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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



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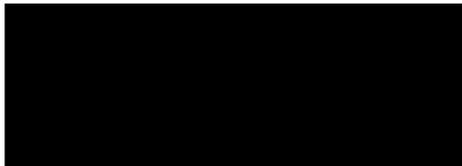
Office: ACCRA, GHANA

Date:

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Acting Officer-in-Charge, Accra, Ghana and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Togo who is 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 more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children.

The Acting Officer-in-Charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Acting Officer-in-Charge*, dated July 16, 2008.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) failed to review the waiver application on its merits. *Form I-290B, Notice of Appeal or Motion*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; statements from a pastor; a lease agreement; a mortgage statement; college and financial aid statements; a medical bill; earnings statements; money transfer receipts; loan statements; telephone bills; credit card statements; a legal bill; a statement from the applicant; a police clearance letter; an employment letter for the applicant; tax statements; W-2 Forms; a statement from a friend; an employment letter for the applicant's spouse; a college admissions letter for the applicant's spouse; a statement from a family member; children's daycare receipts; a car insurance statement; utility bills; and published country conditions reports. The entire record was reviewed and considered in rendering 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.

The record reflects that the applicant was admitted to the United States on January 15, 1994 at New York, New York as a B1 visitor with authorization to remain until July 14, 1994. *Form I-94, Departure card*. The applicant remained in the United States and applied for asylum on December 27, 1994. *Form I-589, Request for Asylum in the United States*. The Asylum Office referred the applicant's application to immigration court and on February 10, 1997, the immigration judge denied the applicant asylum and withholding of deportation while granting him voluntary departure until April 4, 1997. *Order of the Immigration Judge*, dated February 10, 1997. The applicant appealed the decision of the immigration judge and on February 20, 1998 the Board of Immigration Appeals (BIA) dismissed the appeal, affirming the decision of the immigration judge. *Decision of the Board of Immigration Appeals*, dated February 20, 1998. The applicant remained in the United States until January 9, 2008 when he returned to Togo. A period of authorized stay begins on the date an individual files a bona fide application for asylum. *See section 212(a)(9)(B)(iii)(II) of the Act; See United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence*, at 26, dated May 6, 2009. As such, the applicant accrued unlawful presence from February 20, 1998, the date his asylum appeal was dismissed, until January 9, 2008, the date he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his January 9, 2008 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.

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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse 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).

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.

If the applicant's spouse joins the applicant in Togo, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. Her mother is a United States citizen who resides in the United States. *Statement from the mother of the applicant's spouse*, dated December 26, 2007. The mother of the applicant's spouse states that she suffers from diabetes, high blood pressure, and a mild case of glaucoma. *Statement from the mother of the applicant's spouse*, dated December 26, 2007. She notes that the applicant's spouse is her sole caretaker and having the applicant's spouse in the United States is vital to her well-being. *Id.* While the AAO acknowledges the statements of the mother of the applicant's spouse, it notes that the record fails to include documentation from a licensed healthcare professional regarding her health conditions. Going on record without supporting documentary evidence will not meet the burden of proof of 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)).

The pastor of the applicant's spouse notes that the unstable political atmosphere in Togo is not one in which the applicant's children can grow in security, and the children will not be able to receive proper medical attention, proper shelter or proper nutrition. *Statement from [REDACTED]* dated June 6, 2009. The AAO takes notice that according to the United States Department of State, the Togolese president continues to face a significant challenge: balancing entrenched interests with the need to implement democratic reforms and revive Togo's deteriorating economy. *Background Note: Togo, United States Department of State*, dated June 1, 2010. The U.S. Department of State further notes that "Togo's long-suffering population has seen its living standards decline precipitously since the beginning of the 1990s." *Background Note: Togo, United States Department of State*, dated June 1, 2010. The applicant states that there is no paying work available for him to provide for his family in the United States, and that he and his family previously had two incomes and now there is only one. *Statement from the applicant*, undated. The record includes receipts of money transfers sent to Togo. *Western Union correspondence*, dated December 23, 2007. The applicant's spouse asserts there are no jobs in Togo, and she is not a native speaker of Togo's functioning languages of French, Mina and Ewe. *Statement from the applicant's spouse*, dated June 15, 2009. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Togo, her inability to speak the language, the political and economic conditions as noted by the U.S. Department of State, the fact that the applicant's spouse has lived her entire life in the United States, and the effect a separation from her family in the United States would have upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Togo.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. Counsel for the applicant states that his spouse worries that the increased strain of a prolonged separation will cause irreparable harm to her marriage. *Attorney's brief*. The applicant's spouse notes that she and her children have suffered severe mental and physical depression and stress due to the absence of the applicant. *Statement from the applicant's spouse*, dated June 15, 2009. She notes that she has had a counseling session with her church pastor, and that he and others in her community have witnessed the instability of their family. *Id.* A statement from her pastor notes that he has repeatedly counseled the applicant's spouse, as she has gone through moments of severe depression, anxiety and distress. *Statement from [REDACTED]*, dated June 6, 2009. The applicant's spouse notes that she is the only financial support for her family and she cannot pay their monthly expenses without the applicant's income. *Statement from the applicant's spouse*, dated June 15, 2009. The record includes documentation of the applicant's spouse's various expenses, which include a lease agreement, a mortgage statement, college and financial aid statements, a medical bill, children's daycare receipts, a car insurance statement, utility bills, money transfer receipts, loan statements, telephone bills, credit card statements, and a legal bill. The record also includes an employment letter for the applicant's spouse noting that she is a contract employee of Wachovia Corporation and W-2 Forms for the applicant's spouse showing her earnings in 2006 to be \$12121.92, \$1,063.71, and \$3093.43. *Employment letter for the applicant's spouse*, dated December 13, 2007; *W-2 Forms for the applicant's spouse*. The AAO acknowledges the documented expenses of the applicant's spouse as well as her limited income. When looking at the aforementioned factors, particularly the documented health issues of the applicant's spouse, her documented financial difficulties, and the difficulties in being a single parent, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

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 periods of unlawful presence and unauthorized employment for which he now seeks a waiver. The favorable and mitigating factors are his United States citizen spouse and children, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his family as documented in the record.

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.

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.