

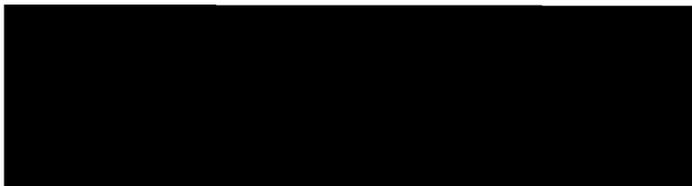
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



H5

FILE: [REDACTED] Office: MEXICO CITY (MEXICO) Date: **DEC 06 2010**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) and of the Immigration and Nationality Act, 8 U.S.C. § 1182(i), and 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:



**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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 waiver application was denied by the Acting District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having willfully misrepresented a material fact. The applicant was also found to be inadmissible 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 record indicates that the applicant is the son of a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and 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 his United States citizen parent.

The Acting District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's parent and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated April 10, 2008.

On appeal, the applicant, through counsel, asserts generally, that the director failed to evaluate all of the evidence in determining the extreme hardship on the applicant's mother, the qualifying relative. Counsel submits a brief and additional evidence. *See Form I-290B, counsel's brief and attachments.*

The record includes a letter from the applicant's mother detailing the hardship claim, a psychological report, medical letter, counsel's statement submitted with the Form I-601 waiver application, and counsel's appeal brief. *See Affidavit from [REDACTED] dated February 7, 2007 and submitted with the Form I-601 waiver application; Psychological Report from [REDACTED] Psy.D.; Medical letter from [REDACTED]; Counsel's statement submitted with the Form I-601 waiver application, and counsel's appeal brief.* The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant arrived at Miami International Airport, Miami, Florida, on January 16, 2001, and was presented at the legacy Immigration and Naturalization Service [INS] primary inspections as a Transit Without Visa [TWOV] and requested asylum in the United States. The applicant had no visa in his passport, he was paroled pending asylum proceedings and referred to INS Expedited Removal. The applicant was determined to have established credible fear and was referred to an immigration judge. The applicant filed an asylum application but did not appear for his asylum hearing. The applicant was placed in removal proceedings which were concluded on October 27, 2005 when his final motion was denied by the Board of Immigration Appeals [BIA]. On February 20, 2006, the applicant departed the United States and returned to Colombia.

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 alien's departure or removal from the United States, is inadmissible.

The applicant accrued over one year of unlawful presence from January 16, 2001, until his removal proceedings were concluded on October 27, 2005 by the BIA. The applicant is, therefore, inadmissible under section 212(a)(9)(B)(i)(II) of the Act on account of having accrued over one year unlawful presence in the United States. Contrary to counsel's assertion, the removal proceedings did not stop the accrual of unlawful presence as the applicant never properly filed for asylum.

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.

The applicant is also inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having willfully misrepresented a material fact. The applicant violated the Transit Without Visa (TWOV) provisions because he received the visa with no intention of continuing his travels. He had no intention of departing within eight hours after his arrival as a TWOV. It is noted that the TWOV program, which was suspended on August 2, 2003, was designed to facilitate international travel, and permitted:

[A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed "in immediate and continuous transit" through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980).

Counsel concurs that the applicant is inadmissible under section 212(a)(6)(C)(i) for having willfully misrepresented a material fact in procuring the TROV.

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

- (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa,

other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

- .....
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

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

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Waivers of inadmissibility under section 212(i) and under section 212(a)(9)(B)(v) of the Act are 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. The applicant's mother 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224

F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The applicant does not establish extreme hardship to his United States citizen parent if she remains in the United States. The applicant’s mother states that the separation is causing her concern that as she gets older she may not be able to support herself and she will need her only son to help her financially. While these concerns may be legitimate, the applicant’s mother does not provide sufficient financial details to allow an assessment of the possible hardship that would result if the applicant is not in the United States to assist her financially.

The applicant’s mother expresses fear of being alone in the United States as she matures in age. She states that she needs the applicant in the United States because “[her] situation is very frail right now because [her] husband died on September 2, 2004 and [her] only son (the applicant) in Colombia.” She also states that she is 62 years old and she has a “stable job” but her employment “will not last too long because there are not a lot of jobs available at [her] age;” That “[her] health is deteriorating and the only person that can support [her] during [her] elderly years is her son.” While the depths of the applicant’s parent’s concerns are apparent and may result in some hardship, it has not been established that her concerns are greater than others in the same situation.

A Psychological Report from [REDACTED] states that because the applicant’s mother has lost her husband and child [the applicant] she “is alone, lonely and distraught.” [REDACTED] states in her conclusion that the mental status of the applicant’s mother “confirms the presence of a depressive and anxious state.”

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted evaluation is based on a single interview between the applicant's mother and the counselor. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's parent or any treatment plan for the conditions noted in the evaluation, to further support the gravity of the situation. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering the findings speculative and diminishing the evaluation's value to a determination of exceptional hardship. It is noted for example, that although the May 1, 2008 report states that it is based on an information "Psychotherapy session with [REDACTED] on April 29, 2008," as part of her conclusion [REDACTED] states after the "recent negative news" of the denial of her son's petition "The psychiatric symptoms have worsened." However, [REDACTED] does not indicate how she gauged the changes in [REDACTED] symptoms given that the psychological evaluation is based on a single psychotherapy session.

A letter, dated June 11, 2008, from [REDACTED] states that [REDACTED] "has been under [his] care since March 7, 2006, for multiple medical conditions." [REDACTED] also states that [REDACTED] "is stable but does require significant family support for her chronic medical conditions." However, Dr. [REDACTED] does not indicate the nature and extent of the "significant family support" needed by the applicant's mother nor does he provide additional details so as to allow an assessment of the hardship [REDACTED] would suffer in the absence of the applicant.

The AAO finds that the cumulative effects of the hardships described by the applicant's parent does not exceed that which would be normally be expected as a result of separation.

In addition, the applicant does not establish hardship to his U.S. citizen parent if she joins him in Colombia. The applicant's mother states that "If [the applicant] can't come and live with [her], [she] will be forced to return to Colombia where in [her] condition it would be a total adversity work-wise and health-wise." The applicant's mother, however, does not provide any additional evidence to enable an assessment of the nature and extent of the hardship she would suffer if she joined the applicant in Colombia.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) and under 212(a)(9)(B)(v) 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.