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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**

HG

FILE:

Office: MIAMI

Date:

MAR 08 2011

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:

SELF-REPRESENTED

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,

A handwritten signature in cursive script that reads "Michael Shumway".

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility 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 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 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 admission within 10 years of his last departure from the United States. The applicant 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 remain in the United States with his U.S. citizen spouse.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated August 14, 2008.

On appeal, the applicant asserts that his wife will suffer extreme hardship if his waiver application is denied. *Letter from* [REDACTED], dated September 12, 2008.

The record contains, but is not limited to: statements from the applicant and his spouse; the applicant's marriage certificate; financial documentation; the applicant's father's medical records; an employment verification letter for the applicant's spouse; and supporting letters from the applicant's friends. The entire record was reviewed and considered in rendering this decision.

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-

....

(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 [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.

The director determined, and the applicant does not contest, that the applicant was admitted to the United States as a B-2 visitor on September 14, 1996. The applicant was authorized to remain in the United States until March 13, 1997. On April 2, 1997, the applicant applied for an extension of his B-2 status. The extension was approved, and his B-2 visitor status was extended until September 3, 1997. On August 25, 1997, a Petition for Nonimmigrant Worker (Form I-129) was filed on the applicant's behalf. The petition was approved, and the applicant was authorized to remain in the United States from September 3, 1997 until September 3, 1998 as an L-1A Intracompany Transferee. On March 18, 2003, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485).

The applicant accrued unlawful presence from the date his nonimmigrant status expired, September 3, 1998, until the date he filed an adjustment application, March 18, 2003. On or about March 24, 2006, the applicant departed the United States with advance parole, thereby triggering the unlawful presence ground of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant subsequently departed the United States on several other occasions with advance parole. The applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and seeking admission within 10 years of the date of his departure from the United States.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen 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.

On appeal, the applicant asserts that his spouse is suffering from panic attacks as a result of his inadmissibility. He states that his wife does not eat, sleep, or smile anymore. He contends that he has saved his money to pay for his father’s medical expenses, and his spouse has supported him when he needed her help. He states that if he departs the United States, his spouse would remain in

the United States alone. He asserts that his absence would “devastate her completely” and he fears for her well-being. *Appeal Letter*, dated September 12, 2008.

The applicant’s spouse asserts in a letter filed with the waiver application that she is “incredibly depressed” as a result of her husband’s inadmissibility. She states that she does not have any children and is in her third marriage. She contends that she is around 50 years old, and would have to start a new life if she remains in the United States without the applicant. *Letter from* [REDACTED] [REDACTED] dated June 16, 2008.

The AAO observes that the applicant has not made a claim of financial hardship to his spouse on the instant appeal. The applicant previously claimed that if his spouse remained in the United States, she would have to struggle to pay for their house, and her current employment would not be sufficient to pay for their expenses. *I-601 Waiver Statement*, dated June 16, 2008. However, on appeal, the applicant states that his wife is now supporting him and he is unemployed. *Appeal Letter*, dated September 12, 2008. The most recent tax returns in the record are separately filed individual tax returns for 2007, and reflect that the applicant earned \$4,018 during that year while his spouse earned \$43,275. An employment verification letter in the file reflects that the applicant’s spouse has held long-term employment with Apartment Investment and Management Company (AIMCO) since November 4, 1999. *Letter from* [REDACTED] [REDACTED] dated May 19, 2008. Accordingly, the record does not show that the applicant’s spouse would suffer financial hardship upon separation from the applicant.

The applicant has claimed that his spouse is suffering emotionally as a result of his inadmissibility. The AAO acknowledges that the applicant and his spouse will experience emotional hardship if they are separated as a result of his inadmissibility. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and that “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted). The AAO finds that the applicant’s separation from her spouse will constitute emotional suffering, and is sympathetic to their situation. However, the applicant has failed to demonstrate that this hardship alone rises to the level of extreme hardship. There are no psychological or medical records to substantiate the claims of depression and anxiety the applicant claims his spouse is suffering. The applicant has made no other claims of hardship to his spouse if she remains in the United States separated from him. While almost every case will present some hardship, the fact pattern here is not beyond the ordinary hardship suffered by individuals who are separated as a result of inadmissibility.

