

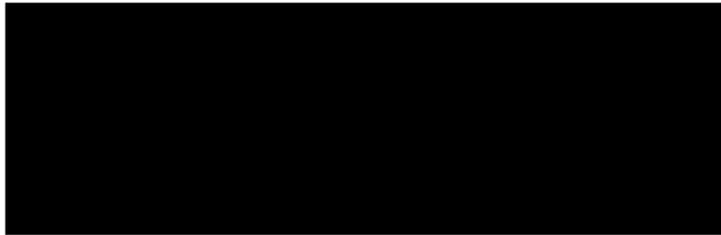
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: MEXICO CITY (PANAMA CITY) Date: OCT 12 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
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 her last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and lawful permanent resident parents.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Acting District Director*, dated March 24, 2008.

On appeal, counsel for the applicant asserts that the applicant's U.S. citizen husband and lawful permanent resident parents will endure extreme hardship should the present waiver application be denied. *Statement from Counsel on Form I-290B*, dated April 18, 2008.

The record contains a brief from counsel; statements from the applicant, as well as the applicant's husband, parents, daughter, sister, brother-in-law, cousin, friend, Pastor, and other relatives; copies of the applicant's parents' lawful permanent resident cards; psychological evaluations for the applicant's husband and daughter; copies of medical documents for the applicant's daughter and son; copies of bills for the applicant's husband; copies of wire transfer receipts showing that the applicant's husband provided economic support for her abroad; photographs of the applicant and her family members; articles on events in Ecuador; copies of birth records for the applicant's children, and; a letter from the applicant's husband's employer. 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 December 1999, and she departed on or about July 31, 2007. Accordingly, the applicant accrued over seven years of unlawful presence in the United States. She now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She 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 her last departure. The applicant does not contest her 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 or her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband and parents are the only qualifying relatives 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.

In the present matter, the applicant's husband expresses that he is enduring significant emotional hardship due to being separated from the applicant, including depression, loss of appetite, lack of sleep, anxiety, and diminished concentration at work. *Statement from the Applicant's Husband*, dated April 17, 2008. He states that conditions in Ecuador are difficult, and that his children cry every day when he speaks to them on the telephone. *Id.* at 1. He indicated that he cannot have his children in the United States because he has to work. *Id.* He noted that he is fortunate to have a good job with

benefits in Michigan where the economy is struggling. *Id.* He asserts that he cannot leave his job due to his expenses, and he adds that he sends funds to the applicant in Ecuador to support her and their children. *Id.* at 2. He explains that he works as a truck driver to transport produce from 2AM to 9:30AM. *Id.* He states that he earns approximately \$800 per week with health insurance and a retirement plan. *Id.*

The applicant's husband states that he has resided in Ecuador and he knows the country, and that he is suffering emotional difficulty due to the circumstances in which the applicant and their children are living. *Id.* at 1. He explains that, although he sends approximately \$800 to them each month, their home and neighborhood conditions are poor. *Id.* at 2. He provides that he suffers because his children's health and safety are in jeopardy. *Id.*

The applicant's husband previously expressed his concern for the applicant's and their children's safety in Ecuador, because they reside in a poor area where people remain on the streets all hours and alcohol is widely consumed. *Previous Statement from the Applicant's Husband*, dated August 13, 2007. He explained that the applicant cannot afford a car in Ecuador and that travel is costly. *Id.* at 1. He added that the applicant and their children are placed in danger due to the need to frequently walk for transportation. *Id.* He indicated that the applicant does not have family to assist her with childcare in Ecuador. *Id.* He added that schools for his daughter are poor in Ecuador. *Id.*

The applicant's husband explained that their son was born prematurely, and that he had lung problems that required a 10 day hospital stay. *Id.* at 2. He stated that he worries that his son will not obtain adequate medical care in Ecuador as his insurance will not cover costs beyond those associated with an emergency. *Id.* He provided that his sons health has improved, yet he is more sensitive to colds and asthma due to his premature birth. *Id.*

The applicant states that, since she and her two children relocated to Ecuador, her daughter has changed physically and psychologically. *Statement from the Applicant*, dated March 3, 2008. She explains that her daughter has refused to eat and she does not want to go to school. *Id.* at 1. She provides that when her daughter does attend school her behavior is aggressive with the teacher and other students, she refuses to completely perform her work, she cries and does not talk to others, she refuses to befriend other children, and she lacks interest in games or distractions. *Id.* The applicant states that her daughter only asks for her father and when their family will return to the United States. *Id.* She provides that she has taken her daughter for psychological treatment due to her changes in character and behavior and her weight loss. *Id.*

