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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE:



Office: NAIROBI, KENYA

Date:

SEP 10 2010

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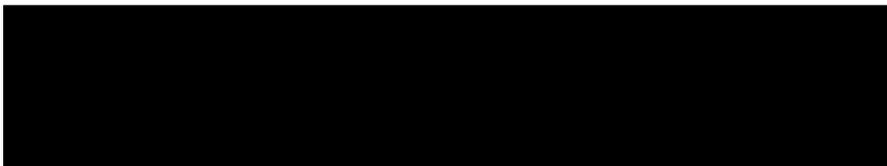
Applicant:



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)

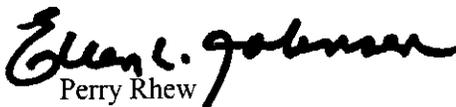
ON BEHALF OF APPLICANT:



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,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Nairobi, Kenya, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Kenya who resided in the United States from September 17, 1995, when he was admitted as an F-1 student, to May 21, 2007, when he was removed to Kenya. He was found to be inadmissible under 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 in the United States for a period of one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States and reside with his wife and children.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director* dated July 20, 2009.

On appeal, counsel for the applicant asserts that the applicant's wife is suffering extreme hardship as a result of separation from the applicant and having to raise her children on her own. Specifically, counsel asserts that the applicant's wife is suffering psychological and emotional hardship and has had suicidal thoughts since the applicant's deportation, and is also experiencing financial hardship from having to maintain two households and the high cost of travel and telephone calls to Kenya. *Counsel's Brief in Support of Appeal* at 3. Counsel claims that denial of the waiver application amounts to an "enforced divorce" if the applicant's wife remains in the United States and further states that the emotional hardship resulting from separation from a close family member is an important consideration in assessing extreme hardship. *Brief* at 6. Counsel further maintains that the applicant's wife, who has a history of severe depression and post traumatic stress disorder, and their children are suffering from psychological hardship and are receiving treatment from mental health professionals due to the separation from the applicant. *Brief* at 7-9. Counsel additionally states that the applicant's wife would be unable to relocate to Kenya because her daughters suffer from medical problems and her older daughter must remain in the United States because of custody arrangements. *Brief* at 3. Counsel further states that the poor economy and other conditions in Kenya would result in extreme hardship for the applicant's wife if she relocated there. *Brief* at 3. Counsel states that the applicant has no arrests or convictions anywhere in the world, his wife and ex-wife state that he was never a threat to them despite the fact that they both filed for protection orders against him, and the positive factors in his case outweigh the single negative factor of his immigration violation such that he merits a favorable exercise of discretion. *Brief* at 10-11. In support of the appeal counsel submitted the following documentation: Letters and affidavits from the applicant's wife and other relatives, medical records and psychological evaluations for the applicant's wife and children, letters from other individuals concerning the applicant's children, educational records for the applicant's wife, past due notices and other financial documents, and a letter from Kenya indicating that the applicant is an internally displaced person. 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:

(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 Secretary, 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 Attorney General [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.

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 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 the 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 or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In the present case, the record reflects that the applicant is a thirty-five year-old native and citizen of Kenya who resided in the United States from September 17, 1995, when he was admitted as an F-1 student, to May 21, 2007, when he was removed to Kenya. The applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States from

September 12, 2000, the date his student visa expired, to his May 2007 removal. The applicant's wife is a thirty-six year-old native and citizen of the United States. The applicant currently resides in Kenya and his wife resides in [REDACTED] with their two daughters.

Counsel asserts that the applicant's wife would suffer extreme hardship if the applicant is denied admission to the United States because she is suffering from Major Depression and Post Traumatic Stress Disorder (PTSD) and her two daughter are also suffer psychological hardship due to separation from the applicant. In support of this assertion, counsel submitted psychological evaluations for the applicant's wife and daughters and letters from the applicant's wife and daughters. The most recent evaluation for the applicant's wife states that she is suffering from a Major Depressive Disorder Recurrent, Severe; Generalized Anxiety Disorder; Post Traumatic Stress Disorder; and a Panic Disorder. The evaluation further states that the applicant's wife had been experiencing emotional and physical distress and severe financial difficulty since the applicant was removed, and records from her previous therapists indicate that her symptoms were often exacerbated due to the stress caused by the applicant's absence from the family. *Letter from [REDACTED] [REDACTED] dated July 15, 2010.* The letter further states that the mental health of the applicant's wife has been greatly impacted by the denial of the waiver application and her symptoms of depression have greatly increased. Ms. [REDACTED] states, "I am concerned that if [REDACTED] loses hope for the return of her husband she will be at a very high risk for suicide." [REDACTED] further states that the applicant's daughters are struggling in his absence and are both receiving mental health services due to fear and anxiety over whether their father will be able to return to the United States. *Letter from [REDACTED]*

