



U.S. Citizenship
and Immigration
Services

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Date: **NOV 01 2012** Office: **LIMA, PERU** FILE: [REDACTED]

IN RE: Applicant: [REDACTED]
[REDACTED]

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

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 Rhee
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Lima, Peru, 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 Brazil 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 willfully misrepresenting a material fact in order to obtain an immigration benefit; and 212(a)(9)(B)(i)(II) of 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 her last departure from the United States. The record indicates that the applicant is married to a U.S. citizen and the mother of a Brazilian citizen child. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and 1182(9)(B)(v), in order to reside in the United States with her spouse.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated May 20, 2011.

On appeal, the applicant, through counsel, asserts that the Field Office Director erred in determining that the applicant is inadmissible for misrepresentation. *Form I-290B, Notice of Appeal or Motion*, filed June 22, 2011. Counsel claims that when the applicant married her second husband, she believed she was divorced from her first husband, so she lacked the intent or willfulness to defraud the U.S. government. *Id.* Moreover, counsel claims that the Field Office Director erred in not finding that the applicant's spouse would suffer extreme hardship should the applicant's waiver application be denied. *Id.* Counsel also submits new evidence of hardship on appeal.

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant and her husband, letters of support, medical documents for the applicant's husband, medical documents for the applicant in Portuguese¹, financial documents, photographs, and documents pertaining to the applicant's marriages and divorces. The entire record was reviewed and considered, with the exception of the Portuguese-language documents, in arriving at a decision on the appeal.

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

- (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.

¹ Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), an applicant who submits a document in a foreign language must provide a certified English-language translation of that document. As some medical documents are in Portuguese and are not accompanied by English-language translations, the AAO will not consider them in this proceeding.

....

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

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

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [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, that:

(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 [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 [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(i) and 212(a)(9)(B)(v) of the Act are dependent first on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband 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 United States Citizenship and

Immigration Services (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 of Immigration Appeals (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.

In the present case, the record indicates that on December 16, 1989, the applicant married Mr. [REDACTED] in Brazil. In 2001, the applicant entered the United States without inspection. On March 26, 2004, the applicant divorced Mr. [REDACTED]. On September 13, 2005, the applicant married Mr. [REDACTED], a U.S. citizen, in Massachusetts. On January 5, 2006, the applicant departed the United States. After discovering that the divorce to her first husband was not valid, the applicant divorced her first husband on April 24, 2006, and remarried Mr. [REDACTED] on December 28, 2009, in Brazil.

Counsel contends that the applicant did not knowingly make a false statement about her divorce in order to deceive an immigration officer. She claims that the applicant relied on an attorney in Brazil who assured her that her divorce from her first husband was final, and she could remarry; she simply made an "honest mistake." When she discovered the mistake, she divorced her first husband and remarried her current husband.

With respect to the willfulness of the applicant's misrepresentation, the Department of State Foreign Affairs Manual, Volume 9 § 40.63 N5, in pertinent part states that, "[t]he term 'willfully' as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise." The AAO accepts the applicant's claim that she is not inadmissible to the United States through the misrepresentation of a material fact because she was unaware that the divorce from her first husband was not final. The AAO observes that in waiver proceedings, the burden of proof is on the applicant to establish admissibility. *See section 291 of the Act*, 8 U.S.C. § 1361. The submitted Brazilian divorce decree indicates that on March 26, 2004, a judge approved the divorce between the applicant and her first husband, and the applicant was returned to her maiden name. She married her second husband believing that the divorce decree was valid, and nothing in the record supports the claim that she knew her first divorce was invalid when she married her second husband. Additionally, in the Forms I-130 and G-325A filed before she remarried her second husband, she declares herself divorced from her first husband on March 26, 2004. If the preponderance of the evidence shows that "any fraud was not intentional or with the intent to deceive, or that the misrepresentation was not willful," then it should be determined that the applicant has met his burden of proving that he is not inadmissible under section 212(a)(6)(C)(i) of the Act. *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, "Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators,"* dated March 3, 2009. Therefore, the applicant has established that the fraud was unintentional, with no intent to deceive, and the misrepresentation was not willful. The AAO finds that the applicant has met her burden of proving she is not inadmissible under section 212(a)(6)(C)(i) for willfully misrepresenting a material fact in order to obtain an immigration benefit.

