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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



DATE: DEC 08 2011

Office: PHILADELPHIA, PA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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)(I) 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 180 days but less than one year and seeking readmission within three years of her last departure from the United States. The applicant's spouse and child are U.S. citizens. She seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Field Office Director*, dated August 27, 2008.

On appeal, counsel asserts that the applicant's child is hyperactive, he needs both parents to maintain his emotional well-being, and the case should have been granted due to extreme hardship. *Form I-290B*, received September 26, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement and a psychological evaluation. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States with a B-2 visitor visa on February 2, 2002, her authorized period of stay expired on August 1, 2002, she departed the United States on February 11, 2003, she entered the United States with a B-2 visitor visa on August 14, 2003, and her authorized period of stay expired on February 10, 2004. The applicant accrued unlawful presence from August 2, 2002, the date after her authorized period of stay expired, until February 11, 2003, the date she departed the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for having been unlawfully present in the United States for more than 180 days but less than one year and seeking readmission within three years of her February 11, 2003 departure from the United States. Although that inadmissibility was triggered more than three years ago, the AAO notes that inadmissibility under section 212(a)(9)(B)(i)(I) remains in force until the alien has been absent from the United States for three years. Further, as explained above, although the applicant was admitted to the United States pursuant to a B-2 visitor visa on August 14, 2003, she was only authorized to remain in the United States until February 10, 2004 and she has accrued additional unlawful presence since that time. Allowing an alien to meet the time requirement of the bar to her admission while simultaneously accruing additional unlawful presence in the United States is incongruent and rewards recidivism, which the AAO deems contrary to the congressional intent underlying the creation of section 212(a)(9) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal,...is inadmissible.

....

(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 [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 section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her child is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel states that the applicant's spouse would have to abandon his business and restart his career in Brazil; and Brazil does not offer the specialized resources necessary for his child's special needs and this would cause extreme hardship to the applicant and her spouse. *Brief in Support of Appeal*,

dated October 28, 2008. Counsel states that the child is not under treatment for Attention Deficit Hyperactivity Disorder (ADHD) as his symptoms have not become unmanageable; the applicant and her spouse are able to manage their child's behavior issues as they can provide a suitable environment for him and he spends his time at home; ADHD usually becomes a problem when a child attends school; and their child has not reached school age. *Id.*

The applicant's spouse states that his son's extreme hyperactivity problems could not be addressed adequately in Brazil; he was born in Brazil; all of his family is in the United States; he no longer has connections in Brazil; he is very close with his family; he has begun to build up a solid carpentry business; the applicant's stepmother in Brazil has little interest in her; she has no skills to help support herself in Brazil; they cannot get their son help with the meager resources in Brazil; there is little work for carpenters in Brazil; he and the applicant cannot both work as one of them has to watch their son; there are no special education programs in Brazil and they cannot afford extra money for specialists; and crime is getting worse in Brazil and kidnapping is a major business there, especially if you have been in the United States. *Applicant's Spouse's Statement*, dated August 24, 2007.

The psychologist who evaluated the applicant's family diagnosed the son with ADHD-Predominantly Hyperactive-Impulsive Type; he states that he will need professional evaluation very soon; and he states that most school systems in the United States are set up for such evaluations. *Psychological Evaluation*, dated August 6, 2007.

The record does not include documentary evidence of the economic and employment situation in Brazil. It is unclear whether the applicant's spouse would experience financial hardship there. There is no documentary evidence of safety issues in Brazil, or of the lack of resources and schools for children with ADHD in Brazil. The record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would suffer extreme hardship upon relocating to Brazil.

Counsel states that the applicant's spouse would have to maintain his business while raising his ultra-hyperactive child on his own or have his son go to Brazil where there is likely to be little or no support for special needs children in the Brazilian school system. *Brief in Support of Appeal*. Counsel states that separation of the applicant and her spouse would exacerbate their child's symptoms and this would cause extreme hardship to the spouse. *Id.*

The applicant's spouse states that his son's problem would become far worse if separated from either parent; it is hard to leave him with babysitters or family because he demands so much attention; they can get him help if they remain in the United States together; the applicant could not provide for their son if she took him to Brazil; their son is close to the applicant so he would experience major emotional problems if separated from her; and he would have to support the applicant in Brazil. *Applicant's Spouse's Statement*.

The psychologist who evaluated the applicant's family states that his son is extremely hyperactive; the applicant's spouse has difficulty falling asleep, his appetite is poor, he has crying episodes and is

persistently sad, and his diagnosis is adjustment disorder with mixed anxiety and depressed mood; it is highly probable that he will have a more serious major depressive disorder upon separation; no nursery school or preschool would be able to tolerate his son's behavior; and children separated from a parent for a significant period are at high risk for development of separation anxiety disorders and symptoms of depression and isolation. *Psychological Evaluation.* The AAO notes the diagnosis in the evaluation, however, the record is insufficient to establish the severity of his emotional and other difficulties. In addition, there is no evidence that he would be unable to care for his child or that care is unavailable for his child in Brazil if his child accompanies the applicant there.

The record reflects that the applicant's spouse would experience difficulty if he remained in the United States. However, the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would suffer extreme hardship upon remaining in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States, as she has not established extreme hardship to her spouse in the event that he remains in the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.