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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]

Office: MEXICO CITY (PANAMA CITY)

Date: **JAN 06 2011**

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:

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,

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The record reflects that the applicant, a native and citizen of Ecuador, entered the United States without authorization in December 2001 and did not depart the United States until April 2008. The applicant was thus 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.¹ The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse, step-child, born in 1999, and biological child, born in 2005 [the children].

The district director concluded 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 Excludability (Form I-601) accordingly. *Decision of the District Director*, dated September 3, 2008.

In support of the appeal, the applicant's spouse submits the following *inter alia*: a letter, dated September 30, 2008; a letter from [REDACTED], dated October 2, 2008; and letters from the applicant's children. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

....

(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 Attorney General (Secretary) that the refusal of

¹ The applicant does not contest the district director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

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 U.S. citizen 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.

The applicant’s U.S. citizen spouse contends that she will suffer extreme emotional and financial hardship were she to remain in the United States while the applicant resides abroad due to his inadmissibility. In a declaration she asserts that she is suffering due to the hardships associated with raising two young children by herself, as primary caregiver and breadwinner, without her husband’s guidance and support. *Letter from* [REDACTED] dated September 30, 2008.

In support, a letter has been provided by [REDACTED] [REDACTED] explains that the applicant’s spouse has a history of anxiety and panic attacks and an eating disorder and is currently suffering from depression and anxiety due to the extreme stress of trying to keep herself, her young children, and her parents alive and together, while also supporting her husband financially as he has been unable to obtain gainful employment. [REDACTED] notes that the applicant’s spouse is working two jobs, approximately 73 hours per week, to make ends meet but remains at risk of losing her home to foreclosure. He further contends that the applicant’s spouse’s nine-year old son is showing signs of distress through acting out at school and has been diagnosed with Opposition Defiant Disorder. [REDACTED] concludes that the family is under extreme hardship and distress, which is likely to get worse, and if the applicant is allowed to return to the United States, the family will be able to recover and restore themselves to safety and health. *Letter from* [REDACTED] [REDACTED] dated October 2, 2008. In addition, the record establishes the applicant’s financial contributions to the household, as [REDACTED]

Connecticut, prior to his departure from the United States. See *Form G-325A, Biographic Information for [REDACTED]* dated May 2, 2008.

Due to the applicant's inadmissibility, the applicant's spouse has had to assume the role of primary caregiver and breadwinner to two young children without the complete support of the applicant. She is holding down two jobs and is in the midst of finding a third job to make ends meet. The record reflects that the applicant's spouse needs her husband on a day to day basis, to help with the care of their children and to provide critical financial support. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship.

Extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. With respect to this criteria, the applicant's spouse contends that were she to move to Ecuador, she would be in fear of her safety due to the high rate of kidnappings, murders and robberies as a result of the strained economy and the turbulent political situation.² She further notes that she was born in the United States and lives in a three family house with her parents and sibling in Connecticut and were she to relocate abroad, she would not be able to afford to travel to the United States regularly to visit her family and would thus suffer hardship due to long-term separation from her family. In addition, the applicant's spouse explains that were she to relocate abroad, she would suffer due to unfamiliarity with the country, culture, customs and language. Moreover, the applicant's spouse notes that she had gastric bypass surgery in 2000 and has had stomach problems in the last year and were she to relocate abroad, she worries about being able to obtain affordable and adequate medical care, and being able to communicate with doctors since she does not speak Spanish. Finally, the applicant's spouse notes that the unemployment rate is very high in Ecuador³ and she and her children would thus be unable to maintain a decent standard of living and her credit rating would be destroyed as she would not be able to keep up with her financial obligations in the United States. *Supra* at 1-4 and *Affidavit of [REDACTED]* dated April 17, 2008.

The record indicates that were the applicant's spouse to relocate to Ecuador to reside with the applicant due to his inadmissibility, she would be in constant fear regarding her and her children's well-being due to the high crime rate. In addition, the applicant's spouse would encounter financial hardship due to the problematic economic situation in Ecuador, as corroborated by the U.S. Department of State. Finally, the applicant's spouse would suffer hardship due to the struggles she and her children would encounter in Ecuador, including unfamiliarity with the language and culture and long-term separation from their extended family. As such, the AAO concludes that based on a

² The U.S. Department of States confirms that "[c]rime is a severe problem in Ecuador. Crimes against American citizens in the past year ranged from petty theft to violent crimes, including armed robbery, home invasion, sexual assault and homicide. Low rates of apprehension and conviction of criminals – due to limited police and judicial resources – contribute to Ecuador's high crime rate...." *Country Specific Information-Ecuador, U.S. Department of State*, dated October 1, 2010.

³ The U.S. Department of State reports that the poverty rate in Ecuador in 2008 was 35% and the per capita income in 2008 was less than \$4000. *Background Note-Ecuador, U.S. Department of State*, dated May 24, 2010.

totality of the circumstances, the applicant's spouse would experience extreme hardship were she to relocate to Ecuador to reside with the applicant due to his inadmissibility.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Further, the AAO notes that the applicant's U.S. citizen spouse would suffer hardship as a result of continued separation from the applicant. However, the grant or denial of the waiver does not turn only on the establishment of extreme hardship. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[b]alance 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 favorable factors in this matter are the applicant's U.S. citizen spouse and children, the hardships that the applicant's family would face if the applicant were not present in the United States, community ties, long-term gainful employment, the apparent lack of a criminal record, and the passage of more than nine years since the applicant's unlawful entry to the United States. The unfavorable factors in this matter are the applicant's unlawful entry to the United States and unlawful presence and employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his

application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's 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 establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.