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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship
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Services



Htg

Date: **NOV 18 2011**

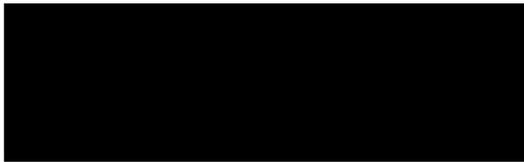
Office: TEGUCIGALPA, HONDURAS

FILE: 

IN RE: Applicant: 

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)

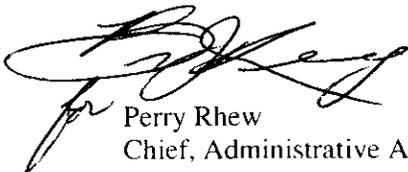
ON BEHALF OF APPLICANT:



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,



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 is seeking admission within ten years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Form I-130, Petition for Alien Relative. 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.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated June 23, 2009.

On appeal, counsel asserts that the denial of the applicant's waiver application would result in extreme hardship to her United States citizen spouse. *Form I-290B, Notice of Appeal or Motion*, dated July 7, 2009; *see also counsel's brief*.

The record includes, but is not limited to, counsel's brief; statements from the applicant's spouse, her mother-in-law and her stepson; psychological evaluation of the applicant's spouse; school records and certificates relating to the applicant's daughter; information on Attention Deficit Disorder (ADHD) relating to the applicant's stepson; medical records relating to the applicant's mother-in-law; information on Type 2 diabetes and Bell's Palsy; statements from [REDACTED]; letters from the applicant's spouse's employer; documentation establishing the applicant's spouse's 401(k) plan and his health and life insurance coverage; letters and notices relating to the applicant's spouse's mortgage; a copy of a loan modification fee receipt schedule; a copy of a gas bill bearing the name of the applicant's father-in-law; a copy of a benefit verification/Deduction authorization; tax and mortgage interest statements; a business permit for J&B 99 Cents & up Discount Store; a certificate of accomplishment awarded to the applicant; and country conditions information on Honduras. The entire record was reviewed and all relevant evidence 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.

In the present application, the record indicates that the applicant entered the United States on February 28, 1997 without inspection. The record also reflects that the applicant applied for Temporary Protected States (TPS) on June 30, 1999, and that TPS was granted on June 19, 2000, with subsequent extensions until January 15, 2009. On May 25, 2008, the applicant departed the United States.

Based on this history, the applicant accumulated unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act until June 30, 1999, the date she filed for TPS. The AAO notes that as a matter of policy, an alien is deemed to be in lawful nonimmigrant status for purposes of section 212(a)(9)(B) of the Act from the date a valid TPS application is filed and continues to remain in lawful status for the duration of the grant of TPS. 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 212(a)(9)(C)(i)(1) of the Act* (May 6, 2009). The record reflects that the applicant is currently in valid TPS status. The applicant's departure from the United States on May 25, 2008, while still under a grant of TPS, triggered the ten year bar under section 212(a)(9)(B)(i)(II) of the Act. As the applicant accrued unlawful presence of more than one year and is seeking admission within ten years of her 2008 departure, she is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act and must seek a 212(a)(9)(B)(v) waiver of inadmissibility.

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 an applicant or other family members 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-Morales*, 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*, 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.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of her inadmissibility.

On appeal, counsel contends that the prolonged separation from the applicant has resulted in extreme emotional and psychological hardship to her spouse. He states that the applicant's spouse has been diagnosed with anxiety, depression, attention problems and somatic complaints. Counsel also states that the applicant's spouse is in a dire financial situation, that he is on the verge of losing his family home, and that although he is working with a company to modify his existing mortgage loan, he is uncertain whether the modification will be approved. Counsel contends that if the applicant's spouse loses his home, he and his family will have no place to live.

In his statement dated September 30, 2009, the applicant's spouse asserts that he has been experiencing emotional and financial hardship since being separated from the applicant. He indicates that his psychological well-being has been greatly affected, that he has been depressed and anxious, and that he has sought counseling from his pastor. He further indicates that he no longer goes out with his friends, that he has stopped singing with his church choir, that he cannot sleep at night, that he wakes up in the middle of the night thinking about the safety of the applicant in Honduras, and that he has developed high blood pressure as a result. The applicant's spouse states that he tries to be bold and remain strong for his children, but that his mother and his son recognize how sad he has become. He also states that his mental health condition is also affecting his productivity at work, that he makes a lot of mistakes and that his co-workers have noticed the change in his personality.

