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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

FILE: [REDACTED] Office: KINGSTON, JAMAICA

Date: FEB 24 2011

IN RE: Applicant: [REDACTED]

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:

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.

Thank you,

for Maria Yeh

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica 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 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 Officer-in-Charge*, dated July 20, 2007.

On appeal, the applicant asserts that his spouse would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of these assertions the record includes, but is not limited to, statements from the applicant's spouse; a statement from the applicant's child; a statement from the applicant; a rent statement; utility bills; an insurance bill; medical records for the applicant's child; medical bills; car maintenance bills; cable bills; credit card statements; bank statements; car loan statements; an employment letter for the applicant's spouse; an employee discipline notice for the applicant's spouse; earnings statements for the applicant's spouse; a tuition statement for the applicant's spouse; a student loan statement for the applicant's spouse; a statement from the applicant's child's school; police clearance letters for the applicant; a statement from the applicant's college; a school transcript for the applicant; and statements from friends. 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 at Miami, Florida on January 12, 1999 as a C-1 crewman with authorization to remain until January 30, 1999. *Form I-*

213, Record of Deportable/Inadmissible Alien. The applicant remained in the United States and filed an application to adjust his status to lawful permanent resident on August 16, 2002. *Id.*; *Form I-485, Application to Register Permanent Resident or Adjust Status.* The applicant failed to appear for his adjustment of status interview on October 21, 2003, February 25, 2004, and May 19, 2004. *Form I-213, Record of Deportable/Inadmissible Alien.* His Form I-485 application was denied on July 28, 2004. *Form I-862, Notice to Appear; Written Pleading,* dated December 2, 2004. An immigration judge granted the applicant voluntary departure until August 3, 2006. *Order of the Immigration Judge,* dated April 5, 2006. The applicant stayed in the United States until August 3, 2006. The applicant, therefore, accrued unlawful presence from January 1999 until he filed a Form I-485 application on August 16, 2002 and from July 28, 2004, the date his Form I-485 application was denied, until he departed the United States in August 2006. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (now Secretary) as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence,* at 33, dated May 6, 2009. In applying for an immigrant visa, the applicant is seeking admission within ten years of his August 2006 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 Jamaica, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. Her parents were born in Haiti and reside in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse*. The applicant and his spouse note that the applicant has been unable to obtain employment in Jamaica. *Statement from the applicant's spouse*, undated; *Statement from the applicant*, undated. While the record does not include published country conditions reports documenting the economy or availability of employment in Jamaica, the AAO takes note of information published by the U.S. Department of State indicating that while Jamaica's political system is stable, the country's serious economic problems have exacerbated social problems and have become the subject of political debate. *Background Note: Jamaica, United States Department of State*, dated August 9, 2010. High unemployment—averaging 14.5%—rampant underemployment, growing debt, and high interest rates are the most serious economic problems. *Id.*

The applicant states that he has no family to support him in Jamaica, as his father is deceased and his mother lives in the United States. *Consular Interview Notes, Embassy of the United States of America, Kingston, Jamaica*, dated August 28, 2006; *Form G-325A, Biographic Information sheet, for the applicant*. The record additionally includes a statement from the school of one of the applicant's children, noting that the applicant's child was enrolled in a preschool in Syracuse that identified her as having a disability. *Statement from [REDACTED] Early Childhood Programs, Syracuse City School District*, dated March 7, 2007. The applicant's child received special services that included a special education teacher, speech language therapy, occupational therapy and physical therapy. *Id.* The school notes that the applicant's child is no longer attending this program due to the applicant no longer being in the United States. *Id.* While the applicant's child is not a qualifying relative for the purposes of this case, the AAO acknowledges the difficulties of caring for a child with a documented disability in another country. The AAO also acknowledges the difficulties placed upon the applicant's spouse in removing this child from the therapy received in the United States.

When looking at the record before it, particularly the applicant's spouse's lack of family and cultural ties to Jamaica, the economic situation in Jamaica, and the difficulties in caring for a disabled child in another country, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Jamaica.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *Birth certificate*. Her parents reside in the United States. *Form G-325A*,

Biographic Information sheet, for the applicant's spouse. The applicant's spouse notes that she is suffering on a financial level as a single parent of two children. *Statement from the applicant's spouse*, dated April 17, 2008. The record includes documentation of the various expenses of the applicant's spouse such as a rent statement, utility bills, an insurance bill, medical bills, car maintenance bills, cable bills, credit card statements, bank statements, car loan statements, a tuition statement for the applicant's spouse, and a student loan statement for the applicant's spouse. Among these documents are an eviction notice indicating that the applicant's spouse was three months behind with her rent payments and several late payment notices from utility companies. The record also includes an employment letter for the applicant's spouse stating she works full-time at a rate of \$18.01 an hour plus an additional .90 per hour shift differential. *Statement from* [REDACTED] dated December 11, 2007; *See also earnings statements for the applicant's spouse.* While the record does not include documentation showing that the applicant is unable to assist in the financial well-being of his family, the AAO acknowledges the documented expenses of the applicant's spouse and her limited income and difficulty meeting her financial obligations. The AAO also observes that the record includes a discipline notice for the applicant's spouse documenting her problems with attendance and noting that continued deficient practice will result in further disciplinary action up to and including termination. *Employee Progressive Discipline Notice*, dated December 27, 2007.

The applicant's spouse notes that she could not afford to take care of her children on her own, that she has no family in Syracuse, and that she has had to leave her kids to be with their grandmother in New York City, thus removing them from school. *Statement from the applicant's spouse*, dated August 13, 2007. The AAO observes that the record includes a statement from one of the children's schools, noting that the applicant's child was enrolled in a preschool in Syracuse which identified her as having a disability. *Statement from* [REDACTED] *Early Childhood Programs, Syracuse City School District*, dated March 7, 2007. The applicant's child received special services which included a special education teacher, speech language therapy, occupational therapy and physical therapy. *Id.* The school notes that the applicant's child is no longer attending this program due to the applicant no longer being in the United States. *Id.* The AAO acknowledges the difficulties of being a single parent with limited family support, particularly to a child with documented special needs. When looking at the aforementioned factors, particularly the documented financial difficulties of the applicant's spouse as well as the difficulties in supporting two children, one of whom has special needs, 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 spouse and children 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.