

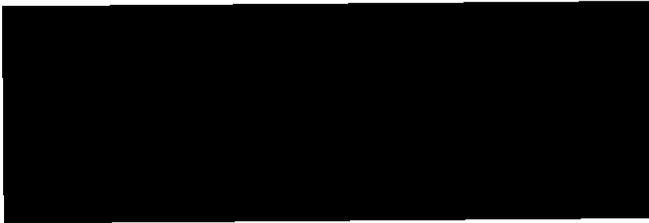
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [redacted] Office: MEXICO CITY, MEXICO

Date:

SEP 08 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:



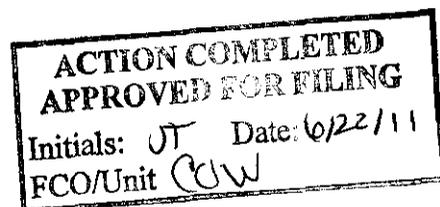
INSTRUCTIONS:

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.

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,


for Perry Rhew
Chief, Administrative Appeals Office



DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. The decision 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 Venezuela who was found to be inadmissible to the United States pursuant to 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 a period of one year or more and is seeking reentry into the country within ten years of his last departure from the United States. The applicant is married to a United States citizen (USC) and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, in order to reside in the United States with his United States citizen spouse and child and his Legal Permanent Resident (LPR) mother.

The Acting District Director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated March 3, 2008.

On appeal, the applicant through counsel asserts that the acting district director erred in denying the applicant's waiver request in that the director did not properly evaluate the evidence of hardship to the applicant's qualifying relatives. See *Form I-290B and accompanying brief from counsel in support of appeal*.

The record includes, but is not limited to, statements from the applicant's wife, Paola A. Tovar, the applicant's mother, Ada Guevara, the applicant's stepfather, the applicant's ex-wife, Ami Michelle Stanley Price and the applicant's son, Gentry Hayes Tovar, and copies of medical bills and records for the applicant's mother and stepfather. The entire record was reviewed and considered in rendering this 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.

....

(v) Waiver

The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [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.

In the present case, the record reflects that on May 20, 1993, the applicant was admitted into the United States through Orlando, Florida on a B-2 visa valid until November 19, 1993. The record reflects that the applicant did not depart the United States as required. The applicant was placed in removal proceedings and he subsequently voluntarily departed the United States in November 2003, pursuant to a grant of voluntary departure. On December 30, 2003, the applicant attempted to enter the United States through Miami, Florida, by presenting his valid passport with a B1/B2 visa that was found to be invalid when it was determined that he had overstayed his prior visa. He was denied admission into the United States, placed in Expedited Removal and was removed from the United States on the same date, pursuant to section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(I). The applicant was then prohibited from entering the United States for a period of 5 years from the date of removal.¹ On February 4, 2004, the applicant married a United States citizen in Lecherias, Venezuela. On March 30, 2004, the applicant's United States citizen wife filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. On July 7, 2005, the Form I-130 was approved. On December 15, 2006, the applicant filed a Form I-601 and an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On February 23, 2008, the acting district director denied the Form I-212 application and on March 3, 2008, she denied the Form I-601, finding that the applicant failed to demonstrate extreme hardship to his qualifying relative.

The applicant accumulated unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act until November 2003, when he voluntarily departed the United States. The applicant's unlawful presence for one year or more from April 1, 1997 until November 2003, triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

¹ Notice and Order of Expedited Removal and Notice to Alien Ordered Removed/Departure Verification, dated December 30, 2003.

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

The record reflects that the applicant’s spouse, [REDACTED], is a 39-year-old native of Chile and citizen of the United States. The applicant and his wife were married in Venezuela on February 4, 2004, and they do not have any children. The record reflects that the applicant has a child from a prior marriage.

The applicant’s spouse states that although she married the applicant in Venezuela, she does not want to live in Venezuela with the applicant because of her need to be in a safe and secure environment, and that her mother and her only sister live in the United States. Additionally, the applicant’s spouse states that she has a full-time job that she likes and that she does not want to give up her employment in the United States. *Affidavit of* [REDACTED] dated June 15, 2005. While the AAO acknowledges the applicant’s wife’s need to be in a safe and secure environment, she has failed to establish that she will be harmed in Venezuela. The record does not contain documentary evidence, such as, country condition reports on Venezuela, which demonstrates that the applicant’s wife will be subjected to crime and violence in Venezuela. The record does not contain information about the applicant’s wife’s family and how they will be impacted by the applicant’s wife’s departure to Venezuela. Going on the 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)). The AAO notes that other than the applicant's wife's statement, the record does not include any evidence of financial, medical, emotional or other types of hardship that the applicant's wife would experience if she joined the applicant in Venezuela. The AAO also notes that the applicant's wife stated that she was raised in Venezuela and she traveled to Venezuela to marry the applicant. The applicant's wife has failed to address any ties she may have in Venezuela that might help her adjust to life there. Accordingly, the AAO does not find the record before it to demonstrate that the applicant's wife would suffer extreme hardship upon relocation.

