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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

H6

[Redacted]

FILE: [Redacted] Office: LONDON, UNITED KINGDOM Date: **APR 07 2011**

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, London, United Kingdom, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Brazil 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 ten years of her last departure from the United States. The applicant is married to a United States citizen, and the beneficiary of approved Petitions for Alien Relative (Form I-130) and for Alien Fiancé(e) (Form I-129F). 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 her husband.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated November 5, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "erred in denying [a]pplicant's I-601." *Form I-290B*, dated December 3, 2008. Additionally, counsel claims that the applicant "has established that refusal of her admission to the United States would result in extreme hardship to her United States citizen spouse." *Id.*

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant and her husband, letters of support, mental health documents for the applicant's husband, electronic messages between the applicant and her husband, a letter from HomeEq Servicing regarding a possible foreclosure of the applicant's husband's home, tax documents, bank documents, loan documents, bankruptcy counseling documents, country specific information on Brazil, a 2007 U.S. Department of State country report on Brazil, and documents from the applicant's removal proceeding. 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:

(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.

....

(iii) Exceptions.-

.....  
(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

- .....  
(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 indicates that the applicant initially entered the United States on January 28, 1991 without inspection. In December 2000, the applicant departed the United States. On December 24, 2000, the applicant entered the United States on a B-2 nonimmigrant visa with authorization to remain in the United States until June 23, 2001. On April 23, 2001, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). The applicant withdrew her asylum claim, and on November 30, 2001, an immigration judge granted the applicant voluntary departure to depart the United States by April 1, 2002. *See applicant's statement*, dated June 21, 2006. On or about December 26, 2001, the applicant filed an appeal with the Board of Immigration Appeals (Board). On February 12, 2003, the Board dismissed the applicant's appeal. The applicant filed a motion to reopen the Board's decision, which the Board denied on October 31, 2003. On or about November 28, 2003, the applicant filed a Petition for Review with the Ninth Circuit Court of Appeals (Ninth Circuit). On August 9, 2004, the Ninth Circuit denied the applicant's petition. On January 12, 2005, the applicant departed the United States.

The applicant initially accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until December 2000, when the applicant departed the United States. As noted above, on April 23, 2001, the applicant filed an asylum application. Under section 212(a)(9)(B)(iii)(II) of the Act, no period of time in which the applicant has a bona fide asylum application pending shall be taken into account in determining the period of unlawful presence in the United States, unless the applicant was employed without authorization. The AAO notes that the applicant withdrew her asylum application on or before November 20, 2001. The applicant began to accrue unlawful presence from April 2, 2002, the day after she failed to voluntarily depart the United States as ordered, until January 12, 2005, when she departed the United States. The applicant is seeking admission into the United States within ten years of her January 12, 2005 departure. 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.

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 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 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 first prong of the analysis addresses hardship to the applicant’s husband if he joins the applicant in Brazil. In counsel’s appeal brief dated December 29, 2008, counsel states the applicant’s husband “has lived in the United States his entire life,” “his entire family lives in the United States,” “he has no ties to either the United Kingdom or Brazil,” and there would be a “financial impact...[in] relocating to Brazil.” Counsel states country conditions in Brazil are poor. In an undated statement, the applicant’s husband states he does “not see how [he] can possibly move to Brazil and not suffer extreme hardship.” He claims that the applicant’s “family [in Brazil] is destitute.” In a statement dated March 31, 2006, the applicant’s husband states if he moves to Brazil, he will “lose everything that [he] [has] earned these forty eight years of [his] life.” He states he does not know what kind of employment he could get in Brazil, it would be “impossible to find a job in Brazil,” and he does not speak Portuguese. The AAO notes the financial and employment concerns of the applicant’s husband.

Counsel states the applicant’s husband has suffered from depression and been prescribed medication. The AAO notes that documentation in the record establishes that the applicant’s husband was diagnosed with depression and prescribed an antidepressant. The applicant’s husband claims they would not have health insurance in Brazil, and they could not afford the applicant’s health care “if she continues to have health problems.” He also claims that the applicant was treated for cervical cancer and she suffered a miscarriage in February 2005. Regarding the medical conditions suffered by the applicant, the AAO notes that medical documentation in the record establishes that the applicant had a complete miscarriage in March 2005; however, the record does not contain any other documentary evidence establishing that she is suffering from any medical conditions, how serious those medical conditions are, or what treatment she is receiving or may require. Going on 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)). However, the AAO notes the claims made regarding the difficulties the applicant's husband would face in relocating to Brazil.

