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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

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FILE: [REDACTED] Office: MEXICO CITY (PANAMA)

Date: **MAR 14 2011**

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 Acting District Director, Mexico City (Panama), Mexico. 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 Ecuador 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 his last departure from the United States. The applicant is the spouse of a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated August 12, 2008, the acting district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility and did not warrant the favorable exercise of the Secretary's discretion. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated September 5, 2008, counsel states that the acting district director erroneously ignored the extreme hardship experienced by the applicant's spouse. He states that the applicant's spouse demonstrated that her extreme hardship extended beyond the mere limitation of her family's dream and into the realm of extreme medical, financial, educational, professional, and cultural hardship. Counsel also states that the acting district director summarily dismissed the evidence showing the applicant's spouse's professional career and development in the United States. Counsel states further that the acting district director ignored the evidence submitted regarding the applicant's spouse's medical treatment for depression and the necessity to continue receiving treatment in the United States.

The record indicates that the applicant entered the United States without inspection in March 2000. The applicant remained in the United States until May 20, 2007. Therefore, the applicant accrued unlawful presence from March 2000 until May 20, 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of his May 2007 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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-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 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.

The record of hardship contains: counsel’s brief, a statement from the applicant’s spouse, evidence of the applicant’s spouse’s travel to Ecuador, medical records for the applicant’s spouse, copies of prescriptions for the applicant’s spouse, a letter from the applicant’s spouse’s

therapist, a letter of employment, information regarding the applicant's spouse's profession, a rental agreement, financial documentation, and three letters of support.

In his brief, dated October 8, 2008, counsel states that the applicant's spouse is a white female with chronic depression and an inability to speak Spanish. He states that she is a health care professional, a mother of two dependent children, and has all of her family, except the applicant, living in the United States. Counsel states that the applicant's spouse's medical complications and family history of chronic depression requires her to receive medical treatment in the United States and demonstrates the extreme hardship she would face if she has to relocate to Ecuador. Counsel states that the applicant's spouse is currently prescribed 10 mg of Lexapro, an antidepressant, and Xanax to treat her anxiety and depression. Counsel states that the applicant received this treatment in December 2006, before the applicant left the United States. Counsel states that the applicant's spouse also attends ongoing therapy through her insurance and that all three treatment methods are necessary to keep her mental state stable. Counsel asserts that the applicant's spouse cannot receive the same medical treatment in Ecuador that she does in the United States and that upon visiting the applicant in Ecuador his spouse had a severe reaction and could not manage her basic daily activities. He states that the applicant did receive basic medical treatment in Ecuador but returned to the United States in a weakened and unhealthy state.

In her statement, dated October 8, 2008, the applicant's spouse states that she has suffered from longstanding major depressive disorder since she was a teenager and has been receiving periodic treatment through therapy and prescription medication since her twenties. She states that her depression and mental anxiety prevent her from having a normal life with normal coping skills and that she cannot just choose to make her life alright without her husband. She states that after meeting the applicant, she continued her treatment because her depression is a chronic and ongoing condition, but that when they started to work on the applicant obtaining legal status her anxiety flared up. She states that being with the applicant makes her life feel more manageable because of her stable relationship, medication, and routine. She states that when faced with the idea of being separated from the applicant for the purposes of resolving his illegal status, she became so depressed that she could not function through daily tasks, nor could she attend work or care for her children. The applicant's spouse also states that her emotional turmoil has increased since the applicant left the United States in 2007 and that her situation was made even more difficult in late 2007 by a pregnancy. She states that based on the U.S. State Department Consular Information Sheet she does not believe she would have access to the medications she needs to survive. She also expresses concerns over being able to pay for her medication because she would not earn a good wage in Ecuador.

In her statement the applicant's spouse states that her son, Elio, suffers from an ongoing medical condition and her daughter has an allergy to eggs, which further complicates their ability to relocate to Ecuador. She states that her son has tracheomalacia, or an underdeveloped trachea, which she fears could cause further respiratory problems if they relocated to Ecuador where elevation and pollution is high.

The applicant's spouse states further that the expense of traveling to Ecuador is so cost prohibitive that they can only afford to travel once a year and that the last time she was in Ecuador she became very ill. She also states that she fears the criminal situation in Ecuador, especially because the applicant was robbed and violently attacked in his own home.