The applicant's parents attest to the hardship that the applicant and the applicant's children are enduring in Ecuador. *Statement from the Applicant's Parents*, dated March 3, 2008. They provided the applicant is alone in Ecuador, and that she must walk long distances to reach a town, including in the cold, rain, or heat which has caused her children to become ill. *Id.* at 1. They state that the applicant's husband is enduring emotional hardship due to separation from the applicant and his children. *Id.* They indicate that they are ill, and that one suffers from diabetes. *Id.*

The applicant submits a psychological evaluation for her husband conducted by [REDACTED]. [REDACTED] indicates that he interviewed the applicant's husband for 60 minutes on April 4, 2008 for the purpose of assessing his hardship should the present waiver application be denied. *Psychological Evaluation for the Applicant's Husband*, dated April 11, 2008. [REDACTED] describes the applicant's husband's history, including that he immigrated to United States at age 19 in order to help support his family in Ecuador. *Id.* at 1. [REDACTED] indicates that the applicant's husband has experienced sleep difficulties, changes in his mood and outlook, episodes of tearfulness and feelings of helplessness, increased tendencies to irritability and anger, problems in concentrating, increased physical health difficulties, and decreased appetite. *Id.* at 2. [REDACTED] explains that the applicant's husband lost his parents at a young age, as his father died and his mother was murdered by the time he reached eight years of age, which makes his adjustment to family separation particularly distressing. *Id.* at 2-3. [REDACTED] explains that the applicant's husband has experienced a decrease in his work performance due to his emotional difficulty. *Id.* at 3. [REDACTED] indicates that the applicant's husband has endured stress-related physical problems including chest pains, abnormality in his blood pressure, elevated cholesterol, and decreased heart rate. *Id.* at 4.

The applicant submits reports from two separate mental health professionals regarding her daughter's condition. A psychotherapist, [REDACTED] indicated that she has provided cognitive behavioral therapy for the applicant's daughter regularly beginning in December 2007. *Report from Psychotherapist regarding the Applicant's Daughter*, dated April 4, 2008. She indicates that the applicant's daughter exhibits depressive disorder due to the separation of her family. *Id.* at 1. An Educative Psychologist, [REDACTED], confirms that the applicant's daughter has received psychological support since December 2007 due to her changes in behavior since becoming separated from the applicant's husband. *Statement from Educative Psychologist regarding the Applicant's Daughter*, dated April 2008. She provides that the applicant's daughter has experienced depressive states including a lack of appetite and aggressiveness. *Id.* at 1.

The applicant has submitted medical documentation for her daughter that shows that she has been treated for a dermatological condition. *Letter from [REDACTED]*, dated April 3, 2008.

The applicant submits a letter from a teacher of her daughter, [REDACTED] who explains that the applicant's daughter does not have an interest in studying, she does not make friends easily with other children, and she is isolated. *Letter from [REDACTED]*, dated April 16, 2008. [REDACTED] states that the applicant's daughter has expressed that she does not like residing in Ecuador, and she misses her father, grandparents, school, and life in the United States. *Id.* at 1. [REDACTED] provides that she recommended that the applicant obtain professional help for her daughter due to her difficulty in Ecuador. *Id.*

The applicant provides letters from other family members and friends regarding the hardship that she, her children, and her husband are enduring due to the applicant's absence from the United States.

Upon review, the applicant has shown that a qualifying relative will endure extreme hardship should the present waiver application be denied. The applicant has established that her husband will experience extreme hardship should he remain in the United States for the duration of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant's husband has expressed his concern for the well-being of his children in Ecuador, and he indicates that their difficulty is creating emotional hardship for him. The applicant has provided clear documentation to show that her daughter, now eight years old, is experiencing unusual difficulty adjusting to life in Ecuador and separation from her father. The applicant's daughter has exhibited personality changes that have undermined her family, social, and academic experience. The record supports that the applicant obtained mental health services for her daughter, yet her symptoms continued after four months of therapy. The reports from mental health professionals regarding the applicant's daughter reflect that her difficulty stems from prolonged separation from the applicant's husband and parents, as well as separation from her academic and social activities in the United States.

