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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

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[Redacted]

FILE: [Redacted] Office: [Redacted] Date: **AUG 18 2010**
(PNM 2006 804 004)

IN RE: Applicant: [Redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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 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 \$585. 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,

Tang Syed
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Panama who was found to be inadmissible to the United States under section 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 applicant is married to a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The Acting District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Acting District Director*, dated February 8, 2008.

On appeal, the applicant asserts that her spouse will suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of these assertions the record includes, but is not limited to, statements from the applicant's spouse; a statement from the applicant; a statement from the mother of the applicant's spouse; statements from friends and family members; employment letters for the applicant; a statement from [REDACTED] loan statements; tax statements for the applicant and spouse; W-2 forms for the applicant and spouse; insurance policies; airline and hotel statements; a Panama apartment lease; a Panama police complaint; a mortgage statement; an employment letter for the applicant's spouse; a statement and membership card from the Florida Bar; a newspaper article; and a bank statement. The entire record was reviewed and considered in rendering 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

[REDACTED]

In the present case, the record indicates that the applicant entered the United States in transit without a visa on September 7, 1988. *Form I-94T, Departure Record*. On March 6, 1989 the applicant

applied for asylum as a dependent on her father's asylum application. *Form I-589, Request for Asylum in the United States*. On April 28, 1998 an immigration judge denied the applicant's request for asylum and ordered the applicant removed from the United States. *Order of the Immigration Judge*, dated April 28, 1998; *Warrant of Removal/Deportation*, dated April 18, 2006. The applicant remained in the United States, and on August 7, 2004, she married a United States citizen. *Marriage certificate; Birth certificate for applicant's spouse*. The applicant's spouse filed a Form I-130 which was approved on October 23, 2006. *Form I-130, Petition for Alien Relative*. On April 25, 2006, the applicant filed a Form I-485 to adjust her status to lawful permanent residence. *Form I-485, Application to Register Permanent Residence or Adjust Status*. On May 11, 2006, the applicant was removed from the United States. *Form I-205, Warrant of Removal*. The applicant accrued unlawful presence from April 28, 1998, the date her asylum application was denied by the immigration judge, until April 25, 2006, the date she filed the Form I-485. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (now Secretary) as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. See *United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence*, at 33, dated May 6, 2009. As such, the applicant is seeking admission within ten years of her May 11, 2006 departure from the United States. 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.

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 the applicant or children can be considered only insofar as it results in hardship to a 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. [REDACTED] (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.” 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 [REDACTED]* (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. [REDACTED] 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) (“[REDACTED] 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 [REDACTED] 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.

If the applicant's spouse joins the applicant in [REDACTED] the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. His parents were born in the United States. [REDACTED] *Biographic Information, for the applicant's spouse*. All of the family of the applicant's spouse lives in the United States. *Statement from the applicant's spouse*, dated February 24, 2008. Spanish is not his native language, and his Spanish speaking and writing skills are at a basic level. *Id.* The applicant states that although her spouse is trying to study with tapes, he cannot speak much Spanish. *Statement from the applicant*, dated September 1, 2006. The applicant's spouse is an attorney licensed in Florida. *Statement from the applicant's spouse*, dated February 24, 2008; *Florida bar membership card*. He notes that his law license has no relevance in [REDACTED] and given the language barrier, he would have a difficult time obtaining a law license in [REDACTED] *Statement from the applicant's spouse*, dated February 24, 2008. When looking at the record before it, particularly the lack of familial and cultural ties of the applicant's spouse; his lack of language abilities and its effect upon his cultural adjustment and ability to find employment, the AAO does find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Panama.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *Birth certificate*. His parents were born in the United States. *Form G-325A, Biographic Information, for the applicant's spouse*. All of the family of the applicant's spouse lives in the United States. [REDACTED] The applicant's spouse notes that the applicant's salary, in addition to his own salary, is required to meet their expenses. *Statement from the applicant's spouse*, dated October 4, 2006. He notes that his expenses include the cost of flights to visit the applicant in Panama, as well as paying for her college courses and other living expenses. *Id.* While the record includes documentation of the law school loans of the applicant's spouse as well as a mortgage statement, the AAO observes that the record also includes tax statements and W-2 forms for the applicant's spouse showing consistent earnings in excess of \$110,000.00 per year. *Loan statements; mortgage statement; tax statements; W-2 forms*. Furthermore, there is nothing in the record to show that the applicant would be unable to contribute to her family's financial well-being from a location other than the United States. The applicant's spouse notes that he is worried about the applicant's safety and well-being in Panama. *Statement from the applicant's spouse*, dated October 4, 2006. The AAO acknowledges the police complaint filed by the applicant in Panama regarding the burglary of her apartment. *Police complaint, Republic of Panama, Public Ministry*, dated September 12, 2006. The applicant's spouse states that he misses the applicant tremendously, and that she is the most important person in his life and he cannot live without her. *Statement from the applicant's spouse*, dated October 4, 2006. His mother is worried for her son's emotional well-being. *Statement from the mother of the applicant's spouse*, dated August 16, 2006. Through regular telephone conversations, she observes her son to be anxiety-ridden, depressed, and confused. *Id.* A childhood friend of the applicant's spouse, who is

also a physician, has performed informal mental status examinations of the applicant's spouse to determine how he was handling the stress of the situation. *Statement from Mark Lipkind, M.D.*, dated August 21, 2006. He notes that the applicant's spouse has and continues to exhibit obsessive-compulsive behavior and symptoms of anxiety and depression. *Id.* While the AAO acknowledges these statements, it gives his comments little weight as they are the informal observations of a friend, not the result of an examination by an independent source.

The AAO recognizes that the applicant's spouse will endure hardship as a result of his separation from the applicant. However, the record does not distinguish his situation, if he remains in the United States, from that of other individuals separated as a result of removal. Accordingly, it does not establish that the hardship experienced by the applicant's spouse would rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

As the record has failed to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States if he remains in the United States, the applicant is not eligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.¹

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.

¹ The AAO observes that the applicant and his spouse are apparently living together in the United Kingdom. *Statement from the applicant's spouse*, dated June 8, 2009.