In his brief, counsel states that in addition to medical and emotional hardship the applicant's spouse will experience financial hardship upon relocation to Ecuador. Counsel states that the applicant's spouse's career as a certified histotechnologist requires that she works fulltime and have childcare for her children. He states that she also has a 401K pension retirement plan and medical insurance, which she would lose if she left her employment in the United States. Counsel states further that the applicant was the caretaker of their children, because his spouse's income was necessary to support the family, but not a single parent family. He states that she cannot afford childcare for her children and she does not have another option to provide care for her children.

In her statement, the applicant's spouse asserts that she has lost professional opportunities in her career and the ability to move into more supervisory roles because she does not have childcare help and/or cannot afford the help.

In his brief, counsel also states that the applicant's spouse will not be able to find comparable employment in Ecuador. He states that she does not speak Spanish and would not be able to keep up with her certification requirements. He states further, citing the 2007 State Department Human Rights Report for Ecuador, that even if the applicant's spouse were able to find comparable employment in Ecuador she would not be paid a comparable wage and would face wage discrimination as a woman in her career. Counsel also states that the applicant's spouse has financial obligations in the United States in the form of \$11,000 in student loans that she would no longer be able to pay if she relocated to Ecuador. Counsel states that the applicant's spouse has been receiving childcare and financial assistance from her parents and family, but that this assistance has stopped and she is moving out of her parents' home and into her own apartment. Counsel also submits evidence of the applicant's spouse enrolling her children in educational classes and starting college savings funds for them, all efforts that, according to counsel, will be lost if the applicant's spouse relocates to Ecuador.

In her statement, the applicant's spouse states that she has experienced extreme emotional strain as a result of living with her parents, which was necessary because she could not financially afford living on her own. She states that living with her parents has placed a strain on their relationship that may be irreparable. She states that her parents have received increased pressure from her siblings to limit supporting her emotionally, financially, and with the care of her children. She states that her relationship with her siblings has also been damaged by her dependence on them and her parents. She states that as of October 3, 2008 she will be renting her own apartment with her children and that she will be putting her children in daycare as her mother can no longer afford to help her.

Finally, counsel states that the applicant's spouse has a supported and legitimate fear of returning to Ecuador based on the violence and abject poverty of the country. Counsel states that on May 23, 2008 the applicant was attacked and robbed in his home in Ecuador, suffering serious injuries. He states that the applicant's spouse and her children would be targets of these kinds of crimes as random crimes against Americans are common in Ecuador. He states that if forced to relocate the applicant's spouse will live in fear for her children's safety and the additional stress will only increase her mental instability. Counsel states that the applicant's medical conditions and her blonde hair, blue-eyed appearance, distinguish her from the expected hardship of an American relocating to Ecuador.

In support of counsel's brief and the applicant's spouse's statement the record includes: copies of the applicant's spouse's passport showing that she traveled to Ecuador on two occasions, each time for two weeks; medical documentation for the applicant's spouse and her children; information regarding the applicant's spouse's employee benefits through her employer; financial documentation; information regarding the requirements of certification for the applicant's spouse's profession as a histotechnologist; and country conditions information regarding Ecuador.

The AAO notes that in support of the applicant's spouse's depression, the record includes: a letter from Fairview Health Services; prescriptions for Lexapro; and letters from the applicant's sister-in-law, and father-in-law attesting to the strain the applicant's absence has placed on the applicant's spouse and on their lives.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if his waiver of inadmissibility is denied. The record establishes that the applicant's spouse is suffering from depression, which she is attempting to manage through therapy and prescription medication. In addition to her mental health condition, the applicant's spouse has shown that she must also deal with financial considerations and caring for her two children. The applicant's spouse has established that her family in the United States is no longer willing to help her with childcare and her finances and that she would not receive the same medical care and would not have access to the same medication in Ecuador. The AAO finds that given the applicant's spouse's medical condition, with the additional stressors of taking care of her children in the United States without the applicant or relocating her children to Ecuador, the applicant's spouse will face hardship above and beyond what is normally expected in situations where a spouse is removed from 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-Moralez, 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 unlawful presence in the United States, the applicant's entry into the United States without inspection, the applicant's conviction for driving without a license in 2001, and the applicant's conviction for driving while intoxicated in 2007.

The favorable factors in the present case are the extreme hardship to his U.S. citizen wife and children if he were to be denied a waiver of inadmissibility and, as indicated by letters from his family, the applicant's attributes as a good father and husband.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.