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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

#6

[redacted]

FEB 23 2011

FILE: [redacted] [redacted] Office: MEXICO CITY, MEXICO (PANAMA CITY, PANAMA) Date:

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 Acting District Director, Mexico City, Mexico, 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 Colombia 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 his last departure from the United States. The record indicates that the applicant is married to a United States citizen and the father of a child. 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 child.

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated February 20, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "abused its discretion by concluding that Applicant failed to show 'extreme hardship' to his U.S. citizen spouse and included factual mistakes." *Form I-290B*, filed March 14, 2008.

The record includes, but is not limited to, counsel's appeal brief, counsel's motion to expedite, statements from the applicant and his wife, medical and psychological documents for the applicant's wife, letters of support for the applicant and his wife, a payroll report for the applicant, a document regarding earthquake damage to the applicant's apartment in Chile, a document regarding a burglary at the applicant's home in Colombia, an article on suicide, medical documents for the applicant's wife's mother, and country condition reports and travel warnings for Colombia. 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-
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> . . . .
>
> (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 [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 application, the record indicates that on September 15, 1999, the applicant entered the United States without inspection. On August 3, 2005, an immigration judge granted the applicant voluntary departure to depart the United States by December 1, 2005. On November 30, 2005, the applicant voluntarily departed the United States.

The applicant accrued unlawful presence from September 15, 1999, the date he entered the United States without inspection, until November 30, 2005, the date he departed the United States. The applicant is attempting to seek admission into the United States within ten years of his November 30, 2005 departure from the United States. 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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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 (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 spouse if she relocates to Colombia. In a statement dated October 14, 2010, the applicant's wife states "this experience indeed has been an extreme hardship." She states she is separated from her family, including her [redacted] who is suffering from dementia and her one (1) year old nephew, she survived an 8.5 earthquake in Chile while pregnant, gave birth to her daughter via emergency cesarean section, she barely speaks Spanish,

they are "living in extreme weather conditions without adequate heating and cooling with a newborn," and she gave up her career as a Registered Nurse. The applicant's wife states she wants her daughter to be raised in the United States. She also states she wants her daughter to be raised around her parents and In a letter dated June 28, 2006, indicates that with the applicant's wife residing outside the United States, the applicant's wife "will not be in a position to provide any assistance to her mother." The AAO notes that the record establishes that the applicant's wife's mother suffers from hypertension, type II diabetes mellitus, hyperlipidemia, asthma, a clotting disorder, depression, and a family history of suicide. *See letter from* dated June 28, 2006. In an affidavit dated April 12, 2010, the applicant's wife's mother states the applicant and his wife moved to Chile instead of Colombia, because "they thought it safer than Colombia, more highly developed, and would accept them without further wait." She states that when the applicant's wife moved to Chile, she "had to forfeit her nursing career." In a motion to expedite filed April 20, 2010, counsel states "[b]ecause the [applicant and his wife] felt that Colombia was too dangerous...they concluded that moving to Chile...would be in their [best] interests." However, "a terrible earthquake struck Chile. In fact, this earthquake was the largest ever recorded in history." The AAO acknowledges that a large earthquake struck Chile while the applicant and his wife were residing there, and the record establishes that their apartment building was damaged. *See letter from The Administration, Building Community, Merced 268*, undated. In an affidavit dated April 8, 2010, the applicant's wife states it has not been "easy" to live in Chile. She states she is "lonely and growing more desperate with each passing day...in Chile" and "[t]o say that [they] are living in Chile is a gross overstatement, [they] are merely surviving." The applicant's wife states that because of her pregnancy, she had to quit working in Chile and they have been surviving on the applicant's income. The AAO notes that the record establishes that the applicant's wife currently resides in Colombia with the applicant and their daughter.

In counsel's appeal brief filed April 14, 2009, counsel states that "[i]t would be extremely difficult for [the applicant's wife] to work in Colombia because she is not fluent in Spanish. Counsel claims that "Colombia is a dangerous place for Americans." The AAO notes that in a travel warning issued on November 10, 2010, the U.S. Department of State warns United States citizens of the dangers of traveling to Colombia. The U.S. Department of State reports that "[w]hile 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." *U.S. Department of State, Travel Warning – Colombia*, dated November 10, 2010. Additionally, the U.S. Department of State notes that "[t]errorist activity remains a threat throughout the country.... While the Embassy possesses no information concerning specific and credible threats against U.S. citizens in Colombia, they are strongly encouraged to exercise caution and remain vigilant." *Id.* Further, the U.S. Department of State notes that kidnapping remains a serious threat and "U.S. citizens have been the victims of violent crime, including kidnapping and murder." *Id.* However, the AAO notes that the report indicates that the "incidence of kidnapping in Colombia has diminished significantly from its peak at the beginning of this decade." *Id.* Additionally, the AAO notes that the record establishes that on July 23, 2006, the applicant and his wife's apartment in Bogota was burglarized. Counsel claims that after the applicant's apartment was robbed, the applicant's wife was "troubled by the authorities' apparent lack of concern about the incident and reluctance to help [her]

catch the criminals and find her belongings." "Thus, this experience has amplified [the applicant's wife's] fear of living in Colombia." The AAO notes the general safety issues in Colombia.

