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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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**U.S. Citizenship
and Immigration
Services**



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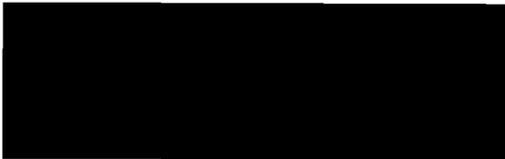
DATE: **JUN 16 2011** OFFICE: NEW YORK, NY

FILE: 

IN RE: 

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:



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 black ink that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York and 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 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 and seeking admission within ten years of her last departure. She is the spouse of a U.S. citizen and the mother of lawful permanent residents. The applicant seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States.

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated October 7, 2009.

On appeal, counsel contends that U.S. Citizenship and Immigration Services (USCIS) failed to consider the mitigating circumstances that would excuse the applicant's departure from the United States, and refused to consider the totality of the circumstances or the applicant's spouse's good faith effort to seek relocation in Brazil. Counsel notes that the applicant's spouse is also experiencing a deterioration in his psychological and mental health since receiving the District Director's decision. *Form I-290B, Notice of Appeal or Motion*, dated November 6, 2009.

The evidence of record includes, but is not limited to: counsel's brief; statements from the applicant, her spouse, and her sons; tax returns; employment letters and W-2 forms for the applicant's spouse; bank statements; medical documentation relating to the applicant's spouse and her younger son; country conditions information on Brazil; and support statements from friends and a family member. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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.

The record reflects that the applicant entered the United States on September 8, 2005 with a B-2 nonimmigrant visa, valid until March 7, 2006. The applicant remained in the United States following the expiration of her visa and began accruing unlawful presence on March 8, 2006, the day after her B-2 visa expired. On May 4, 2008, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, which placed her in a period of authorized stay.¹ On December 4, 2008, the applicant departed the United States under advance parole, thereby triggering the unlawful presence provisions under the Act. She returned on January 9, 2009 and was paroled into the United States. On February 12, 2009, the applicant again left the United States under advance parole. The applicant's Form I-485 was denied on April 2, 2009. She returned to the United States on April 3, 2009 and was paroled until April 2, 2010. On April 22, 2009, the applicant filed a second Form I-485. Based on this history, the AAO finds the applicant to have accrued unlawful presence in excess of one year prior to her initial departure from the United States on December 4, 2008. As she is seeking immigrant admission within ten years of this departure, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

We now turn to a consideration of the applicant's eligibility for a waiver under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B)(v) of the Act states 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. Accordingly, in this proceeding, any hardship asserted in relation to the applicant or her children will be considered in terms of its impact on the applicant's spouse, the only qualifying relative. 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).

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*,

¹ The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (Secretary of Homeland Security) as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 312(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

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.

On appeal, counsel for the applicant states that the applicant's spouse's obligation to the applicant would require him to relocate to Brazil if the waiver application is denied. He asserts that the District Director disregarded this obligation when she stated in her decision that the applicant's spouse was not required to live in Brazil. Counsel also asserts that the applicant's spouse has established that he would not be able to obtain employment in Brazil, based on his "personal good faith effort to seek employment" when he traveled there in August 2009. Counsel contends that the applicant's spouse has personal knowledge that his livelihood, his career and his family's well-being would be in jeopardy if the waiver application is denied.

In October 5 and November 6, 2009 statements, the applicant's spouse states that if the applicant is removed from the United States, he must go with her, despite the fact that it will require him to abandon everything he has achieved. He further asserts that he does not speak Portuguese and that his "skill set in Real Estate is nonexistent in Brazil," as he traveled to Brazil in August 2009 and found that he was "unable to even remotely present [himself] at the level [to] which [he] is accustomed." He further states that the average person in Brazil makes \$250 per month. The applicant's spouse also contends that Brazil is a violent country and that moving there would be dangerous for him and his family. He claims that he has personally witnessed the crime explosion in the country and that there are many examples of carjackings and murders. He states that he does not want to live in a country that does not afford basic protections to its civilian population and notes that there is wide-scale corruption in Brazil's government.

In support of the preceding claims, the applicant has submitted a printout of [REDACTED] [REDACTED], " compiled by [REDACTED] which reports that in 2002, the average net monthly income for workers in the Brazilian real estate sector was \$278. No other country conditions materials are found in the record.

The AAO finds the record to offer insufficient evidence of the applicant's spouse's claims concerning employment and security conditions in Brazil. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in 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)). However, we have taken note of the fact that the applicant's spouse has lived in the United States his entire life and would have no family ties to Brazil other than the applicant and his stepsons. We have also considered that he would be relocating to a country where he does not speak the language. When the AAO considers the applicant's spouse's situation, particularly his inability to speak Portuguese, which would significantly limit his ability to obtain employment, as well as his ability to integrate into a new society and culture, we find the record to demonstrate that he would experience extreme hardship if he relocates to Brazil with the applicant.