The AAO acknowledges that the applicant's husband is a native and citizen of the United States and that he may experience some hardship in relocating to Brazil. Based on the applicant's spouse's lack of ties to Brazil and his lack of Portuguese language skills which will affect his ability to work and settle into Brazilian society, his separation from his family, country conditions in Brazil, mental health issues, losing his employment in the United States, and lack of health insurance in Brazil, the AAO finds that the applicant's husband would suffer extreme hardship if he were to join the applicant in Brazil.

Regarding the hardship the applicant's husband would suffer if he were to remain in the United States without the applicant, counsel states that the applicant's husband "has suffered greatly as a result of their separation." The applicant's husband states he is "suffering extreme financial, emotional and psychological hardship without [the applicant]." He states he "cannot imagine [his] life without [the applicant]." The applicant's husband states he constantly worries about the applicant, because she is "not fully completely healthy." As noted above, he claims that the applicant was treated for cervical cancer and she suffered a miscarriage in February 2005. Counsel states the applicant's husband is suffering from "significant mental health problems." The applicant's husband states he "break[s] out into uncontrollable fits of sobbing," he has "the most horrific, crushing feelings of loss and aloneness," and he has a "heavy feeling of sadness." The applicant's husband also states he has gained weight and he is "hurting physically" without the applicant. As noted above, the record establishes that the applicant's husband was diagnosed with depression and prescribed an antidepressant. The AAO notes the applicant's husband's mental health problems.

In a statement dated June 21, 2006, the applicant states she is "suffering extreme emotional hardship." She states "[i]t has been really hard to live without [her husband]" and she worries about his health. The applicant's husband states that before he met the applicant, he "used to smoke and gamble [a] lot." He claims that with the applicant's help, he quit smoking and gambling; however, now that he has been separated from the applicant, he "got [his] bad habits back." The AAO notes that federal tax documents in the record establish that in 2002, the applicant's husband claimed \$102,249.00 in gambling winnings; in 2003, he claimed \$12,000.00 in gambling winnings; in 2004, he claimed \$46,000.00 in gambling losses; and in 2005, he claimed \$100,000.00 in gambling winnings. Additionally, the AAO notes that the applicant and her husband were living together from 2002 until 2005. However, the AAO notes the applicant's concerns for her husband.

The applicant's husband states he needs the applicant's income to help with "the necessary living expenses." The applicant states "Brazil is a third world country that has limited jobs. It is hard for [her] to find a job there, so [she] moved to London," and she is "barely paying [her] bills." Counsel states the applicant's husband "has had serious financial problems which have required him [to] take out home equity loans and borrow substantial sums of money." The applicant's husband claims that some of the home equity loans were taken to send money to the applicant. The AAO notes that documentation in the record establishes that the applicant's husband has taken out home equity loans totaling \$80,000.00.

Counsel states the applicant's husband's "home is on the verge of foreclosure, his various credit cards are all maxed out, and he is in the process of filing for bankruptcy." The applicant's husband states he "cannot prevent foreclosure or bankruptcy without the help of [the applicant]." The AAO notes that documentation in the record establishes that the applicant's husband's credit cards are over limit, he was in default on his mortgage, and he sought bankruptcy counseling. However, the AAO notes that this documentation is from 2008, and no updated documents have been submitted establishing that the applicant's husband's home was foreclosed and he filed for bankruptcy. The AAO notes the applicant's husband's financial concerns.

Considering the applicant's spouse's mental health issues, financial issues, and the normal effects of separation of a loved one, the AAO finds the record to establish that the applicant's husband would face extreme hardship if he remained in the United States in her absence.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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).

The adverse factors in the present case are the applicant's initial entry into the United States without inspection and the applicant's unlawful presence. The favorable and mitigating factors are the applicant's United States citizen husband, the extreme hardship to her husband if she were refused admission, and the letters of support.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.