With regards to the financial hardship of separation, the applicant's spouse states that he and the applicant owned a 99 cents store, which provided additional income for the family. However, when the applicant left for Honduras, he lost the business as well as the income from the business because he could not manage it with his regular work schedule and could not afford to hire help. The applicant's spouse also states that he is earning less at his place of employment as a result of the economic downturn. He asserts that he has had to sell a lot of his personal belongings to raise money for his bills as his income was not sufficient to meet the family's financial obligations. He also states that he fell behind in his mortgage payments on the duplex he owns and had to rent the second apartment in which his parents were living to increase his income, moving his parents and younger brother into his apartment. The applicant's spouse reports that he is working with a company to modify his existing loan in the hope of preventing foreclosure on his home. He indicates that he is stressed, that he is worried that he will lose his home and have no place for his family to live.

In a July 31, 2009 psychological evaluation of the applicant's spouse, [REDACTED] reports that a clinical assessment and mental status evaluation of the applicant's spouse, supported by the results of the Beck Depression Inventory II, the Beck Anxiety Inventory and the Achenbach System of Empirically Based Assessment she administered, found him to be experiencing significant emotional difficulties, which are affecting his ability to cope with difficulties and stressful situations, as well as with personal, social and environmental pressures. [REDACTED] diagnosed the applicant's spouse with a Major Depressive Disorder, Single Episode, Moderate (BDI-II 296.22) and an Anxiety Disorder, NOS (BAI 300). She recommends that the applicant's spouse seek professional psychotherapy and a psychiatric evaluation for possible medication. [REDACTED] reports that she found the applicant's spouse to be "an overwhelmed, stressed, worried, anxious and devastated man," who is filled with fears, worries, and concerns regarding the future of his family. She indicates that his current psychological profile makes him vulnerable to more severe depression and an inability to manage his emotions and that as he internalizes his emotions, he will become more anxious and eventually more depressed; and that at some point he may become so overwhelmed with depression and his inability to make a change in his life, that he may act upon his already active suicidal ideation, placing his life and well-being in jeopardy. [REDACTED] observes that the applicant's spouse is experiencing significant financial pressures that are affecting his already fragile mental and emotional health. She recommends psychological counseling for the entire family.

In a September 13, 2009 statement, from [REDACTED] West Los Angeles, states that he has known the applicant's spouse for over 18 years and that recently he has dedicated extra attention to prayer and counseling for him due to his current situation. In a September 21, 2009 declaration, [REDACTED], the applicant's now 16-year-old stepson, states that since the applicant left for Honduras, his father is always sad, forgets things, always looks depressed, and that he is not the same man he was when he and the applicant were together. He states that his father has had to sell a lot of their belongings for extra money and to make room for his grandparents. The applicant's spouse's mother, [REDACTED] in a September 21, 2009 statement, indicates that she is worried about her son because of the stress and the anxiety he has been feeling since the applicant left for Honduras. She states that her son used to be a more outgoing person but that after the applicant left and especially after the denial of her application, he has become very quiet. She also states that he does not want to go out much, that he walks around the house feeling very sad and that sometimes he will leave the house because he is so depressed and does not want his children to see him that way. [REDACTED] further states that her son started biting his nails when he heard about the political turmoil in Honduras because he was concerned about the applicant's safety and overall well-being. She also indicates that her son is experiencing financial problems, that he has difficulties paying his mortgage, that he moved her and her husband into his house so that he could rent their residence and that he had to sell personal belongings to raise money to pay his mortgage and to make room for them.

In support of the applicant's spouse's claim of financial hardship, the record includes a July 15, 2009 employment verification letter showing his annual salary as \$31,918; a copy of a Sales and Use Tax

Permit Verification, indicating that the applicant opened a 99 cents store in Los Angeles, California, on March 1, 2007; tax and interest statements; statements from [REDACTED] indicating outstanding loan balances of \$603,874 and \$69,000 respectively; a statement and several letters from [REDACTED] notifying the applicant's spouse of past due loan payments and possible foreclosure. The record also includes a Loan Modification Fee Receipt Schedule indicating that the applicant's spouse has applied for a loan modification.

