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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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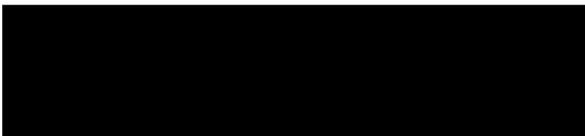
DATE: **OCT 17 2011** Office: NEW YORK, NY

FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Ground 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.

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Dominican Republic 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 ten years of his last departure from the United States. 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 with his spouse.

The District Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated May 13, 2009.

On appeal, the applicant's spouse states that denial of the applicant's waiver request will result in extreme hardship to her. *Form I-290B*, dated June 8, 2009.

The record includes, but is not limited to, statements from the applicant's spouse; a psychological evaluation by [REDACTED] Licensed Clinical Social Worker; a statement from [REDACTED] relating to the applicant's spouse; employment letters from the applicant's and his spouse's employer; copies of W-2, tax returns, and bank statements; a copy of a lease agreement, telephone, cable, electric and gas bills. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

In the present case, the applicant indicated that he entered the United States on April 29, 1992 without inspection. At his adjustment of status interview, the applicant testified that he entered the United States on April 29, 1994, without inspection. On April 27, 2001, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, based on petition by his prior spouse. The Form I-485 was denied on April 10, 2003. In May 2002, the applicant departed the United States

pursuant to Advance Parole and returned to the United States on May 29, 2002 to continue with the adjustment process. He has not subsequently 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 March 27, 2001, the date he filed the Form I-485, thereby suspending his accrual of unlawful presence. The AAO notes that as a matter of policy, aliens do not accrue unlawful presence and are considered to be in a period of stay authorized for purposes of section 212(a)(9)(B) of the Act during the entire period a properly filed adjustment application is pending. Memorandum from [REDACTED] 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 applicant's 2002 departure from the United States triggered the bar to inadmissibility 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 his 2002 departure, he 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.

The AAO notes that the District Director erred in finding the applicant to have accrued unlawful presence following his 2002 return to the United States. As the applicant has not departed the United States since his 2002 return, he has not accrued unlawful presence for the purposes of section 212(a)(9)(B)(i) of the Act. The AAO also observes that periods of unlawful presence are not aggregated in determining a section 212(a)(9)(B) 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. In this case, the applicant's spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (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 his inadmissibility.

On appeal, the applicant's spouse states that she will experience extreme hardship if separated from the applicant due to his inadmissibility. The applicant's spouse asserts that she has been traumatized by the applicant's immigration problems, that she is suffering from depression, anxiety attacks and insomnia. The applicant's spouse further states that she is receiving psychotherapy and counseling in order to maintain some stability in light of the mental, emotional, financial and physical loss she will experience if the applicant is removed from the United States.

In support of these assertions, the record includes a statement from [REDACTED], [REDACTED] dated June 4, 2009. [REDACTED] states that the applicant's spouse is being followed in their Ambulatory Medical Facility for evaluation and treatment of her chronic medical conditions, which include depression. [REDACTED] reports that the applicant's spouse has been referred to the Psychiatry Department for further evaluation and immediate treatment. The record also includes a February 4, 2009, psychological evaluation prepared by [REDACTED] LCSW-R.

While the AAO notes the applicant's spouse's claims regarding the physical, emotional and psychological impacts she would experience upon separation from the applicant, we find them to be *insufficiently supported by the record*. In his statement, [REDACTED], reports that the applicant's spouse suffers from chronic medical conditions, but fails to identify them, the symptoms that they have produced or how they have affected the applicant's spouse's physical health or her ability to meet her daily responsibilities including her employment. [REDACTED] also fails to indicate that the applicant's spouse is dependent on the applicant for her health care needs.

Additionally, although [REDACTED] statement reports that the applicant's spouse is suffering from depression and that he has referred her to the Psychiatry Department for evaluation and treatment, he offers no information regarding the symptoms that led him to diagnose the applicant's spouse with depression or how the applicant's mental state is affecting her ability to function. Therefore, while the AAO acknowledges that [REDACTED] has found the applicant's spouse to be depressed and to require mental health treatment, his statement does not allow us to reach any conclusions regarding the nature or severity of her depression or the impact that the applicant's inadmissibility would have on her mental health. We also note that the record contains no supplemental reports generated by [REDACTED] referral of the applicant's spouse for evaluation and treatment.

The AAO also notes the psychological evaluation prepared by [REDACTED], [REDACTED], but does not find the applicant's spouse to be the subject of the evaluation. [REDACTED] indicates that the client about whom she is writing is from Colombia and is seeking treatment to deal with an abusive prior marriage. Thus, the report from [REDACTED] will not be considered in assessing extreme hardship to the applicant's spouse. Based on our review of the evidence, the record fails to establish the specific impacts of separation on the applicant's spouse's physical or mental health. However, the AAO does take note of the fact that the applicant's spouse's physician has referred her for evaluation and treatment of depression.

Regarding the financial hardship claim by the applicant's spouse, the record contains a letter from the applicant's spouse's employer, Ser Bella Beauty Salon, documenting the applicant's spouse's income as of March 19, 2009. The letter states that the applicant's spouse earns \$150 per week or \$7,800 per

year. This income places the applicant's spouse below the 2009 federal poverty guideline of \$10,830 for a family of one. As a result, the applicant's spouse would experience significant financial hardship without the applicant's income. When the applicant's spouse's poverty and all that it entails is combined with her emotional problems and the normal hardships created by the separation of a husband and wife, as well as [REDACTED] statement that he has referred the applicant's spouse for psychiatric treatment and monitoring is considered in the aggregate, the AAO finds the record to establish that the applicant's spouse would experience extreme hardship if she remains in the United States without the applicant.

The applicant's spouse claims that the applicant's mother is a Lawful Permanent Resident (LPR) of the United States and that she would also experience hardship if the applicant is removed from the United States. The applicant's spouse asserts that the applicant's mother suffers from many ailments. However, there is no evidence in the record that documents the applicant's mother as an LPR, that establishes her health conditions or that indicates the specific reason why she would experience hardship if the applicant is removed from the United States.

The applicant has not addressed the hardships that his spouse would face if she returned to the Dominican Republic to live with him. In the absence of clear assertions from the applicant, the AAO may not speculate as to what hardships if any his spouse would encounter in the Dominican Republic. Therefore the record does not demonstrate that the applicant's spouse would experience hardship upon relocation to the Dominican Republic.

Although the applicant has demonstrated that the qualifying relative would experience extreme hardship if separated from the applicant, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

The record does not establish that a qualifying relative would suffer extreme hardship as a result of the applicant's inadmissibility. Therefore, the applicant has failed to establish eligibility 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.

[REDACTED]

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ORDER: The appeal will be dismissed.