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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: MAY 3 1 2011 Office: TEGUCIGALPA, HONDURAS FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Honduras 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 married to a United States citizen and the father of two United States citizen children and one stepchild. He is the beneficiary of approved Petitions for Alien Relative (Form I-130) and for Alien Fiancé(e) (Form I-129F). 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 reside in the United States with his spouse, children, and stepchild.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 29, 2009.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "incorrectly determined that [the applicant's wife] and her 3 U.S. citizen children would not suffer extreme hardship if [the applicant] remains in Honduras away from them." *Form I-290B*, dated February 25, 2009.

The record includes, but is not limited to, statements from the applicant's wife, a statement from the applicant's wife's ex-husband, medical documents for the applicant's wife and son, household and utility bills, a pay stub for the applicant's wife, and documents from the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (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.

In the present case, the record indicates that the applicant initially entered the United States on May 15, 2000 without inspection. On November 10, 2005, an immigration judge ordered the applicant removed from the United States. On January 18, 2006, the applicant was removed from the United States.

The applicant accrued unlawful presence from May 15, 2000, the date the applicant entered the United States without inspection, until January 18, 2006, when he was removed from the United States. The applicant is seeking admission into the United States within ten years of his January 18, 2006 removal. The applicant is, therefore, 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 more than one year.

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 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 not the result of removal or inadmissibility. As the Board of Immigration Appeals (Board) 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.

The first prong of the analysis addresses hardship to the applicant's wife if she joins the applicant in Honduras. On appeal, counsel states the applicant's wife is a fourth generation American, and to ask her and her children "to move away from her entire extended family, her support system, to a foreign country is undue hardship." In a statement dated March 20, 2009, the applicant's wife states she "was born and raised in the United States and [her] entire family live in the same city." She claims that she is very close to her mother, and "[t]he thought of moving to another country so far away would be unbearable for her [mother] since [she] [is] her oldest child." The applicant's wife states she "could not imagine living in a country to which the language and culture are distinct from what [she] [has] lived all [her] life." She claims that she only speaks "a limited amount of Spanish" and she would not find employment in Honduras because of her limited Spanish language skills. She also states moving to Honduras would ruin her credit, because she could not pay on her credit cards and car loan. The applicant's wife states her job provides her with health insurance for her and her children. She claims that if she joins the applicant in

Honduras, she "would be forced to terminate [her] employment and loss [sic] [her] medical insurance." The applicant's wife states she suffers from anxiety and depression, and takes medication. In a statement dated March 13, 2009, Dr. states he has been treating the applicant's wife for post traumatic stress disorder, depression and anxiety for the last two years. Dr. states the applicant's wife takes an anti-depressant. The applicant's wife claims that in Honduras, she "would not have access to the same medical care that [she] [has] here in the United States." The AAO notes the claims made regarding the difficulties the applicant's wife would face in relocating to Honduras.

The applicant's wife states she sent two of her children to Honduras for six months "so [the applicant] could care for them"; however, "[t]hey had to visit the doctor several times," they got rash outbreaks and diarrhea, and her son "was hospitalized due to gastroenteritis." The AAO notes that the record establishes that the applicant's son received medical treatment in Honduras for "gastroenteritis cased [sic] by intolerance to water." *Doctor's statement*, dated September 3, 2009. Counsel states because of the applicant's children's illnesses, she had to bring them back to the United States. Dr. indicates that the applicant's wife cannot move to Honduras because she has an older child from a previous relationship and his father will not allow his son to move to Honduras. Counsel states the applicant's wife and her ex-husband "have a amicable relationship and co-parent their child well." In an undated statement, the applicant's ex-husband, states he shares custody of his son with the applicant's wife, he "would never be able to give up [his] parental rights for [his] son, so that [the applicant's wife] could leave this country with him," his son "would not have the same education and health care in Honduras," his son does not speak Spanish, he "would always fear for his [son's] safety," and it would be "impossible for him to travel between both countries due to the cost involved." The applicant's wife states her children "deserve to receive an education in their country so that they can have a prosperous future." Additionally, the applicant's wife states Honduras is dangerous, and "[b]oth [her] appearance and [her] lack of language skills would make it easy for people to single [her] out to victimization or discrimination. [She] would be in constant fear of having one of [her] children kidnapped." She states she is "terrified of the possibility of living in Honduras." The AAO notes the safety concerns in Honduras and the applicant's wife's concerns for her children.