With regard to the hardship that the applicant's spouse would suffer as a result of separation, counsel states that USCIS wrongly dismissed the claim that the applicant's spouse would need the applicant in order to raise his stepsons who entered the United States on September 4, 2009 as lawful permanent residents. Counsel further asserts that the applicant's spouse has experienced symptoms of stress, high anxiety and chronic depression since the Form I-601 was denied and that the applicant's physician, [REDACTED], has ordered him to undergo a psychological evaluation.

In his November 6, 2011 statement, the applicant's spouse states that he will not be able to raise his stepsons in the applicant's absence. He states that he will be solely responsible for supporting his stepsons financially, intellectually, psychologically and emotionally, and that these responsibilities seem "out of reach" in the applicant's absence. The applicant's spouse further notes that he has never had children before, does not speak the same language as his stepsons and that his younger stepson is blind in his right eye as a result of Strabismus Syndrome.

The applicant's spouse also claims that he is emotionally drained as a result of the applicant's immigration situation and that he has been brought to the "breaking point." He asserts that he is suffering from sleep disorders, his stomach is a "war zone" and he "eats heartburn medicine like [it's] candy." When he went for his annual physical, the applicant's spouse states, he was shocked by the fact that his doctor referred him for an immediate psychiatric evaluation.

An October 5, 2009 statement from the applicant's spouse's aunt, [REDACTED], reports that he has lost more friends and family members than is normal for someone of his age and that she is sure that these deaths and departures have taken their toll. She states that she is concerned that the applicant's removal would crush her nephew emotionally and that the applicant would be the one loss with which he would not be able to cope.

In support of these assertions, the applicant has submitted two statements concerning his younger stepson's health, one from [REDACTED], dated November 13, 2008 and the other from [REDACTED] dated March 2, 2009. Both statements indicate that the child requires surgery for Strabismus Syndrome in his right eye. The record also contains an October 29, 2009 handwritten note on an Official New York State Prescription form, signed by [REDACTED] referring the applicant's spouse for a psychiatric evaluation based on his anxiety, depression and stress. Copies of Form I-551s, Permanent Resident Cards, issued to the applicant's stepsons establish they entered the United States as lawful permanent residents on September 4, 2009.

Having considered the record before us, the AAO finds that the applicant has also established that her spouse would suffer extreme hardship if the waiver application is denied and he remains in the United States. In reaching this conclusion, the AAO has considered that, if the applicant is removed, her spouse would become a single parent for two children who are newly arrived in the United States, who would have no family in the United States other than a stepfather they have only recently met, and who would have a limited ability to communicate in English, their stepfather's only language. We also note that while the record does not document that the applicant's younger son is blind in his right eye, it does establish that he has recently had vision problems requiring surgery,

thereby potentially complicating his adjustment to a new life in the United States. The AAO also notes that the applicant's spouse's physician has found his emotional reaction to the applicant's potential removal to warrant evaluation by a mental health professional, although we observe that the evaluation has not been provided for the record. Nevertheless, when we consider the preceding factors and the hardships that normally result from the separation of spouses in the aggregate, we find the applicant to have demonstrated that her spouse would suffer extreme hardship if the waiver application is denied and he remains 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 applicant 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 failure to comply with the conditions of her B-2 nonimmigrant visa, the more than one year of unlawful presence for which she now seeks a waiver and a 2006 conviction for disorderly conduct under New York Penal Code § 240.20.² The

² The AAO notes that on January 25, 2006, the applicant pled guilty to disorderly conduct under New York Penal Code § 240.20, a violation, and was given a conditional discharge, which expired on January 25, 2007. The AAO has not considered whether the applicant's conviction is for a crime involving moral turpitude that would bar her admission to the United States under section 212(a)(2)(A)(i)(I) of the Act. Even if the applicant were found to have committed a

mitigating factors in the present case are the applicant's U.S. citizen spouse and lawful permanent resident sons; the extreme hardship to her U.S. citizen spouse if she is denied a waiver of inadmissibility; the absence of any unlawful employment; her payment of taxes; the health problems of her younger son; the absence of a criminal record or offense beyond the 2006 conviction just noted; and her support of her spouse, as documented by statements from the applicant's spouse's aunt, friends and employer.³

The AAO finds that the immigration violation committed by the applicant was serious in nature and cannot be condoned. Nevertheless, 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 an application for a 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. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

crime involving moral turpitude, her conviction is subject to the petty offense exception found in section 212(a)(2)(ii)(II) of the Act and would not result in a *finding of inadmissibility*.

³ On appeal, counsel asserts that the fact that the applicant left the United States for a medical emergency involving her younger son and her previous counsel's failure to apprise her of the immigration consequences of leaving the United States should be mitigating factors in the present case. The AAO notes, however, that although the applicant's departure from the United States triggered the unlawful presence bar under the Act, the reasons for that departure are not relevant here. The fact that the applicant left the United States to assist her child and that she might not now be subject to section 212(a)(9)(B)(i)(II) of the Act had she understood the consequences of her departure from the United States do not serve to mitigate or otherwise explain her decision to remain unlawfully in the United States after her B-2 visa expired.