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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

[redacted]

H6

DATE: JUN 03 2011 OFFICE: ACCRA, GHANA FILE: [redacted]

IN RE: [redacted]

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:

[redacted]

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

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, Accra, Ghana. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Cape Verde 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 again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director concluded that the applicant failed to establish that a bar to his admission to the United States would result in extreme hardship to the qualifying relative and denied the application accordingly. *See Decision of the Field Office Director* dated July 24, 2008.

The applicant's attorney provided an appeal statement and brief in support of the applicant's waiver application. The applicant's attorney contends that the applicant and qualifying spouse's child will encounter hardships because she does not speak, read or write the languages of Cape Verde, and would not be able to continue her education at the same pace. Further, the applicant's attorney states that the qualifying spouse would not be able to find employment in Cape Verde, either as an interpreter or a nurse's assistant. The applicant's attorney asserts that the applicant has been unable to secure employment since he returned to Cape Verde. Moreover, the applicant's attorney indicates that the qualifying spouse has not lived in Cape Verde for almost twenty years, and is no longer familiar with its current culture and has acculturated herself to the United States. The applicant's attorney also contends that the qualifying spouse is suffering financially and medically due to the absence of the applicant.

The record contains the following documentation: the original Application for Waiver of Grounds of Inadmissibility (Form I-601), the Notice of Appeal (Form I-290B), letters from the qualifying spouse, a letter from the applicant's brother and sister-in-laws whom he lives with in Cape Verde, photographs, a brochure for the school that one of the applicant's children attends in the United States, an appeal statement and briefs from the applicant's attorney, the qualifying spouse's naturalization certificate, financial documentation, proof of the qualifying spouse's medical insurance and other benefits, proof of the qualifying spouse's attendance in counseling sessions, country condition information, a marriage certificate, divorce documentation for the applicant and the qualifying spouse's prior marriages, a birth certificate for the applicant and qualifying spouse's child, letters from the qualifying spouse's coworker and friends, a letter from the qualifying spouse's daughter, letters from the applicant's family, a mental health evaluation of the qualifying spouse, a letter from the qualifying spouse's employer, and a copy of an approved Petition for Alien Relative (Form I-130). 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.

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. The applicant's wife 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 the Phillipines, 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 a qualifying relative, 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 qualifying relative is his wife, a United States citizen. The documentation provided that specifically relates to the qualifying relative's hardship includes letters from the qualifying spouse, a letter from the applicant's brother and sister-in-laws whom he lives with in Cape Verde, an appeal statement and briefs from the applicant's attorney, financial documentation, proof of the qualifying spouse's medical insurance and other benefits, proof of the qualifying spouse's attendance in counseling sessions, country condition information, letters from

the qualifying spouse's coworker and friends, a letter from the qualifying spouse's daughter, letters from the applicant's family, a mental health evaluation of the qualifying spouse and a letter from the qualifying spouse's employer. The entire record was reviewed and considered in rendering a decision on the appeal.

As aforementioned, the applicant's attorney contends that the applicant and qualifying spouse's child will encounter hardships because she does not speak, read or write the languages of Cape Verde, and would not be able to continue her education at the same pace. Further, the applicant's attorney states that the qualifying spouse would not be able to find employment in Cape Verde, either as an interpreter or a nurse's assistant. The applicant's attorney asserts that the applicant has been unable to secure employment since he returned to Cape Verde. Moreover, the applicant's attorney indicates that the qualifying spouse has not lived in Cape Verde for almost twenty years, and is no longer familiar with its current culture and has acculturated herself to the United States. The applicant's attorney also contends that the qualifying spouse is suffering financially and medically due to the absence of the applicant.

The AAO finds that the applicant has established that his wife is encountering extreme hardship as a consequence of being separated from the applicant. The applicant's attorney asserts that the qualifying spouse is suffering financially without the contributions of the applicant. The qualifying spouse states that she is having financial difficulties because her home has lost value and she is having a hard time fulfilling her financial obligations without the contributions of the applicant. The record contains documentation of the qualifying spouse's expenses, including her utilities and mortgage, tax returns, banking information, as well as letters from the qualifying spouse's coworker and employer. The documentation submitted demonstrates that the applicant contributed more than two thirds of the income for his family when he lived in the United States. The record reflects that the qualifying spouse is financially struggling to support herself and her child on her salary alone, without any contributions from the applicant.

Moreover, the applicant's attorney asserts that the qualifying spouse's health is deteriorating as a result of the applicant's absence. The record contains letters from the qualifying spouse and her friends and family as well as a mental health evaluation and proof of her treatment. The qualifying spouse, in one of her letters, indicates that she is "depressed and emotionally and physically devastated to a point that [she] gets sick constantly." The mental health evaluation also diagnosed the qualifying spouse with anxiety disorder. When considered in the aggregate, the documentation provided regarding the qualifying spouse's emotional, psychological and financial hardships demonstrate that the qualifying spouse would suffer extreme hardship if she were to remain in the United States without the applicant.

The applicant also demonstrated his qualifying relative would suffer extreme hardship in the event that she relocated to Cape Verde with the applicant. The applicant's attorney contends that the applicant's spouse has lived in the United States for nearly twenty years and that her daughter lives in the United States with her. Although the applicant and the qualifying spouse have family in Cape Verde, their family members in Cape Verde stated in their letters that they are having financial difficulties and it would be hard for them to assist the qualifying spouse and the applicant in the event that they both lived in Cape Verde. In fact, the letter from the applicant's father states

that the applicant used to send him and his family money when he was working in the United States. The applicant's attorney further contends that the qualifying spouse will suffer financially if she relocates to Cape Verde. The record contains country condition information and letters from friends and family confirming that the applicant has been unable to find employment since returning to Cape Verde. The qualifying spouse also expresses her concerns about shortages of potable water and availability of health care in Cape Verde. To support these contentions, the record contains country condition information confirming that droughts have been prevalent in Cape Verde and that the health system has many deficiencies. The applicant also submitted proof of the qualifying spouse's medical insurance and other benefits, including retirement savings, which she would lose if she relocated to Cape Verde. The AAO therefore concludes that the qualifying spouse would suffer extreme hardship due to her length of residence in the United States, economic difficulties, and other country condition issues, if she returned to Cape Verde to reside with the applicant.

Considered in the aggregate, the applicant has established that his wife would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

*Id.* at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States, his support from the qualifying spouse and his family in the United States and his prior financial contributions to his family. The unfavorable factors in this matter are the applicant's accrual of unlawful presence in the United States and his prior arrests in the United States.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the passage of time since the applicant's violations of immigration law and criminal arrests, the AAO finds that a favorable exercise of discretion is warranted. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.