The applicant's wife states she was traumatized by the earthquake in Chile. The AAO acknowledges the applicant's wife's claims. However, the AAO notes that no documentary evidence, e.g., an evaluation by a licensed mental health or other medical practitioner, was submitted establishing that the applicant's wife suffered from any mental health conditions because of the Chile earthquake. 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)).

Based on the applicant's spouse's lack of ties to Colombia and her lack of Spanish language skills which will affect her ability to work and settle into Colombian society, her separation from her family including her mother and who suffer from medical conditions, employment issues, the travel warning issued to United States citizens, and the crime committed against the applicant and his wife, the AAO finds that the applicant's wife would suffer extreme hardship if she were to remain in Colombia with the applicant.

Regarding the hardship the applicant's wife would suffer if she were to return to the United States without the applicant, counsel states that before the applicant's wife became pregnant, she was being treated "for hypertension (high blood pressure), depression, panic attacks and a family history of suicide." In a letter dated April 3, 2008, states the applicant's wife was "in great distress due to not being united with [the applicant]...[and] [she] presents with severe depression and significant anxiety." The AAO acknowledges that the applicant's wife was suffering psychological and emotional hardship by being separated from the applicant; however, stated the applicant's wife was taking antidepressants and she was able to function at work. Additionally, in an affidavit dated April 11, 2008, the applicant's wife states that when she was 18 years old, she suffered from depression but after she started seeing a counselor and taking medication, she was "able to return to [her] regular state of being." In a letter dated May 15, 2006, states the applicant's wife "is at profound risk of continuing with her depression and of it potentially worsening over time." The applicant's wife states that after learning of the denial of the applicant's waiver, she "thought of ending everything." Counsel states the applicant's wife cannot stay "in the United States without [the applicant] [because] [it] would have severe mental health implications – including the potential of suicide/death." The AAO notes that the record establishes that the applicant's wife's family has a history of suicide; however, reported that the applicant's wife denied "any ideas of harm." Additionally, the AAO notes the applicant's wife's health concerns.

The applicant's wife's mother states the applicant's wife is currently pregnant; however, she has high blood pressure and her pregnancy is now high-risk. The applicant's wife states she has hypertension, is on medication and a strict diet, and currently on bed rest. In a letter dated April 6, 2010, diagnosed the applicant's wife with arterial hypertension. He states that the applicant's wife requires constant treatment and her pregnancy is high risk. *See also letter from* dated March 23, 2010 (The applicant's wife was "diagnosed with chronic

arterial hypertension.... The pathology associated with this pregnancy could be high risk."). The AAO notes that other than the applicant's wife's statement, there is no medical documentation or a birth certificate in the record establishing that the applicant's wife has given birth to a child.

Counsel states that the applicant's wife's grandmother, Nana, relies on her "on a daily basis for assistance walking, cooking, cleaning and dressing.... [The applicant's wife] has been her primary care-giver." Additionally, counsel states the applicant's wife's mother "is reaching her geriatric years" and she "has already been diagnosed with hypertension, asthma, diabetes, clotting disorder, high cholesterol, hyperlipidemia, clinical endogenous depression and a family history of suicide." The AAO notes the medical conditions of the applicant's mother and grandmother.

The applicant's wife states that because of her pregnancy, she had to quit working in Chile and they have been surviving on the applicant's income. She also states that they were "hosting American students in [their] home to supplement [their] income" and using her savings. The applicant's mother-in-law states that in Chile, the applicant was working "continuously" and "the wages in Santiago are low and the cost of living is high." The AAO acknowledges that the earthquake in Chile and the applicant's wife's pregnancy may have affected the applicant and his wife's financial situation. However, the AAO notes that the record establishes that the applicant and his wife are currently residing in Colombia. Counsel states that when the applicant and his wife were separated, she was "suffering a unique and serious financial burden." Counsel claims that the applicant's wife has "student loans in excess of $60,000, resulting in a monthly payment of about $400." The AAO notes that the record includes student loan statements for the applicant's wife. The applicant's mother-in-law states the applicant is a "licensed cosmetologist and stylist," and he has plans to open his own salon. In a statement dated April 11, 2008, the applicant's wife states when the applicant was in the United States, "[h]e was supporting [their] household while [she] was in school and agreed to help [her] repay the loans once [she] finished school." She states that when the applicant was in Colombia and she was in the United States, she was "supporting two households because although [the applicant] work[ed] more than a full time job (68 hours per week), [she] [was] sending monthly money to help with regular living expenses as the wages he earn[ed] in Colombia [were] not enough to cover even the most basic of needs." Counsel states unemployment is high in Colombia. The AAO notes that the high rate of unemployment in Colombia would affect the applicant's chances of obtaining sufficient employment in Colombia which would allow him to financially assist his wife in the United States.

Considering the applicant's spouse's mental health issues, her family history of emotional problems and treatment, assisting her elderly grandmother without the applicant's support, her experience with the Chilean earthquake, financial issues, and the normal effects of separation of a loved one, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she returned to the United States without the applicant.

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 factor in the present case is the applicant's unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife, the extreme hardship to his wife if he were refused admission, and the letters of support.

The AAO finds that, although the immigration violation committed by the applicant is 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) 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. The waiver application is approved.