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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

[redacted]

H5

Date: FEB 15 2012 Office: NEW YORK [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), and 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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,

for
Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Ecuador who attempted to procure entry to the United States in June 1995 by presenting a fraudulent passport. The applicant was ordered excluded and deported from the United States on June 14, 1995. *See Order of the Immigration Judge,* dated June 14, 1995. The applicant departed the United States on August 23, 1995. *See Notice to Alien Ordered Excluded by Immigration Judge,* dated August 23, 1995. The applicant subsequently entered the United States without inspection in December 1995. In April 2001, the applicant submitted the Form I-485, Application to Register Permanent Residence or Adjust Status, based on his then marriage to , a U.S. citizen. In February 2002, the applicant traveled outside the United States utilizing the Form I-512, Advance Parole Document. The district director determined that the applicant was inadmissible under 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. The AAO notes that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry to the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Inadmissibility Grounds (Form I-601) accordingly. *Decision of the District Director,* dated December 6, 2008.

In support of the appeal, counsel for the applicant submits the following: a brief, dated January 5, 2009; evidence of the applicant's spouse's and child's U.S. citizenship; a copy of the applicant's and his spouse's marriage certificate; medical documentation pertaining the applicant's child; psychiatric documentation regarding the applicant's spouse; an affidavit from the applicant's spouse; and a confirmation of employment letter for the applicant. The entire record was reviewed and considered in rendering this decision.

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

> (i) 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:

(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.

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...

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) 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 U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant or the child can be considered only insofar as it results in hardship to a qualifying relative. 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-Moralez,* 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 she would suffer extreme hardship were she to remain in the United States while her husband relocates abroad due to his inadmissibility. In her declaration, the applicant's spouse explains that she works from 11:00 PM to 9:00 AM Monday through Saturday and depends on the applicant to take care of their daughter. Were the applicant to relocate abroad, she contends that she would have to quit her job to care for her child, thereby causing her financial hardship. Moreover, she asserts that she would experience financial hardship as a result of the loss of her husband's income. She further maintains that she and her child are very close to the applicant and were he to relocate abroad, they would both suffer emotional hardship. Finally, the applicant's spouse contends that since the applicant's immigration problems have arisen, her daughter's bronchial asthma has worsened. *Affidavit of* , dated January 2, 2009.

In a separate affidavit, the applicant's spouse explains that although she is employed, what she makes is not sufficient to support the family and thus, without her husband's income, she would experience financial hardship. In addition, the applicant's spouse asserts that were her husband to relocate abroad, her child would experience emotional hardship due to long-term separation from her father, thereby causing her hardship. *Affidavit of* dated July 2, 2008.

In support, evidence has been provided establishing the applicant's U.S. citizen child's medical condition, specifically, bronchial asthma. *See Letter from* , dated December 30, 2008. In addition, a letter and medical documentation has been provided establishing that the applicant's spouse is suffering from depression and anxiety in regards to her husband's immigration situation. This documentation further establishes that the applicant's spouse has been prescribed medications for her conditions and needs to continue psychotherapy. *Letter from* dated January 2, 2009. A second evaluation has been provided, from June 2008, establishing that the applicant provides essential physical, emotional, financial and instrumental care and love for his wife and child and the loss of his daily presence and support would be devastating to the applicant's spouse and child. *Report from* dated June 21, 2008. Moreover, a letter has been provided establishing the applicant's gainful employment, since November 1999, earning $400 per week. *See Letter from* , dated December 30, 2008. Based on a totality of the circumstances, the AAO concludes that were the applicant to relocate abroad, his wife would experience extreme hardship.

The applicant's U.S. citizen spouse asserts that she does not want to relocate to Ecuador to reside with the applicant due to his inadmissibility. She explains that she has no ties to Ecuador as she was born in the Dominican Republic. She further asserts that long-term separation from her gainful employment, her friends and her community would cause her hardship. Moreover, the applicant's

spouse contends that were she to relocate abroad, she would not be able to find a job and her daughter would not be able to receive proper medical care in Ecuador. *Supra* at 2-3. In his evaluation, r notes that Ecuador is a poor country and there is a high rate of unemployment, poverty, criminal activity, social and political strife and a strong history of violence and the applicant's spouse cannot imagine beginning again in a place where they have no house, job or future prospects. *Supra* at 16.

The record reflects that the applicant's spouse was born and raised in the Dominican Republic and has been residing in the United States for over 15 years. Were she to relocate to Ecuador to reside with the applicant, she would have to adjust to a country with which she is not familiar. She would have to leave her community and her gainful employment and she would be concerned for her and her child's safety and well-being in Ecuador.[1] It has thus been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. 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 she 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,

[1] The U.S. Department of State confirms that crime is a severe problem in Ecuador and medical care is adequate in major cities, but below U.S. standards in in smaller communities. Moreover, the per capita income is estimated to be $4,013 and the poverty rate is over 30%. *Country Specific Information-Ecuador, U.S. Department of State,* dated December 12, 2011 and *Background Note-Ecuador, U.S. Department of State*, dated June 8, 2011.

> 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 then "balance 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 hardships the applicant's U.S. citizen spouse and child would face if the applicant were to relocate to Ecuador, regardless of whether they accompanied the applicant or remained in the United States, the applicant's long-term gainful employment in the United States, the payment of taxes, the apparent lack of a criminal record, his community ties, and the passage of more than sixteen years since the applicant was ordered removed. The unfavorable factors in this matter are the applicant's attempt to procure entry to the United States by fraud or willful misrepresentation in 1995, his deportation from the United States in 1995, his subsequent re-entry to the United States without inspection in 1995 and periods of unauthorized presence and employment in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. 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 I-601 waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.