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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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MINNEAPOLIS, MN 55401

FILE:



Office: MEXICO CITY

Date: **SEP 22 2010**

IN RE: 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:



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

ACTION COMPLETED
APPROVED FOR FILING
Initials: JT Date: 6/22/11
FCO/Unit COW

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the Acting District Director for continued processing.

The record reflects that 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 in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and he 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, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen wife and children.

The Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated February 13, 2008.

On appeal, the applicant, through counsel, asserts that the applicant's spouse will suffer extreme hardship as a result of separation of the family. Counsel submits a brief and additional evidence. Counsel does not dispute that the applicant accrued over a year of unlawful presence and is, therefore, subject to a 10 year bar. *See Form I-290B, and counsel's appeal brief and attachments.*

The record includes statements from the applicant's spouse detailing the hardship claim; medical reports and medical records pertaining to the medical condition of the applicant's spouse; and, several letters from the friends and relatives of the applicant's spouse. It is noted that subsequent to the appeal the applicant's spouse submitted a supplemental updated statement, dated October 21, 2008, describing the hardship claim, and additional medical documentation. The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record reflects that the applicant entered the United States in 2000 with a K-1 visa. He did not marry the fiancée who had filed the K-1 petition for him. On October 7, 2005, the applicant's wife filed a Form I-130, Petition for Alien Relative, on behalf of the applicant. On February 21, 2006, the applicant's Form I-130 was approved. On May 29, 2007, the applicant returned to Ecuador. On June 15, 2007, the applicant filed a Form I-601. On February 13, 2008, the Director denied the Form I-601, finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant accrued unlawful presence from his entry in 2000, until he departed the United States on May 29, 2007. The applicant is attempting to seek admission into the United States within 10 years of departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

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

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 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 applicant’s spouse states that she will suffer extreme emotional and financial hardship were she to reside in the United States while the applicant resides in Ecuador due to his inadmissibility. She describes medical problems that she has and which she states cause her extreme emotional distress. For example, the applicant’s spouse states that she suffers from a “debilitating back condition” which has worsened since the applicant returned to Ecuador. In her October 21, 2008 statement she states that she has “experienced daily pain for over a year without a single pain-free day. [that] muscle spasms are so intense that anyone looking at [her] can see that [her] back is not straight.” She states further that she is “having great difficulty being the primary care giver for her active toddler,” and she is in need of the assistance of her husband to assist her and help care for the child. [REDACTED] dated March 7, 2008, states that the applicant suffers from “chronic back pain ... [that] bother[s] her on a daily basis... [and] she continues to have episodes of severe pain that make it difficult for her to take care of her 2 year old child and tasks at home.”

The applicant's spouse also states that in May 2008 she underwent eye surgery for a Cataract condition and now she is unable to drive at night, and that she fears risking another surgery to correct her vision because she does not have her husband here to assist her and care for their child if the surgery is unsuccessful. A statement from [REDACTED] dated May 20, 2008, indicates that the applicant's spouse underwent eye surgery. In addition, the applicant's spouse states that she has a family history of colon cancer, and a 1998 colonoscopy report "showed two areas of concern" and she needs to continue regular monitoring. A medical report from [REDACTED], indicates that the applicant's spouse had a colonoscopy procedure on October 30, 1998, and recommends that she undergo a repeat colonoscopy in five years for continued surveillance purposes. Further, the applicant's spouse states that since she has been separated from her husband she has been experiencing depression symptoms, such as "difficulty sleeping, wanting to sleep all the time, headaches while sleeping, a lack of motivation..." and she is fighting depression.

The applicant's spouse states that she is in need of her husband to help with daily routines, care for their child and her stepson, and help her with household expenses. She states that she has had to take measures such as deferring frequent visits to the doctor to avoid the medical costs, and although because of her back condition she needs her gym membership, she has had to end it to save the recurring dues.

Were the applicant to remain abroad due to his inadmissibility, the record indicates that the applicant's spouse would be required to assume the role of primary caregiver to their young child, and breadwinner without the support of the applicant. The applicant's spouse states that it is difficult for her to care for their child because her job requires travel. Her employer confirms that the applicant must travel for her job and her inability to travel may impact her ability to perform her duties. In addition, due to the applicant's spouse's medical conditions, the strain associated with caring for herself and the child without her husband would cause extreme hardship. As the applicant's spouse references, and various medical reports corroborates, the separation of the applicant's spouse from her husband at a time when she faces medical challenges particularly in light of her employment as the sole breadwinner, has caused the applicant's spouse emotional hardship.

Given the difficulties the applicant's spouse faces with having to care for herself and her child without the help of her husband, the applicant's spouse would face hardship beyond that normally expected of one facing the removal of a spouse. The AAO thus concludes that based on the totality of the circumstances, were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. The record reflects that the applicant's spouse suffers from medical conditions that must be monitored, and she states that she would have difficulty paying for medical services in Ecuador without benefits of medical insurance. The applicant's spouse also states her prospect of employment in Ecuador is limited because she does not speak Spanish, and her employment skills are specific to the United

States because it entails research pertaining to medical device implantation which requires knowledge of United States drug safety regulations. In addition, the applicant states that it would be difficult for her to adjust to life in Ecuador without relatives there and she would have to leave her sisters to whom she is very close.

The record reflects, in relocating to Ecuador, the applicant's spouse would have to leave her long-term gainful employment, and she would be concerned about her and her child's safety, health, academics, and financial well-being at all times while in Ecuador. It has thus been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe.

The favorable factors in this matter are the hardships the applicant's U.S. Citizen spouse and U.S. citizen child would face if the applicant were to relocate abroad, regardless of whether they relocate to Ecuador or remain in the United States, the applicant's apparent lack of a criminal record, and the passage of more than ten years since the applicant's entry to the United States. The unfavorable factors in this matter are the applicant's failure to comply with the terms of his K-1 visa which he used to enter the United States, and years of unlawful presence.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.