Counsel additionally asserts that the applicant's wife would suffer extreme hardship if she relocated to Kenya because of poor economic conditions there and because she would be separated from her older daughter, because the applicant's spouse's mother, with whom she has shared custody over her daughter, would not allow her to leave the United States. The applicant's wife further states that her younger daughter has asthma and would not have access to adequate treatment for her condition in Kenya, she and her daughter do not speak Swahili and would have difficulty adjusting to the poverty and dangerous conditions there, and they would be separated from their relatives in Minnesota, including her mother and siblings. She further states that the applicant and his family lost their home in the 2007 post-election violence in Kenya and are currently internally displaced persons. Documentation on the record indicates that the applicant and his family members are internally displaced, and a Travel Warning issued by the U.S. Department of State warns U.S. citizens of the risks of travel to Kenya in light of continuing threats from terrorism and the high rate of violent crime. *U.S. Department of State, Bureau of Consular Affairs, Travel Warning – Kenya, March 16, 2010.*

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that his wife would experience extreme hardship if he is denied admission to the United States. This finding is largely based on evidence submitted with the appeal that documents the emotional and physical distress experienced by the applicant's wife due to being separated from the applicant and exacerbated by depression and trauma she has experienced in the past. The evidence indicates that the applicant's wife is suffering from Major Depression and PTSD and that separation

from the applicant is exacerbating these conditions and is also causing her daughter to experience psychological hardship and require treatment by mental health professionals. The AAO notes that the most recent psychological evaluations for the applicant's wife do not address the troubled nature of the relationship between the applicant and his wife in the past, which caused his wife to withdraw her first Petition for Alien Relative after filing for divorce and to seek two separate protection orders against the applicant. Nevertheless, the psychological evaluation of the applicant's wife states that she is suffering severe emotional distress and exacerbation of her symptoms of depression and anxiety since the applicant was removed from the United States and her daughters are also suffering emotional and psychological hardship due to his absence. The evidence on the record further indicates that the applicant's wife has lost her employment and is having difficulty paying the family's expenses and raising her children on her own. In light of her history of depression and PTSD and the effects of her daughters' emotional hardship, the hardship to the applicant's wife resulting from separation from the applicant is beyond the common results of removal or inadmissibility and rises to the level of extreme hardship.

The record also establishes that if the applicant's wife relocated to Kenya she would suffer hardship beyond that which is normally experienced by family members as a result of removal or inadmissibility. The record indicates that the applicant's wife has lived her entire life in the United States and has significant family ties to the United States, including a daughter from a previous relationship who would be unable to travel to Kenya due to the custody arrangements. In light of her psychological condition as well the recent ethnic violence and general conditions in Kenya, the emotional and financial hardship resulting from severing her ties to the United States and having to adjust to conditions in Kenya would amount to extreme hardship if the applicant's wife relocated to Kenya to reside with the applicant.

The AAO finds, however, that the applicant does not merit a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether a waiver is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible

community representatives). *See Matter of Mendez-Morales, supra*. The AAO must then “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The negative factors in the case include the applicant’s unlawful presence from the time his student visa expired, until his 2007 removal, and his unauthorized employment in the United States during that time. The record indicates that the applicant was arrested on May 3, 1999 for procuring alcohol for a minor and was arrested for driving while intoxicated, test refusal, careless driving, and possession of marijuana on October 19, 2001 and convicted of possession of marijuana, reckless or careless driving, and speeding on May 23, 2002. He was charged with domestic assault against his current wife and convicted on April 20, 2006 of interfering with Emergency Telephone Calls in connection with this December 26, 2005 incident. He was again arrested on December 20, 2006 and charged with Domestic Assault, Assault in the Fifth Degree, and Disorderly Conduct. The arrest report indicates that the applicant’s wife stated that the applicant had grabbed her by the thighs and caused bruises from squeezing them, causing her to yell until their daughter woke up, and he then overturned items in the house. The report further states, “The Defendant was convicted of one prior qualified domestic violence offense . . . Interference with a 911 Emergency Call . . . occurring on December 26, 2005 . . ., a misdemeanor, against the same victim.”

