

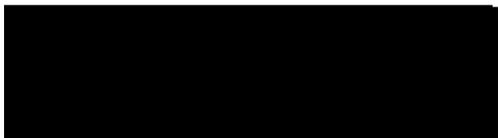
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



HG

FILE: [REDACTED] Office: MEXICO CITY (PANAMA) Date: **DEC 07 2010**

IN RE: Applicant: [REDACTED]

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

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.

Thank you,

Perry Rhew
for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Ecuador who was found to be inadmissible to the United States 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 for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his wife and denied the Form I-601 application for a waiver accordingly. *Decision of the Acting District Director*, dated June 19, 2008.

On appeal, counsel for the applicant asserts that the applicant’s wife will endure extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated July 17, 2008.

The record contains briefs from counsel; statements from the applicant, as well as the applicant's wife, mother-in-law, father-in-law, sister-in-law, and his wife's grandparents; medical and mental health documentation regarding the applicant's wife; documentation in connection with the applicant's wife's expenses; reports on conditions in Ecuador; information on asthma and depression; a letter from a professor with whom the applicant's wife worked and studied; letters from the applicant's wife's employer and manager; copies of birth records for the applicant and his wife; a copy of the applicant's marriage certificate, and; a certification that the applicant has no criminal record in Ecuador. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

The record shows that the applicant entered the United States without inspection in or about July 2000, and remained until approximately September 2007. Thus, he accrued over seven years of

unlawful presence in the United States. He now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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.

On appeal, the applicant's wife states that she has experienced significant hardship since the applicant departed the United States. *Statement from the Applicant's Wife*, received July 23, 2008. She explains that she spent three months in Ecuador with the applicant, yet she has had difficulty finding another satisfactory job upon her return due to poor economic conditions in the competitive job market in the United States. *Id.* at 1. She indicates that U.S. employers are wary of the possibility that she will depart for Ecuador due to the fact that she left her previous job to join the applicant abroad. *Id.* She notes that she was previously an account manager, yet now she must work as a food server at minimum wage. *Id.* She asserts that she has lost valuable time and experience in her field and it will be difficult for her to recover her previous level of employment. *Id.*

The applicant's wife explains that she wishes to complete a Master's degree program and that a professor offered her a graduate assistant opportunity. *Id.* However, she indicates that she is unable to accept the position due to her financial stresses and uncertainty with the applicant's immigration situation. *Id.*

The applicant's wife explains that she is under significant stress due to financial hardship, as her expenses have risen and her income has decreased since the applicant departed for Ecuador. *Id.* at 1-2.

The applicant's wife indicates that she has experienced health problems, and that upon returning from three months in Ecuador she experienced heart palpitations and subsequent chest pains. *Id.* at 2. She reports that she was seen by an urgent care clinic, and then referred by her physician to a cardiologist for tests. *Id.* She explains that the tests were not conclusive, but that her symptoms were most likely aggravated by extremely stressful factors in her life. *Id.* She provides that her asthma condition has also degenerated during the period that she has resided apart from the applicant, and that the stress of separation is likely a cause. *Id.* She indicates that her medication dosage was increased, and that she was prescribed a controlling medication. *Id.*

The applicant's wife further reports that she has been diagnosed with adjustment disorder or depression. *Id.* She indicates that she has experienced a reduced appetite, difficulty sleeping, reduced concentration, and that she has been prescribed anti-anxiety medication. *Id.* She states that she has a documented family history of mental illness, including her mother's severe depression. *Id.*

The applicant's wife previously explained that she has suffered from asthma for her entire life, and that it is exacerbated by allergens in the air, plants and pollens, pollution, exertion, heat, and illness. *Prior Statement from the Applicant's Wife*, undated. She stated that she has been hospitalized in the past, and that she must travel with a nebulizer machine in the event that she has serious trouble breathing. *Id.* at 1. She reported that her doctor warns against living in conditions where environmental triggers exist, and that she shares her doctor's concerns about the effect of factors in Ecuador. *Id.* She expressed concern for her access to medical care should she have an emergency in Ecuador, as well as the availability of good medical care and safe medicines. *Id.*

The applicant's wife explained that she is close with her family in the United States and that she sees them regularly. *Id.* She indicated that she would face significant emotional difficulties should she reside apart from her family. *Id.* at 1-3. She expressed concern for the health of her relationship with the applicant should they reside apart for a lengthy duration. *Id.* at 3.

