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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: BANGKOK, THAILAND (MANILA, PHILIPPINES) Date: FEB 07 2011

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 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, Manila, Philippines. 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 Tonga. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. He is the son of a U.S. citizen and lawful permanent resident. 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen father, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 6, 2008.

On appeal, the applicant states that the Field Office Director failed to consider all of the hardships involved in his case and that many facts were mischaracterized in denying the decision. *Brief in Support of Appeal*, received on September 29, 2008.

The record includes, but is not limited to: statements from the applicant, the applicant's spouse, the applicant's children and members of the applicant's family; a statement from [redacted] a representative in the legislative assembly of Tonga, dated September 18, 2008; a statement from [redacted], from [redacted], dated September 11, 2008; statement from [redacted] of the [redacted] dated September 12, 2008; two statements from [redacted], Director of Tonga's National Diabetes Center, dated September 15, 2008; and a collection of hospital discharge records from the [redacted] with regard to the applicant's parents; a statement [redacted] Wage comparison submitted by [redacted]; a copy of the Tongan Government Budget for fiscal year 2006 for all government employees, the primary employer in Tonga, submitted by [redacted] school records for the some of the applicant's children, including statements from school administrators; a statement from [redacted] dated December 13, 2007; a statement from [redacted] the [redacted] dated December 14, 2007; and a letter from the applicant's prior landlord.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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.
>
> . . . .

The record indicates that the applicant entered the United States without inspection in 1988 as a B2 visitor and remained until he departed in November 2007. Therefore, the applicant was unlawfully present in the United States for over a year from April 1, 1997, the effective date of the unlawful presence provision of the Act until November 2007, and is now seeking admission within ten years of his last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

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 father and mother are the qualifying relatives 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) ([redacted] 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.

On appeal the applicant asserts that United States Citizenship and Immigration Services (USCIS) failed to give proper weight to the economic, employment and political situation which exists in Tonga. *Joint statement of the applicant and his spouse*, received September 29, 2008. The applicant further asserts that it was erronous to not consider the effects of relocating six children to Tonga and that USCIS was incorrect in presuming the reasons behind his parents relocation to Tonga.

The AAO would note that an applicant must establish extreme hardship to a qualifying relative, in this case the applicant's father or mother. The majority of the evidence that has been submitted discusses hardships to the applicant, his spouse and their children, who are not qualifying relatives for the purpose of this proceeding. Nonetheless, some of the evidence of the conditions in Tonga would be relevant in assessing conditions experienced by the applicant's parents.

The applicant has asserted that he and his spouse are not employed in Tonga, that it is unlikely they will find employment and that they have to rely on his father's pension check. He further asserts that he and his wife are depressed after being separated from their six children and their lives in Hawaii, and that they sometimes feel suicidal. In an affidavit submitted on appeal the applicant explains that his parents intended to return to Hawaii but continue to suffer health problems. In response to this the AAO would note that the applicant previously claimed that his parents returned to Hawaii from time to time to see their family. *Statement of the applicant*, dated June 5, 2008. He states the conditions in Tonga would not be appropriate for their children, including his younest son who has asthma.

The record contains substantial evidence of the dire economic conditions in Tonga, including a letter from , a Tonga legislative representative. Based on testimony from s the AAO can derive that contrast between the quality of life in Tonga and the United States is stark. s explains that the government is the primary employer in Tonga and that it had a yearly wages budget of only $58 million dollars. s stated that the applicant and his spouse were unemployed and likely to remain so and that many Tongans rely on remittances from the United States to survive. The AAO notes that the applicant's father relies on a monthly retirement check of $428 from the United States.

s also explains that the situation of the applicant's family is worse because they do not qualify for the government allotment of land for subsistence farming. Currently only the applicant and his spouse are residing in Tonga because they believed their departure for a consular interview would be temporary. If their six children were to relocate to Tonga to be with their parents, the applicant's father's retirement income would be their only source of income.

The record contains a letter from attesting to the fact that the applicant's youngest son has asthma. *Statement of* dated December 13, 2007. Country conditions materials and testimony from corroborate assertions of the dangerous environment in Tonga, and that the applicant's and his wife's "employment prospects are zero." *Statement of* paragraph 14, September 18, 2008.

The record does not clearly articulate any basis of hardship on the applicant's parents, despite evidence corroborating some of the applicant's factual assertions. The applicant has not shown that his parents will experience extreme hardship should they continue to reside in Tonga, and in fact the AAO notes that the applicant's parents have chosen to reside in Tonga without expressing that doing so has resulted in extreme hardship to them.

With regard to hardship upon separation, the applicant has not shown that his parents will experience extreme hardship should they reside in the United States during the applicant's term of inadmissibility. The record does contain some evidence of hardship impacts to the applicant's parents upon separation based on their ages and medical conditions. As noted by testimony in the record, however, the applicant has many brothers and sisters in the United States to assist with the care of the applicant's parents if they returned to the United States.

It would also be reasonable to assume that the applicant's parents would experience some emotional impact upon separation, but the record does not contain sufficient evidence to establish that any emotional impact on the applicant's parents would rise above the common emotional impacts experienced by all relatives of inadmissible aliens who reside in the United States.

The applicant has not shown that hardship to his children will impact his parents should they reside in the United States. It is noted that the burden of caring for them in the applicant's absence has not fallen on to the applicant's parents but on extended family members. *See Statement from* [redacted] received January 7, 2008. There are currently no qualifying relatives residing in the United States.

The record does not establish that a qualifying relative would experience extreme hardship upon separation.

The AAO acknowledges that the applicant, the applicant's wife, and their children will face significant hardship should the present waiver application be denied. However, the record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's parents face extreme hardship if the applicant is refused admission to the United States. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen father or lawful permanent resident mother as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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 rests 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.