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



PUBLIC COPY



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DATE: **JUL 18 2011** Office: TEGUCIGALPA, HONDURAS FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under 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 waiver application was denied by the Field Office Director, Tegucigalpa, Honduras. 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 Honduras who was 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 and seeking readmission within ten years of her last departure from the United States. The applicant's spouse is a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Field Office Director*, dated February 4, 2009.

On appeal, counsel asserts that the applicant's spouse is suffering extreme hardship. *Form I-290B*, dated March 3, 2009.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statements, medical records for the applicant's spouse, a social worker's letter, a document in Spanish, and medical records for the applicant. The entire record was reviewed and considered, except the document in Spanish, in rendering a decision on the appeal.¹

The record reflects that the applicant entered the United States without inspection in or around July 2002 and departed the United States in May 2008. The applicant accrued unlawful presence during this entire period of time. The applicant is 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 and seeking readmission within ten years of her May 2008 departure from the United States.

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

¹ The AAO notes the document in Spanish, but it does not include a translation as required by 8 C.F.R. § 103.2(b)(3).

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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant or children is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. The AAO notes that the record does not contain a birth certificate or other reliable evidence of the applicant's claimed child. As such, any hardship that the child may experience and its effect on the applicant's spouse will not be considered. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel states that the applicant’s spouse has lived most of his life in the United States; an adjustment to the lower socio-economic conditions in Honduras would be difficult for him; and he would likely become impoverished due to his medical condition. *Brief in Support of Appeal*, dated March 27, 2009. The applicant’s spouse states that he was born in Mexico; he has resided in the United States for over 25 years; and the opportunities for jobs and education in Honduras are not as good as they are in the United States. *Applicant’s Spouse’s Second Statement*, dated March 25, 2009. The applicant’s spouse previously stated that he does not have family in Honduras; he will have to quit his job of ten years; he will lose his benefits; it will be impossible for him to find a job in Honduras at his age; the applicant has medical problems related to becoming pregnant and they have lost one child already; she will need to get medical treatment to become pregnant again and this type of medical treatment is not good in Honduras; and there are security problems in Honduras. *Applicant’s Spouse’s Statement*, dated May 12, 2008. The record reflects that the applicant had a suction dilation and cutterage procedure done on February 18, 2008 due to fetal demise at 14 weeks. *Applicant’s Medical Records*, dated February 18, 2008. The AAO notes that Honduras is currently listed as a country whose nationals are eligible for Temporary Protected Status (TPS) due to the

damage done to the country from Hurricane Mitch and the subsequent inability of Honduras to handle the return of its nationals. 75 Fed. Reg. 24734-24736 (May 5, 2010). Under the TPS program, citizens of Honduras are allowed to remain in the United States temporarily due to the inability of Honduras to handle the return of its nationals due to the disruption of living conditions. *Id.* Considering the unique factors presented, including the applicant's spouse's lack of ties to Honduras, his ties to the United States, the medical issue presented and the designation of Honduras as a TPS country, the AAO finds that the applicant's spouse would suffer extreme hardship if he relocated to Honduras.

Counsel states that the applicant's spouse suffers from medical and psychiatric conditions and he requires medication and psychological care. *Brief in Support of Appeal.* The applicant's medical records reflect that he is depressed due to separation from his spouse and the loss of his unborn child; he was assessed with depressive disorder and was prescribed medication; he was assessed with elevated blood pressure; he has complained of back pain; stress has caused him to take up smoking again and he is smoking six cigarettes a day; he is working two full-time jobs at 75 hours per week to support himself and the applicant's son; he is getting 4 to 5 hours of nightly sleep; and he has lost 15 pounds over 8 months although he is not trying to lose weight. *Medical Records*, various dates.

The applicant's spouse's social worker states that the applicant's spouse has begun therapy for severe depression due to the applicant's absence; the applicant's 14 year old son is living with her spouse; the applicant and her spouse want to start a family together; the applicant's spouse feels that the applicant's son is depressed; and the applicant's spouse's and child's depression would decrease, perhaps even disappear if the applicant was back home. *Letter from [REDACTED]* dated April 2, 2009.

The applicant's spouse states that he was demoted from his supervisor position due to his crying and depression; he is now working as a janitor; the pain is unbearable; the applicant's son is in his care and he is suffering a lot; the applicant is a caring mother and good wife; and the applicant is the element that holds the family together. *Applicant's Spouse's Second Statement.*

Considering the unique factors presented, including the applicant's spouse's medical and psychiatric issues, and the normal results of separation from a spouse, the AAO finds that the applicant's spouse would suffer extreme hardship if he remained 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).

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-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 adverse factors in the present case are the applicant's entry without inspection and unlawful presence.

The favorable factors include the presence of the applicant's U.S. citizen spouse, extreme hardship to her spouse, and the lack of a criminal record.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met that burden. Accordingly, the appeal will be sustained.

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