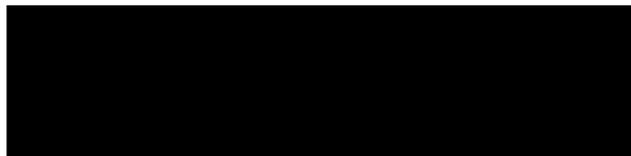


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE:



Office: MEXICO CITY, MEXICO

Date:

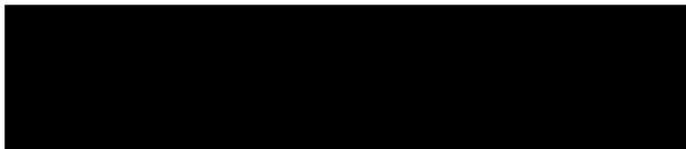
FEB 28 2011

IN RE:



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:



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 District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Ecuador. 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, and 8 U.S.C. § 1182(a)(9)(ii)(I), § 212(a)(9)(ii)(II) of the Act, as an alien who has been ordered removed and seeking admission within ten years of departure. He is married to a U.S. citizen and has one U.S. citizen child. 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 District 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 spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on September 5, 2008.

On appeal, counsel for the applicant asserts the District Director's decision was in error, and that the hardship impacts on the applicant's spouse go beyond the norm and constitute extreme hardship. *Form I-290B*, received on September 30, 2008.

The record includes, but is not limited to, counsel's brief; a statement from the applicant's spouse; a statement from [REDACTED], regarding the applicant's spouse; A medical care statement regarding the applicant's spouse from [REDACTED]; a disability certificate regarding the applicant's spouse from [REDACTED]; medical documents and a police report related to an auto accident involving the applicant's spouse; A Letter of Medical Necessity regarding the applicant's spouse's father from [REDACTED]; A Letter of Medical Necessity regarding the applicant's sister from [REDACTED]; psychological evaluation of the applicant's sister by [REDACTED]; a psychological evaluation of the applicant's spouse by [REDACTED]; A letter from the applicant's spouse's employer regarding her work performance; a statement from [REDACTED] regarding the applicant's spouse's ear condition; statements from family members of the applicant; and documents filed in conjunction with the applicant's Form I-485 application and a Form I-130 petition and Form I-864 affidavit of support on his behalf.

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 on September 16, 1974. He was granted voluntary departure through June 16, 1978, but failed to depart the United States. On April 28, 2006, the applicant was deported to Ecuador. 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 August 16, 2005, when he filed his Form I-485. He 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 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-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) (“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.

On appeal, counsel for the applicant asserts that the District Director's decision was in error and that the applicant's spouse will experience extreme hardship upon relocation to Ecuador or separation if she remains in the United States. *Brief in support of appeal*, received November 3, 2008. He explains that she has lived in the United States for over 15 years, that all of her immediate family resides in the United States, and that she has no family ties Ecuador. He further states that the applicant was recently disabled in a car accident which impairs her ability to work, that she suffers from Otosclerosis in both of her ears, that she would lose her employment and benefits if she relocated to Ecuador and that there would be inadequate medical facilities to treat her medical needs in Ecuador.

The applicant's spouse has submitted a statement discussing the assertions made by counsel. *Affidavit in Support of I-212 and I-601 Waiver*, October 18, 2008. In addition, she asserts that it would constitute a hardship if she had to relocate her daughter to Ecuador and leave behind her invalid father with whom they share an apartment.

The record includes medical, employment and financial records for the applicant's spouse. These documents establish her income and stable employment. These records also establish that she was recently in a car accident which has left her disabled due to pain in her neck and back. *Statement*, [REDACTED], October 22, 2008. There is a statement from the applicant's doctor restricting her to light duty and explaining the nature of her condition. *Statement*, [REDACTED], March 26, 2008. The record also contains a statement from [REDACTED] corroborating the fact that she has Otosclerosis, a condition of the ear for which she has already had one surgery and will require another soon on her other ear. *Statement*, [REDACTED], March 26, 2007. The record contains statements from family members of the applicant, as well as documentation corroborating the presence of the applicant's spouse's family and attesting to the impacts on the applicant's spouse if she were to relocate to Ecuador. Severing the ties with her medical care providers and family would result in a significant physical and medical hardship to the applicant's spouse if she were to relocate.

The record also contains medical records confirming the medical issues of the applicant's spouse's father. While children are not qualifying relatives in these proceedings, hardships on them may be indirectly relevant due to their impact on the qualifying relative. In this case it is clear that the applicant's child, born in the United States, would experience a significant acculturation hardship at this stage of her development which would compound the hardship impacts on the applicant's spouse upon relocation.

The evidence in the record supports the assertions of counsel and the applicant's spouse. When these hardship impacts are considered in the aggregate, they establish that the applicant's spouse would experience extreme hardship if she were to relocate to Ecuador with the applicant.

Counsel asserts that many of the same hardship factors apply to the applicant's spouse upon separation. The applicant's spouse has recently suffered an automobile accident which has limited her physical ability at work. She has also been diagnosed with Major Depression and has a hearing disability which may require additional surgery, in addition to the possible surgery needed for her back and neck problems. She shares a small apartment with her invalid father and has had to assume additional parenting duties due to the applicant's absence. The applicant's spouse has also submitted a letter explaining that, in addition to having to move in with her father, the increased cost of child-care due to the night-time hours of her employment, travelling expenses and telephone calls are all financial impacts of the applicant's departure.

As noted above the record contains sufficient evidence to establish the assertions of the applicant's spouse. The applicant's spouse is experiencing physical and medical hardship related to her back and neck injuries, she has lost, and will continue to lose, her hearing due to Otosclerosis in both ears, and she has had to care physically for both her daughter and her aging father. A letter from her employer notes that her performance at work has suffered and that she cannot afford to take much more time off from her job.

When these physical, medical and financial impacts are considered in the aggregate they establish that the applicant's spouse will experience hardships which rise above the common impacts experienced due to separation from an inadmissible family member, and as such, constitute extreme hardship.

As the record establishes extreme hardship to a qualifying relative in the event of relocation and separation, the AAO may now move to consider whether the applicant warrants a waiver as a matter of discretion.

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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the

alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence and employment in the United States, as well as his entry without inspection and failure to depart the United States pursuant to the order of an immigration judge. The favorable factors in this case include the presence of the applicant's spouse and child, the hardship his spouse would experience if he were not admitted to the United States, his long term residence in the United States and the lack of any criminal record during his residence in the United States. The favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The director's decision will be withdrawn and the appeal will be sustained.

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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.