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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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H6



FILE: [REDACTED]

Office: MEXICO CITY

Date: **SEP 23 2010**

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

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

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

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States 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 resided in the United States from December 18, 2002, when she entered without inspection, to March 2, 2007, when she returned to Colombia. She is married to a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative. 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 return to the United States and reside with her husband.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the District Director* dated April 10, 2008.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant had not established extreme hardship to her husband if the waiver application is not granted. *See Notice of Appeal to the AAO (Form I-290B)*. Counsel further states that the applicant's husband is experiencing hardships that when combined constitute hardship beyond the common results of deportation or exclusion. *Brief in Support of Appeal* at 2. Counsel further asserts that the applicant's husband is suffering from hypertension and major depression due to separation from the applicant and the effects of the separation on their daughter. *Brief* at 2. Counsel claims that the applicant's husband has been unable to concentrate since the applicant was denied an immigrant visa and has missed work due to the need to care for his daughter, and further states that he is experiencing financial hardship due to significant financial obligations in the United States. *Brief* at 3. Counsel states that it would be unlikely that the applicant's husband would be able to find employment in Colombia that would allow him to meet these obligations. *Brief* at 3. In support of the appeal, counsel submitted letters from the applicant and her husband, a psychological evaluation of the applicant's husband, copies of mortgage statements and other financial documents, copies of an application for an administrator certificate to operate a new business, information on conditions in Colombia, and copies of long distance calling cards. The entire record was reviewed and considered in arriving at 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.

....

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 husband 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).

Although 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 and/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 year-old native and citizen of Colombia who resided in the United States from December 2002, when she entered without inspection, until March 2, 2007, when she returned to Colombia. The applicant married her husband, a thirty-five year-old native of Colombia and citizen of the United States, on January 31, 2004. The applicant currently resides in Colombia and her husband resides in Mission Viejo, California.

Counsel asserts that the applicant’s husband is suffering emotional and financial hardship since the applicant returned to Colombia, including hardship resulting from the effects of separation from the applicant on their daughter. In support of this assertion counsel submitted a psychological evaluation of the applicant’s husband indicating that he is suffering from major depression that is exacerbated by concern for his daughter, who clung to the applicant’s husband and appeared to fear losing her father because she has been separated from her mother since the age of two. *Psychological Consultation from* [REDACTED] dated May 2, 2008. Dr. Seidman further states,

██████████ visited ██████████ in Columbia [sic], but the costs of travel have depleted the family's finances. Of major importance, ██████████ is fearful of kidnappers there, who would target an American child for ransom . . . Staying there for any period of time is tantamount to putting his daughter in harm's way, he feels.

The applicant's husband states that without the applicant his life is empty and further states,

I cannot bear anymore to cry together with ██████████ every night so filled with sadness and worry – Worrying that my wife is being forgotten, that my daughter is having to grow up without her mother and will not have the security of having her mom next to her. *Letter from ██████████ dated May 26, 2008.*

The applicant's husband further states that he cannot send his daughter to Colombia to reside with her mother because of dangerous conditions there, and refers to a travel warning issued by the U.S. Department of State stating that Colombia is not safe for U.S. Citizens. *Letter from ██████████ dated May 26, 2008.* The AAO further notes that a more recent travel warning issued by the U.S. Department of State states,

The Department of State continues to warn U.S. citizens of the dangers of travel to Colombia. While security in Colombia has improved significantly in recent years, violence by narco-terrorist groups continues to affect some rural areas as well as large cities. The potential for violence by terrorists and other criminal elements exists in all parts of the country. . . . The incidence of kidnapping in Colombia has diminished significantly from its peak at the beginning of this decade. Nevertheless, terrorist groups such as the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and other criminal organizations continue to kidnap and hold civilians for ransom or as political bargaining chips. *See Travel Warning for Colombia dated March 25, 2009.*

The applicant's husband states that he is afraid to travel to Colombia with his daughter or send her to live with her mother because he fears she might be kidnapped for ransom. A psychological evaluation further indicates that he is experiencing symptoms of major depression due to separation from the applicant and the effects of the separation on their daughter. The record also contains evidence that the applicant's husband has incurred a significant amount of debt in the United States, including two mortgages, a line of credit, and automobile loans. The record does not contain evidence of the applicant's husband's current or previous income and the documentation does not indicate when this debt was incurred or whether it increased due to the applicant's departure. Nevertheless, the evidence on the record is sufficient to establish that the applicant's husband is suffering from depression due to separation from his wife, and that because of conditions in Colombia, he fears visiting or sending his daughter to Colombia, which contributes to his emotional hardship. When combined with his current financial difficulties, the emotional and psychological hardship the applicant's husband is experiencing, which is exacerbated by the effects of the separation on their daughter, amounts to hardship beyond the common results of inadmissibility or removal for the applicant's husband if he remains in the United States without the applicant.

Counsel further claims that the applicant's husband would be unable to find employment and meet his financial obligations if he relocated to Colombia. The applicant's husband further states that he has resided in the United States with his parents and brothers since he was fourteen years old and fears he will lose his home and everything he has worked for in the United States if he returns to Colombia. *Letter from* [REDACTED] dated May 26, 2008. In light of conditions in Colombia, relocating to Colombia at the present time would pose a risk to the safety of the applicant's husband and their daughter. When considered in the aggregate, these conditions, combined with the emotional and financial hardship that would result from separation from his family members and loss of his home and employment in the United States and having to readjust to life in Colombia after over twenty years in the United States, would constitute extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 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 section 212(a)(9)(B)(v) relief 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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 adverse factors in the present case are the applicant's immigration violations, including entering the United States without inspection and residing unlawfully in the United States for over four years. The favorable factors in the present case are the hardship to the applicant's husband and daughter, the applicant's family ties to the United States, including her mother, who is now a lawful permanent resident, and the fact that she has never been convicted of a crime.

The AAO finds that applicant's violations of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh

the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.