibility. The only documentation referencing the applicant's spouse's stress with respect to his wife's inadmissibility is from 2006, more than a year prior to the appeal filing. Moreover, it has not been established that the applicant's child is unable to relocate to the United States to reside with her father, thereby ameliorating the hardships referenced by the applicant's spouse with respect to long-term separation from his child. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record.

Extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. This criterion has not been addressed. As such, it has not been established that the applicant's spouse would experience extreme hardship were he to relocate to Venezuela to reside with the applicant as a result of her inadmissibility.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States and/or refused admission. Although the AAO is not insensitive to the applicant's spouse's situation, the record does not establish that the hardship he would face rises to the level of "extreme" as contemplated by statute and case law.

The applicant departed the United States on April 28, 2005. The applicant was thus found to also be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed.¹

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

(A) Certain alien 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.

As noted above, the district director concurrently denied the applicant's Form I-212 and Form I-601. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is

¹ As noted above, the applicant's order of deportation was not properly reinstated in 2005, and a finding that she was inadmissible for a period of 20 years for having had a prior order of deportation reinstated appears to be in error. Nevertheless, the applicant was inadmissible for a period of ten years under section 212(a)(9)(A)(ii) of the Act and did not remain outside the United States for ten years after her 1999 departure, but returned in March 2000 without obtaining permission to reapply for admission. She therefore still requires permission to reapply for admission for her 1999 departure while an deportation order was outstanding.

mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) and is not eligible for a waiver under section 212(a)(9)(B)(v) of the Act, no purpose would be served in granting the applicant's Form I-212.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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.