Although the applicant has asserted that his spouse would remain in the United States, the applicant must also demonstrate that his spouse would suffer extreme hardship if she relocated with him to Brazil to maintain family unity.

On appeal, the applicant states that his wife is from Portugal and has been living in the United States for ten years. He states that she is 50 years old and has never visited Brazil. He asserts that because

of his age, he would be unable to find employment in Brazil to pay for his father's medical expenses, and financially care for his family in Brazil and wife in the United States. The applicant notes that crime is "horrible" in Brazil. He contends that he cannot take his wife to Brazil because the country "is truly hell on this earth." He states that Brazil "is not a place where good people belong in and no one should even be punished to going back there." *Appeal Letter*, dated September 12, 2008.

The applicant's spouse asserts that she is "incredibly depressed" with having to face the possibility of her husband's deportation to Brazil because "someone around 50 is considered 'too old' to start over" and there is a "cultural barrier amongst many other problems." *Letter from* [REDACTED] dated June 16, 2008.

The AAO notes that the U.S. Department of State's travel advisory for Brazil provides the following on criminal activity in the country:

Crime throughout Brazil has reached very high levels. Brazilian police and media report that the crime rate continues to rise, especially in the major urban centers – though it is also spreading in rural areas. Brazil's murder rate is more than four times higher than that of the U.S. Rates for other crimes are similarly high. The majority of crimes are not solved.

U.S. Department of State. Country Specific Information, Brazil, dated November 5, 2010.

The AAO will give some weight to the hardships associated with relocation to a country that has a high rate of crime. However, the applicant has not stated where he and his spouse would reside upon relocation to Brazil. Nor has he stated whether he was a victim of crime when he resided in the country. The AAO is not in a position to make broad conclusions regarding the applicant's spouse's safety and security in Brazil.

The AAO acknowledges that the applicant's spouse would have to adjust to a new culture upon relocation to Brazil, and will give this factor some weight. However, she has not stated that she would be unable to find employment, or face a language barrier. Nor has she explained whether she has any family or community ties in the United States that would be severed upon relocation. Accordingly, the AAO finds that the applicant has not demonstrated that his spouse's relocation would be beyond the typical hardships associated with relocation. In *Shooshtary v. INS*, the Ninth Circuit Court of Appeals noted that "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy." 39 F.3d 1049, 1051 (9th Cir. 1994).

Finally, the applicant has claimed that he would be unable to financially support his spouse and his family in Brazil. Hardship to the applicant and his family will be considered insofar as it results in hardship to his spouse. As discussed, the record indicates that as of the date of the appeal notice, the applicant was struggling with finding employment in the United States. See *Appeal Letter*, dated September 12, 2008. The most recent tax return in the record is from 2007 and reflects that the applicant earned \$4,018, which is well below the poverty line. See *Department of Health and*

Human Services 2007 Poverty Guidelines. Moreover, the applicant has not demonstrated with country reports, or any other documentation, that his spouse would suffer financial hardships in Brazil.

All elements of hardship to the applicant's spouse, should she relocate to maintain family unity, have been considered in aggregate. The AAO acknowledges that the applicant's spouse would face some hardships associated with readjusting to a new culture and residing in a country that has a high rate of crime. However, the applicant has failed to illustrate how these general assertions of hardship specifically affect his spouse. There is no indication of where the applicant and his spouse would reside in Brazil. Nor is there any discussion of his spouse's ties to the United States, and whether she would face a language barrier in Brazil. Accordingly, the AAO cannot find that the applicant's spouse would suffer extreme hardship upon relocation to Brazil.

Accordingly, the applicant has not established that denial of the present waiver application "would result in extreme hardship" to his spouse, as required for a waiver under section 212(a)(9)(B)(v) of the Act. 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. The waiver application is denied.