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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 06 2011 Office: MIAMI, FLORIDA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Brazil who 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 more than one year. The applicant is married to a U.S. citizen and 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), in order to reside with his wife in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated February 4, 2008.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, , indicating they were married on July 14, 2005; a letter from the applicant; an affidavit from a letter from physician and copies of her medical records; copies of tax returns, bank account statements, bills, and other financial documents; copies of photographs of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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 -
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> . . . .
>
> (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.
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> . . . .
>
> (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 this case, the record shows, and the applicant does not contest, that he entered the United States on June 11, 1996, with a B-2 visitor's visa, with authorization to remain until December 8, 1996. The applicant concedes that he overstayed his visa and departed the United States in August 2001. *Sworn Statement*, dated November 14, 2007. The applicant accrued unlawful presence of more than one year. The record further shows, and the applicant concedes, that he reentered the United States on October 25, 2001, with a B-2 visitor's visa and again overstayed his visa.[1] *Record of Sworn Statement in Administrative Proceedings*, dated October 25, 2004. Accordingly, he 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 one year or more and seeking admission to the United States within ten years of his last departure.

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 her children can be considered only insofar as it results in hardship to a qualifying relative. 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

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[1] It is unclear from the record when the applicant last departed the United States. According to [redacted] affidavit, the applicant was working as a taxicab driver in the United States as of December 2007. *Affidavit of* [redacted], dated December 14, 2007. However, the applicant's letter, dated February 28, 2008, indicates that he and his wife were no longer in the United States and that his wife needs to return to the United States for medical treatment. *Letter from* [redacted] dated February 28, 2008.

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 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.

In this case, the applicant's wife, , states that she has lived in the United States for over 23 years. She states she was married to her first husband for 34 years and they have four children together. She contends their relationship ended in 1994 and that she felt a void in her life until she met the applicant in 1998. According to she does not know how she will be able to live without him if he returns to Brazil. She states she cannot move to Brazil with him because her home is in the United States. In addition, contends she suffers from osteoporosis and is unable to work a steady job. She also states she is going through menopause and experiences back pain, hot flashes, and sleeping problems. She states she is receiving estrogen replacement treatment and takes sleeping pills and calcium pills. also contends she depends on her husband for financial support and that he works as a taxicab driver. She states her children sometimes need her to babysit her grandchildren and that the only family she has left in Brazil is her mother and her two brothers. *Affidavit of* , dated December 14, 2007.

A letter from the applicant states that his wife is very sick and depends on him to take care of her physically. The applicant contends that his wife has "a serious ailment that requires additional and progressive medical care [and] needs to return to the United States as soon as possible to avoid further damage and further advance of the disease without proper treatement. . . . However, she cannot return by herself because of the seriousness of her healthcare issues." According to the applicant, they have documented the status of his wife's condition to the best of their ability and have included all medical reports along with their translation from Portuguese to English. *Letter from* , dated February 28, 2008.

A letter from Ms. physician in Brazil states that she "is receiving treatment at this facility, has physical restrictions regarding her labor activity." *Letter from* dated February 12, 2008. Copies of medical reports indicate she had a bone density exam and an X-ray of her lumbar spine.

After a careful review of the record, there is insufficient evidence to show that will suffer extreme hardship if her husband's waiver application were denied.

The AAO recognizes that will endure hardship upon the denial of her husband's waiver application. However, if decides to continue living in the United States without her husband, their situation is typical of individuals separated as a result of inadmissibility or exclusion and does not rise to the level of extreme hardship based on the record. Regarding her osteoporosis and menopause conditions, although the record contains some documentation addressing bone density, there is insufficient evidence to show extreme hardship. Although the letter from contends has some physical restrictions, *Letter from* , the letter lacks sufficient details. For instance, the letter does not address the diagnosis, prognosis, treatment, or severity of her purported conditions. In addition, there is no evidence in the record addressing her symptoms from menopause and no copies of the prescription medications she purportedly takes. Without more detailed information, the AAO is not in the position to reach conclusions regarding the severity of any medical or mental health condition or the treatment and assistance needed.

Regarding the financial hardship claim, there is insufficient evidence to show that hardship is extreme. Although contends she relies on her husband for financial assistance, according to the applicant's Biographic Information form, he has not been employed for the last five years. *Biographic Information form (Form G-325A)*, signed by the applicant on June 14, 2006. There is no evidence in the record addressing the applicant's wages or income, such as copies of the applicant's tax returns, pay stubs, or a letter from his employer. The record shows that Ms. is unemployed and has earned a limited income in the past. *Affidavit of Support Under Section 213A of the Act (Form I-864)*, dated September 12, 2006 (stating no income for 2006); *2005 U.S. Individual Income Tax Returns (Form 1040)* (indicating a total income of $1,513); *2004 U.S. Individual Income Tax Returns (Form 1040)* (indicating a total income of $9,007). Therefore, it is unclear how Ms. has been financially supported. Without more detailed information addressing the couple's total income, there is insufficient evidence in the record to determine the extent of her financial hardship.

Furthermore, the record does not show that would suffer extreme hardship if she were to return to Brazil to be with her husband. The record shows that was born in Brazil and married and divorced her first husband in Brazil. *Biographic Information form (Form G-325A), supra.* She states that her mother and two of her brothers continue to live in Brazil. *Affidavit of* . In addition, was diagnosed with osteoporosis in Brazil, *id.*, and copies of her medical records are from Brazil. There is no evidence in the record that she receives any medical treatment in the United States for any health problem. Furthermore, although contends she has four children and sometimes babysits her grandchildren, she has not addressed whether or not they can visit her in Brazil. In sum, there is no evidence that her transition to moving back to Brazil would be any more difficult than would normally be expected under the circumstances.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.