The record further indicates that the applicant’s former wife obtained an Order for Protection (OFP) against the applicant on March 8, 2004 and his current wife obtained OFPs against him on July 16, 2004 and December 22, 2006. In the affidavit for the 2004 OFP, the applicant’s wife describes an incident in which the applicant appeared at her house in a rage and refused to leave, used force against her to take her keys and prevent her from leaving the home, and had previously broken into her home while she was sleeping and threatened her. *See Petitioner’s Affidavit, Emergency (ex parte) Order for Protection State of Minnesota, Ramsey County*, dated July 16, 2004.

The applicant was taken into the custody of Immigration and Customs Enforcement (ICE) on July 22, 2004 and was later released on bond under the condition he enroll in the Intensive Supervision Appearance Program (“ISAP”) due to suspicions that he was a marijuana user and appeared intoxicated when arrested by police on July 17, 2004. Reports from the applicant’s ISAP case specialist indicate that his wife reported several incidents in which the applicant behaved in a violent or threatening manner, including the following incidents: a report on November 30, 2004 that the applicant slashed two of her tires and broke a headlight and a window of her car; a report on January 20, 2005 that the applicant told his wife that “he had a lot of anger built up and he feels sorry for the person that is going to be around when this anger is released,” and that he got upset that his wife was at home and not at work and disabled her car so that she could not go anywhere; a report on January 19, 2005 that the applicant was out at night despite a program curfew, his behavior was erratic, and he was often upset, and that she suspected that he was taking drugs; a report on February 7, 2005 from the applicant’s wife that the applicant threatened her and stated that if things did not work out, “he knows some people that will come take care of her,” and threatened that he would cut the fuel line and blow up the house if she did not give him her truck; a report on February 7, 2005 from the

applicant's brother, with whom he was living, stating that he thought the applicant was using marijuana because he could smell it on him; and a report on July 7, 2005 from the applicant's wife that he became angry and punched a hole in the bathroom wall and told his wife she was lucky it was not her face that he hit.

The applicant was taken into ICE custody on July 8, 2005 after a positive drug test in June 2005 and failure to comply with the rules of the ISAP program. *See Behavioral Interventions, Individual Client Report for the Department of Homeland Security*, July 1, 2004 through July 12, 2005. The applicant was again released on bond but was detained by ICE again on January 3, 2007 after his wife reported that he had assaulted her twice during the past week, had broken into her home, and had been leaving threatening messages on her answering machine, causing her to call the police and to obtain a protection order against him. These incidents had led to the applicant's arrest on December 20, 2006 and charges of domestic assault and disorderly conduct, the outcome of which is not contained in the record.

The positive factors in this case include the applicant's family ties to the United States, including his wife, daughter, stepdaughter, brother and sister-in-law, as well as hardship to the applicant's family members if he is denied admission to the United States.

The applicant was arrested on several occasions and was convicted for possession of a controlled substance and interfering with an emergency call in connection with an incident of domestic violence. Further, despite the fact that the applicant's wife states that she is no longer afraid of the applicant, the record indicates that she obtained OFPs against him on two occasions and he was twice arrested and once convicted of charges stemming from incidents of domestic violence against her. The record further indicates that the applicant continued to use marijuana after he was released from ICE custody and threatened his wife with violence on several occasions. In light of the applicant's history of violent and threatening behavior, drug use, and disregard for the law, the AAO finds that the negative factors in the present case outweigh the positive ones and the applicant does not merit a waiver as an exercise of discretion.

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 that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden that he merits approval of his application.

ORDER: The appeal is dismissed.