The AAO notes that while the record does not contain information on the income generated by the 99 cents store or the current status of the store, the loan modification document, the letters and statements from [REDACTED] concerning past due payments and possible foreclosure on his home establish that the applicant's spouse is experiencing significant financial hardship in the applicant's absence.

Accordingly, when the AAO considers the applicant's spouse's mental health status, his financial hardship and the hardships routinely created by the separation of families in the aggregate, we find the record to demonstrate that the applicant's spouse would experience extreme hardship if he continues to reside in the United States without the applicant.

Counsel asserts that relocation to Honduras would also result in hardship to the applicant's spouse. Counsel indicates that the applicant's spouse was born in Guatemala and that he is a U.S. citizen. He states that the applicant's spouse's immediate family, including his parents and siblings all reside in the United States and that except for the applicant, he does not have any family ties to Honduras. Counsel also asserts that he is responsible for taking care of his parents as they live with him, and that he is concerned that if he relocates to Honduras, there will be no one to care for them. Counsel also contends that the applicant's spouse is concerned about the safety of the applicant in Honduras, and that the political turmoil resulting from the coup d'état in June 2009, continues to escalate and that it is unsafe for him and his family to relocate there.

In his September 30, 2009 statement, the applicant's spouse asserts that he cannot relocate to Honduras because he has significant ties to the United States; he is neither a native nor a citizen of Honduras; he and his family would be at risk in Honduras; he would lose his long-term U.S. employment, which provides him and his children with health benefits; he would not be able to obtain employment that would pay him enough income to support his family. The applicant's spouse also states that he has had primary custody of his now 16-year-old son from a prior relationship and that his son's mother would not allow him to take his son to Honduras. The applicant's spouse states that if he relocated to Honduras, that his older son would grow up without a father, that he would have to live with his mother who cannot financially provide for him and that he would be exposed to abuse by his mother's boyfriend. The applicant's spouse further asserts that his son may have Attention Deficit Disorder (ADD), which will require medical treatment and special accommodations at school. He contends that his son would not be able to receive the medical attention he needs for his ADD or the special educational accommodations he requires in Honduras. The applicant's spouse also states that he is responsible for his parents, that he provides them with

financial support and accommodation, and that it would be a great hardship for him to leave them behind in the United States.

In support of counsel and the applicant's spouse's claims on the impact of relocation, the record includes an online article about education in Honduras; a report from the Overseas Security Advisory Council on Honduras, U.S. Department of State, dated November 11, 2009; an Amnesty International Report on Honduras, dated September 24, 2009; news articles on Honduras from 2009; a U.S. Department of State Country Specific Information on Honduras, dated October 2, 2009 and a Travel Alert on Honduras, dated September 22, 2009.

The AAO acknowledges the country conditions information provided in the record and notes it demonstrates the unstable conditions in Honduras following the January 28, 2009 coup d'état. While the Department of State cancelled the Travel Alert for Honduras on December 8, 2009, the AAO notes that Temporary Protected Status (TPS) designated for Honduras has been extended until January 5, 2012 as the Secretary of Homeland Security has determined that the conditions that prompted the TPS designation for Honduras in 1999 following the environmental disaster caused by Hurricane Mitch persist and prevent Honduras from adequately handling return of its nationals.

Having reviewed the record, the AAO finds that when considered in the aggregate, the applicant's long-term residence in the United States, the loss of his long-term employment and benefits, his familial ties to the United States and the lack thereof in Honduras, the current status of Honduras as a TPS country, and the normal disruptions and difficulties created by relocation, establish that the applicant's spouse would experience extreme hardship if he relocated to Honduras to live with his spouse.

As the applicant has established extreme hardship to her spouse as a result of her inadmissibility, she is statutorily eligible for a waiver under section 212(a)(B)(v) of the Act. Accordingly, the AAO now turns to a consideration of the applicant's eligibility for a favorable exercise 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 unlawful presence in the United States for which she now seeks a waiver, her initial entry into the United States without inspection, and her unauthorized employment. The mitigating factors in the present case are the applicant's U.S. citizen spouse and U.S. citizen daughter and stepson; the extreme hardship to her spouse if the waiver application is denied; the absence of a criminal record; statements from her family members and her pastor noting her good moral character and her attributes as a loving mother and wife, and her commitment to her community through the volunteer work she performed through her church, as indicated by the statement written by her pastor and the certificate of recognition that was awarded to her.

The AAO finds the applicant's immigration violations to be serious in nature and does not condone them. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(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. 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 will be sustained.