However, the applicant accrued over one year of unlawful presence between 2001 and January 5, 2006. The applicant is, therefore, inadmissible to the United States 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, and she seeks admission within 10 years of her departure from the United States. The applicant does not contest this ground of inadmissibility.

In a statement dated January 7, 2011, the applicant's husband states he was born in Italy, he has no family ties to Brazil, and he is very close to his sister. He has continuously lived in the United States, next door to his sister, for over 55 years. In a statement dated July 18, 2011, the applicant's husband states he has "an extraordinarily close-knit family." In her statement dated July 18, 2011, the applicant's sister-in-law states her brother helps her with running errands, as she is afraid to drive alone, and has dinner with her family every night since the applicant left. The applicant's husband claims that if he relocates to Brazil, he will lose his home and be unable to maintain his real estate investments, which he relies on for his livelihood. Federal income tax returns corroborate the applicant's spouse's claims about his investments. Additionally, he states that he does not read or speak Portuguese, and at 72 years old, it would be difficult to learn. Moreover, it would be difficult to adjust to the Brazilian culture.

In several statements over a five-year period, the applicant's husband states his health would be negatively affected if he joins the applicant in Brazil. In a letter dated June 26, 2012, Dr. [REDACTED] states the applicant's husband suffers from pulmonary emphysema and chronic obstructive pulmonary disease; he requires regular visits to his doctor. He advises the applicant's husband to not relocate to Brazil because of the hot weather and limited medical facilities. The applicant's husband states the applicant resides in a small town of 4000 people, which does not have the medical resources to treat his medical conditions. He states the language barrier would complicate his ability to get quality medical care in Brazil. The applicant's husband also states he has excellent insurance which will only cover an emergency in Brazil.

Based on the record as a whole, including the applicant's husband's serious medical conditions and possible disruption of his treatment; his age; his separation from his family, including his sister who he has lived next door to for over 55 years; his lack of health insurance; and the possibility of losing his home and real estate investments, the AAO finds that the applicant's husband would suffer extreme hardship if he were to join the applicant in Brazil.

However, the record fails to establish extreme hardship to the applicant's husband if he remains in the United States. In her appeal brief dated July 18, 2011, counsel claims that living without the applicant's emotional support in the United States amounts to extreme hardship to her husband. The applicant's husband states the applicant has helped him through emotional difficulties, but constantly worrying about the applicant in Brazil threatens his "mental and physical well-being." The applicant's sister-in-law states she has never seen her brother as happy as he is with the applicant.

The applicant's husband states he is "financially comfortable" and can afford to travel to Brazil to visit the applicant. However, his doctor has advised him to not spend extended amount of time in Brazil because of his medical conditions. Documentation in the record establishes that the applicant's husband suffers from pulmonary emphysema and chronic obstructive pulmonary disease, and he has been advised

to not relocate to Brazil because of climate and limited medical facilities. Additionally, he states that even though he can afford to travel to Brazil, he has debts in the United States, the applicant is financially dependent on him, and he pays for travel and communication expenses, which are becoming a financial burden. He also claims that when the applicant was in the United States, she worked and contributed to the household.

The AAO acknowledges that the applicant's husband may be suffering emotional difficulties in being separated from the applicant. While it is understood that the separation of spouses often results in significant psychological challenges, the applicant has not distinguished her husband's emotional hardship upon separation from that which is typically faced by the spouses of those deemed inadmissible. Additionally, though the applicant's husband refers to financial difficulties, the record does not contain evidence corroborating the applicant's husband's statement that he is suffering financial hardship. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). Further, the applicant has not distinguished her husband's financial challenges from those commonly experienced when a family member remains in the United States. The evidence does not establish that the applicant is unable to obtain employment in Brazil and, thereby, financially assist her husband from outside the United States. Based on the record before it, the AAO finds that the applicant has failed to establish that her husband would suffer extreme hardship if her waiver application is denied and he remains in the United States.

Although the applicant has demonstrated that her husband would experience extreme hardship if he relocated abroad to reside with the applicant, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 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.