The applicant's wife stated that she worries about what could happen to her in Ecuador, as she has heard about increased crime and insecurity in the larger cities. *Id.* at 5. She indicated that she is concerned that foreigners, especially Americans, are targeted for kidnappings and robbery, and that police fail to adequately respond to these incidents. *Id.*

The applicant's mother-in-law describes her struggles with severe depression, and she reports that she receives antidepressant medication as well as medical and psychological intervention. *Statement from the Applicant's Mother-in-law*, dated July 16, 2008. She adds that mental issues run in her family, and that those affected lacked the resiliency to cope well with stress. *Id.* at 1. She states that she has considered suicide four times, and that her condition is biological and life-threatening. *Id.* She notes that the applicant's wife is from this genetic pool, and that she fears for her mental and physical health given the stress she is experiencing as a result of the applicant's immigration difficulties. *Id.*

The applicant submits a letter from a psychiatrist for his mother-in-law, [REDACTED] who reports that the applicant's mother-in-law suffers from depression and that she is on medication. *Letter from Applicant's Mother-in-law's Psychiatrist*, dated November 30, 2005.

The applicant submits a letter from a physician for his wife, [REDACTED] who reports that his wife began requiring her asthma rescue inhaler on a daily basis over several months. *Letter from [REDACTED]* dated July 9, 2008. He adds that use of a rescue medication twice a week or more is considered poor asthma control, and that previously the applicant's wife's asthma was under good control with nothing more than the very rare use of her rescue medication. *Id.* at 1. He referenced the applicant's wife's evaluation for chest pain palpitations, and noted that she has experienced weight loss and insomnia. *Id.* He reports that the applicant's wife's health issues appear to be traceable to the extremely significant stress of the applicant's absence from the United States. *Id.* He provides that the applicant's wife's asthma medications have been adjusted and some treatment for adjustment disorder with anxiety/depressive features has been initiated. *Id.* [REDACTED] asserts that residing in Ecuador is not in the best interest of the applicant's wife's health. *Id.* He indicates that "there can be little doubt from a medical perspective that [the applicant's wife] would clinically benefit by having [the applicant] present in [the United States]" *Id.*

Upon review, the applicant has shown that his wife will face extreme hardship should the present waiver application be denied. The applicant has established that his wife will endure extreme hardship should she remain in the United States without him for the duration of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant's wife has a documented history of struggles with asthma, and recent experience with heart palpitations. Medical documentation in the record supports that the stress of separation from the applicant has significantly exacerbated her asthma and posed a threat to her physical health. It is evident that the applicant's wife's physical health contributes to her emotional difficulty. The record sufficiently establishes that the applicant's wife's mother suffers from depression that requires medication and medical care, which further supports that the applicant's wife is at risk for significant mental health problems. The applicant's wife's documented physical and mental health problems constitute unusual circumstances not commonly faced by individuals who reside apart from a spouse due to inadmissibility.

The AAO acknowledges that the separation of spouses often results in significant psychological difficulty, and that the applicant's wife will face emotional consequences as a result of residing apart from the applicant. The applicant's wife joined the applicant in Ecuador for three-month period at

significant cost to her career, and this sacrifice reflects the significant attachment she has to the applicant.

Based on the foregoing, the applicant has shown that his wife will endure extreme hardship should she reside in the United States without him.

The applicant has established that his wife will suffer extreme hardship should she relocate to Ecuador. As discussed above, the applicant's wife has documented physical and emotional health problems for which she receives care from multiple medical professionals in the United States. It is evident that her uncertainty regarding the continuity of her care in Ecuador would create physical and emotional difficulty. The applicant has provided information to support that a change in environmental conditions and stress due to relocating to Ecuador could exacerbate his wife's asthma.

The AAO recognizes the relationship between economic factors and the receipt of required medical services. It is evident that the applicant's wife would be separated from her employment opportunities in the United States should she reside in Ecuador, and that the interruption of her employment would impact her ability to fund medical insurance and health care.

The applicant's wife's concern for crime and her physical safety in Ecuador is warranted, as the U.S. Department of State has indicated the following:

Crime is a severe problem in Ecuador. Crimes against American citizens in the past year ranged from petty theft to violent crimes, including armed robbery, home invasion, sexual assault and homicide. Low rates of apprehension and conviction of criminals – due to limited police and judicial resources – contribute to Ecuador's high crime rate.

Ecuador Country Specific Information, U.S. Department of State, dated October 1, 2010.

The record shows that the applicant's wife would face other elements of hardship should she reside in Ecuador, including separation from her close family members in the United States, the financial consequences of ending her employment and moving, and the loss of her academic and career development opportunities in the United States.

All elements of hardship to the applicant's wife, should she reside in Ecuador, have been considered in aggregate. Based on the foregoing, the applicant has established that his wife will endure extreme hardship should she reside in Ecuador to maintain family unity.

Accordingly, the applicant has shown that denial of the present waiver application “would result in extreme hardship” to his wife, as required for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be

considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for a lengthy duration without a legal immigration status.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States, and; numerous individuals attest to the applicant's good character and support of his U.S. citizen wife.

While the applicant's violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

ORDER: The appeal is sustained.