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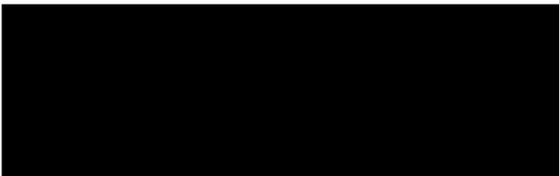
JAN 24 2011

FILE: [REDACTED] Office: ROME, ITALY Date:

IN RE: Applicant: [REDACTED]

APPLICATION: Immigrant 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,

[Handwritten signature]

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Rome, Italy. 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 Morocco who was found to be inadmissible to the United States under 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 spouse.

The Field Office Director 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 Field Office Director*, dated May 5, 2010.

On appeal, counsel for the applicant states that the applicant has shown that his qualifying relative would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, psychological evaluations; a statement from the applicant; statements from the applicant's spouse; country conditions reports; statements from academic faculty for the applicant's spouse; statements from friends; an apartment lease; tax statements; W-2 Forms; a student loan statement; and a bank statement. 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.

....

(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 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 case, the record indicates that the applicant was admitted to the United States on October 9, 1998 with a B-2 visa with permission to remain until April 2, 1999. *Form I-213, Record of Deportable/Inadmissible Alien*, dated January 28, 2003; *Form I-265, Notice to Appear*; *Form I-94, Departure Card*. The applicant remained in the United States, overstaying his permission to stay. The applicant was placed into immigration proceedings before an immigration judge and on October 6, 2003, the immigration judge granted the applicant voluntary departure on or before February 3, 2004. *Order of the Immigration Judge*, dated October 6, 2003. The applicant did not voluntarily depart the United States and on October 30, 2008 was arrested by immigration authorities. *Form I-213, Record of Deportable/Inadmissible Alien*, dated October 30, 2008. In December 2008, the applicant was removed from the United States. *Form OF-194, Refusal Worksheet*, dated December 10, 2009. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. *See United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence*, at 40, dated May 6, 2009. As such, the applicant accrued unlawful presence from April 3, 1999, the date after the expiration of his B-2 status, until October 6, 2003, the date the immigration judge granted voluntary departure, and from February 4, 2004, the date the voluntary departure period expired, until his removal in December 2008. In applying for an immigrant visa, the applicant is seeking admission within ten years of his December 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 Morocco, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Birth certificate*. She is of Asian descent. *Statement from the applicant's spouse*, dated June 29, 2010. She has no familial or cultural ties to Morocco. *Id.*; *Attorney's brief*. She speaks English and has a limited knowledge of French. *Statement from the applicant's spouse*, dated June 29, 2010. The applicant's spouse is concerned that her inability to speak the language will affect her ability to adjust to Morocco. *Id.* She believes she will be unable to work and continue her education in Morocco, particularly because of the language barrier. *Id.* The applicant notes that Morocco is not a very safe country and he would always worry about his spouse's safety if she were to relocate. *Statement from the applicant*, dated June 30, 2010. The record includes published country conditions reports documenting human rights abuses in Morocco. *Morocco, Country Reports on Human Rights Practices – 2007, United States Department of State*, dated March 11, 2008; *Morocco, Country Reports on Human Rights Practices – 2003, United States Department of State*, dated February 25, 2004. The applicant's spouse further notes that she was raised by her great aunt who is now 78 years old and sick with Chronic Obstructive Pulmonary Disease and emphysema. *Statement from the applicant's spouse*, dated June 29, 2010. She asserts that she provides her great aunt with the constant care she now requires. *Id.* Her great aunt depends upon her for laundry, cleaning, making meals and overall general care. *Id.* While the AAO acknowledges these statements, it notes that the record fails to provide documentation, such as a statement from a licensed healthcare professional, regarding the health conditions of her great aunt and the type of care needed. 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)). Nevertheless, the AAO acknowledges the emotional effects on the applicant's spouse that would result from separation from her great aunt if she relocated to Morocco. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties, her inability to speak the language, the documented country conditions reports, and the effect of being separated from her family member in the United States, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Morocco.

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*. The applicant's spouse's only family in the United States is the great aunt who raised her. *Statement from the applicant's spouse*, dated June 29, 2010. The applicant's spouse notes that being separated from the applicant has emotionally drained her. *Id.* She states that she

gets depressed, has had suicidal thoughts, and feels consumed by the fact that she cannot enjoy life. *Id.* Several psychological evaluations are included in the record from the same licensed clinical psychologist who has evaluated the applicant's spouse over the course of several months. The licensed clinical psychologist notes that there has been a growing extremity of psychological symptoms of the applicant's spouse because of the distress caused by separation from the applicant. *Psychological evaluation from [REDACTED]* dated November 24, 2009. She has diagnosed the applicant's spouse as having Post Traumatic Stress Disorder (PTSD) and Major Depression, and the ongoing social isolation that is a consequence of the applicant's continued absence has contributed to her symptoms, which are severe. *Psychological evaluation from [REDACTED]* dated June 23, 2010. In October 2010, her licensed clinical psychologist stated that the applicant's spouse continues to meet the criteria of PTSD and Major Depression and her overall adaptation remains seriously compromised. *Psychological evaluation from [REDACTED]* dated October 12, 2010. Her symptoms are a response of the applicant's removal from the United States complicated by a childhood history of neglect and a current social situation virtually devoid of social support in the face of the applicant's absence. *Id.* There has been no improvement in the applicant's spouse's symptoms since the previous evaluation and the applicant's spouse appears to be in a course of progressive decline. *Id.* The applicant's spouse notes that she is encountering financial difficulties without the applicant. *Statement from the applicant's spouse*, dated June 29, 2010. The record includes an apartment lease and a student loan statement for the applicant's spouse documenting her expenses. *Apartment lease; Student loan statement.* The record also includes W-2 Forms from different employers for the applicant's spouse showing her earnings in 2008 to be \$4275, \$1660, \$1437, and \$1732. *W-2 Forms.* As such, the AAO acknowledges the documented expenses of the applicant's spouse. When looking at the aforementioned factors, particularly the health conditions of the applicant's spouse as documented by a licensed healthcare professional and her financial difficulties, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain 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 prior unlawful presence for which he now seeks a waiver and his unauthorized employment while in the United States. The favorable and mitigating factors are his United States citizen spouse, the extreme hardship to his spouse if he were refused admission and his lack of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant were 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) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the

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Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.