The AAO acknowledges that the applicant's wife is a native and citizen of the United States and that she may experience some hardship in relocating to Honduras. Based on the record as a whole including the applicant's spouse's lack of ties to Honduras and her lack of Spanish language skills which will affect her ability to work and settle into Honduran society, her separation from her family including her son, the medical issues her son previously encountered in Honduras, safety concerns in Honduras, having to raise her children in Honduras, losing her employment in the United States, her mental health issues, disruption of her mental health treatments, and lack of health insurance in Honduras, the AAO finds that the applicant's wife would suffer extreme hardship if she were to join the applicant in Honduras.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States without the applicant, as noted above, the applicant's wife is suffering from post traumatic stress disorder, depression and anxiety, and she takes medication to help her symptoms. The applicant's wife states her symptoms started after her father was killed in a violent crime when she was seven (7) years old, and her mother struggled as a single mother to raise her and her siblings. Dr. states the applicant's wife

has suffered from depression throughout her life. The applicant's wife claims she has "had suicidal ideation due to the tremendous strain of feeling [her] life is out of [her] control. [She] sometimes [feels] [she] would rather be dead than having to live without [the applicant] and not being able to provide for [her] children." Dr. [redacted] states the applicant's wife's depression worsened after the applicant was removed from the United States. He claims that the applicant's wife "has episodes when she feels incapable of caring for her children" and she has to take a sleeping aid to help her sleep. The applicant's wife states she has gained about 30 pounds which her doctor attributes to her depression. Dr. [redacted] also states the applicant's wife has become withdrawn. Dr. [redacted] states the applicant's wife's "physical and mental health have been affected." The AAO notes the applicant's wife's serious mental health problems.

The applicant's wife states she and the applicant have two children, and she has a son from a previous relationship. She claims that the separation from the applicant "has caused the children a lot of emotional and psychological problems." She states her children often ask for the applicant, and she does "not want [her] children to have traumatic childhood [sic] by not having their father involved in their lives." The AAO notes the applicant's wife's concerns for her children.

The applicant's wife states she earns approximately $940 every two weeks, and she receives $200 a month for child support. She states her income is modest and "not sufficient to provide for [herself] and [her] three children without the support of [the applicant]." She claims that her monthly expenses include $300 for a mobile home lot, $355 for daycare, $400 for groceries, $260 for utilities, $400 for a car loan, and $237 for insurance. She also claims that her "monthly expenses exceed [her] take home pay and [she] often find[s] [herself] getting charged late fees and over the limit fees on [her] credit cards or having to borrow money which then puts [her] more in debt." The AAO notes that documentation in the record establishes that the applicant's wife has received a past-due notice and one of her credit cards was over limit. The applicant's wife states her total debt is $19,000 which includes her car loan and credit cards. She claims that the applicant is working in Honduras but he only earns the equivalent of approximately $63.00 a week, and this "income barely allows him to provide for himself." She states if the applicant "were allowed to return to the United States he would be able to help [her] provide for [her] children and eliminate [her] debt." The AAO notes the financial concerns of the applicant's wife.

Considering the totality of the circumstances in the instant case, including the applicant's spouse's mental health issues, financial issues, raising two children without their father, and the normal effects of separation of a loved one, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she remained in the United States in his absence.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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).

The adverse factors in the present case are the applicant's initial entry into the United States without inspection, his removal from the United States, and his unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife and children, the extreme hardship to his wife if he were refused admission, and the absence of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when 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.

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 met that burden. Accordingly, the appeal will be sustained.

Even though the AAO has now sustained the applicant's appeal and approved his Form I-601, the applicant still needs an approved Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The applicant may now file a Form I-212 with the Tegucigalpa, Honduras, Field Office.

ORDER: The appeal is sustained. The waiver application is approved.