As noted above, the applicant's daughter is not a qualifying relative as contemplated by section 212(a)(9)(B)(v) of the Act. However, the AAO examines the hardship to the applicant's daughter to assess the impact it has on the applicant's husband. The applicant has shown that her husband faces unusual emotional difficulty due to the extreme challenges of his daughter. The applicant's daughter's mental health constitutes an unusual circumstance not commonly faced by an individual who becomes separated from his spouse and children due to inadmissibility.

The record further shows that the applicant's son has experienced health problems in the past due to his premature birth. While his physical health appears to be stable, the AAO recognizes that the applicant's husband has concern for his son's access to quality medical care in Ecuador.

The applicant's husband indicated that he is enduring financial hardship due to the applicant's absence from the United States. The applicant has submitted documentation to show that her husband provides financial support for her and their children in Ecuador. While the applicant has not shown that her husband lacks sufficient resources to meet his needs while continuing to support his family in Ecuador, the AAO acknowledges that supporting two households creates additional financial needs for a family.

The applicant submits photographs of her and her children in Ecuador, and her husband expressed his concern for their quality of life and safety there. While the applicant has not shown that she and her children live in conditions that rise to an extreme level, the AAO gives due consideration to the applicant's husband's emotional difficulty due to his family members living in more difficult circumstances than they would likely experience in the United States.

Applicant's husband expressed that he is enduring emotional hardship due to being separated from the applicant and their children. The separation of family members, including spouses and children, is a common consequence when an individual relocates abroad due to inadmissibility. Such separation, without additional distinguishing factors, does not constitute extreme hardship as contemplated by section 212(a)(9)(B)(v) of the Act. However, the AAO recognizes that the applicant's husband is particularly sensitive to family separation due to the loss of both of his parents

by age eight. The history of his family experience involves unusual loss which compounds his psychological suffering in his present circumstances.

All stated elements of hardship to the applicant's husband, should he remain in the United States, have been considered. The AAO finds that the sum of his difficulty rises to the level of extreme hardship, particularly due to his emotional challenges as a result of his daughter's mental health problems in Ecuador.

The applicant has shown that her husband will face extreme hardship should he join her and their children in Ecuador. As discussed above, the applicant's daughter is experiencing significant mental health challenges due to her residence in Ecuador. It is evident that a contributing factor to her difficulty is separation from the applicant's husband, and that she would no longer face such separation should he join his family in Ecuador. However, the reports from mental health professionals clearly show that the applicant's daughter is enduring hardship due to separation from her grandparents, academic activities, and life in the United States. Thus, the record supports that she will continue to face significant psychological challenges should she remain in Ecuador, whether or not the applicant's husband relocates there. It is evident that the applicant's husband will continue to face significant emotional hardship due to sharing in his daughters continued problems. The applicant's daughter's mental health constitutes an unusual circumstance that the applicant's husband will face should he reside in Ecuador.

The AAO acknowledges that many of the applicant's husband's concerns regarding his family will remain should he join them in Ecuador, including reduced access to medical services, issues of safety, lack of transportation, and the loss of access to educational institutions in the United States.

The applicant's husband indicated that he holds a stable and satisfying job in the United States that provides ample financial resources and benefits for him and his family. It is evident that he will endure emotional hardship should he be compelled to relinquish his position in the United States. While the applicant has not provided sufficient information regarding her family's prospective expenses or employment opportunities in Ecuador, the AAO recognizes generally that relocating abroad involves considerable expense and effort in reestablishing employment.

The applicant's husband is a native of Ecuador, thus he would not be faced with the challenge of adapting to an unfamiliar language or culture should he return there. Yet, the record shows that the applicant's husband immigrated to the United States at age 19, he has resided here for approximately half of his life, and he is a citizen of the United States. It is evident that he would endure emotional difficulty should he now leave his life in the United States to return to Ecuador.

The AAO has considered all elements of hardship to the applicant's husband, should he relocate to Ecuador, in aggregate. Based on the foregoing, the applicant's husband will face extreme hardship should he join the applicant and his children in Ecuador.

Accordingly, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to her husband, as required by 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 husband would experience extreme hardship if she is prohibited from residing in the United States; the applicant's lawful permanent resident parents will experience hardship if the applicant remains in Ecuador; the applicant's U.S. citizen daughter will face extreme circumstances should she remain in Ecuador with the applicant; applicant's U.S. citizen son will endure difficulty should he continue to reside in Ecuador, and; the applicant has cared for her U.S. citizen children and cultivated a strong family unit.

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-Moralez*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met her burden that she is eligible for a waiver and she merits approval of her application.

ORDER: The appeal is sustained.