Regarding the emotional hardship of separation, the applicant's wife states that the applicant has given her love, peace, stability, and support but that she and the applicant have not been able to "have our home." *Affidavit of* [REDACTED] dated June 15, 2005. In a letter dated March 28, 2008, the applicant's son, Gentry Hayes Iovar, states that the applicant has been gone for most of his life, that he misses the applicant and wants him to come back to "make me whole." The applicant's mother, [REDACTED] states that she needs the applicant to help support her financially. The applicant's mother states that the applicant had been a "major and fundamental source of income provider" for her and her husband and that they have suffered financially and emotionally since the applicant's departure to Venezuela. The applicant's mother states that she underwent breast cancer surgery in May 2005, and that her husband (the applicant's stepfather) underwent cardiac surgery, that the two of them have accumulated almost \$95,000 in medical bills, that they do not have medical insurance, that their meager income is not sufficient to pay off their medical bills and other financial obligations and that they need the applicant to return to the United States so that he can support them financially and help them pay off their medical bills. *See Statements from* [REDACTED] [REDACTED] dated March 20, 2008, translated on March 23, 2008. The applicant's mother states that they do not have social security or Medicare benefits and do not want to resort to welfare, and that her two children in the United States are not in the position to assist them financially. *Id.* The applicant's mother also states that because of the tough economic situation in Venezuela, the applicant is unable to obtain a job that will pay him enough to continue to provide them financial support from Venezuela. *Id.* Finally, the applicant's mother states that due to her advanced age and medical condition, she would like to see the applicant in the United States again. The applicant's stepfather states that he loves the applicant like his own son, that the applicant did not know his biological father and that he raised the applicant. *Id.*

While the AAO acknowledges the claims made by the applicant's qualifying relatives, it does not find the evidence in the record sufficient to demonstrate that the challenges encountered by the applicant's qualifying relatives, considered cumulatively, meet the extreme hardship standard. While the emotional hardship of separation is apparent from the applicant's qualifying relatives' statements, the record lacks evidence to establish the severity of their emotional hardship or that the emotional challenges they face are unusual or beyond what would be expected upon family separation due to one member's inadmissibility. Although the applicant's parents claim that the applicant supported them financially while he was in the United States, the record lacks evidence detailing his employment and the amount of money he contributed to his family. Additionally, there is no country condition information on Venezuela to demonstrate that the applicant is unable to obtain employment and continue to contribute to his family's financial well-being from Venezuela. The record contains copies of medical bills for the applicant's parents and shows that they are having

problems paying their bills. The record however, does not show that the applicant's absence is the cause of their financial hardship, or that his return would result in the elimination of this hardship. The applicant's parents provided no evidence of the applicant's prior financial contributions to them. Given the lack of relevant evidence in the record, the AAO cannot conclude that family separation has caused financial hardship to the applicant's parents. Finally, hardships faced by the applicant's son, [REDACTED], as a result of family separation are not relevant to the extreme hardship analysis, except to the extent that these hardships impact the applicant's qualifying relatives. In this case, the applicant has not established such hardship to his qualifying relatives. Accordingly, the evidence in the record does not establish that the hardships the applicant's qualifying relatives face rise to the level of extreme hardship.

The AAO notes that no claim was made by the applicant's parents that they would suffer extreme hardship if they relocated to Venezuela to be with the applicant. Therefore, the AAO cannot make a determination of whether the applicant's parents would suffer extreme hardship if they moved to Venezuela.

In sum, although the applicant's qualifying relatives claim hardships based on family separation, the record does not support a finding that the difficulties, considered in the aggregate, would rise beyond the common results of removal or inadmissibility to the level of extreme hardship. *See Perez*, 96 F.3d at 392; *Matter of Pilch*, 21 I&N Dec. at 631. Although the distress caused by separation from one's family is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal. *See id.* The AAO therefore finds that the applicant has failed to establish extreme hardship to his qualifying relatives, as required for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.