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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H6

DATE: OCT 19 2011 Office: TEGUCIGALPA, HONDURAS



IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); Application for Permission to Reapply for Admission into the United States after Deportation or Removal filed under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tegucigalpa, Honduras. 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 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 (INA or the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of her last departure from the United States. The applicant's admission was also found to be barred by INA § 212(a)(9)(A)(ii)(II), 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having departed the United States while an order of removal was outstanding and seeking admission within ten years of her last departure and INA § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B), for failing to attend an immigration hearing. The applicant seeks a waiver of inadmissibility pursuant to INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) based on extreme hardship to her U.S. citizen husband, and permission to reapply for admission under INA § 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(ii)(iii).

In a decision dated May 22, 2009, the Field Office Director concluded that the applicant's admission was statutorily barred under INA § 212(a)(6)(B) for failure to attend a removal hearing, a provision that affects the applicant's admission for five years after her last departure from the United States and for which there is no waiver.

The applicant in a letter submitted to the AAO on June 4, 2011 by her attorney stated that the five year period under INA § 212(a)(6)(B) has passed and requested that her case be remanded to the Field Office Director for consideration on the merits. The applicant stated that her U.S. citizen husband has suffered emotionally, financially, and physically as a result from the separation from the applicant and provided additional evidence to demonstrate that hardship. The AAO will consider the appeal on its merits.

The record contains an approved Petition for Alien Relative (Form I-130) filed on the applicant's behalf by her U.S. citizen husband, Application for Waiver of Grounds of Inadmissibility (Form I-601), Application for Permission to Reapply for Admission (Form I-212), Biographical Information (Forms G-325A) for the applicant and her spouse, Form I-290B, and additional documentation of the applicant's immigration history in the United States. The record also contains sworn declarations from the applicant's spouse, doctor's letters concerning the applicant's spouse's son and the applicant's spouse's mother, a letter from the applicant's daughters, a letter from the applicant's spouse's son's school principal, documentation of the applicant's spouse's travel to Honduras to visit the applicant and his son, documentation of the applicant's daughters' travel to Honduras to visit the applicant, documentation concerning the reasons for the applicant's failure to appear at her prior immigration hearing, a sworn declaration from the applicant, a letter from the applicant and her spouse's therapist, a letter from the applicant's spouse's parents, birth certificates, foster care and adoption documents for the applicant's spouse's son, federal tax returns, country conditions documentation regarding Honduras, and letters regarding the applicant's moral character.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The facts of this case are as follows. The applicant first arrived in the United States without inspection on or about July 17, 1999 through Eagle Pass, Texas. She was detained by the immigration authorities and placed into removal proceedings. She was ordered removed *in absentia* on August 10, 2000 in San Antonio, Texas. The applicant remained in the United States until she departed voluntarily at her own expense on May 31, 2006. During her time in the United States, the applicant married her spouse, a U.S. citizen, on January 26, 2002. The I-130 filed on her behalf by her U.S. citizen husband was approved on February 21, 2007. The applicant subsequently sought an immigrant visa, waiver of inadmissibility and permission to reapply for admission at the U.S. Consulate in Tegucigalpa, Honduras.

The AAO will consider each ground of inadmissibility in turn.

Section 212(a)(6)(B) of the Act provides:

Failure to attend removal proceeding. Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

Although no waiver exists for inadmissibility under section 212(a)(6)(B) of the Act, this ground of inadmissibility only applies to admissions within the five years since the applicant's last departure from the United States. Because the record is clear that the applicant last departed the United States on May 31, 2006, the applicant is no longer inadmissible under this provision as of May 31, 2011.

The applicant was also found inadmissible under INA § 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for one year or more.

Section 212(a)(9) of the Act provides:

(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 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 Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant's time in unlawful presence began to accrue upon her entry into the United States without inspection on or about July 17, 1999 and ran through her departure from the United States on May 31, 2006. The applicant was unlawfully present in the United States for one year or more. In applying for an immigrant visa, the applicant is seeking admission within ten years of her last departure from the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for a period of more than one year. The applicant has not disputed her inadmissibility on this ground. She is eligible to apply for a waiver of this ground of inadmissibility under INA § 212(a)(9)(B)(v), as the spouse of a United States citizen. In order to qualify for this waiver, she must first prove that the refusal of her admission to the United States would result in extreme hardship to her U.S. citizen spouse. And, if she meets that requirement, she must then prove that she merits a waiver in the exercise of discretion.

The applicant's qualifying relative in this case is her U.S. citizen husband. The AAO notes that only hardship to the applicant's U.S. citizen spouse can be taken into account in the determination of extreme hardship. Congress did not include hardship to an applicant's children as a factor to be considered in assessing extreme hardship in cases under INA § 212(a)(9)(B)(v) for waivers of unlawful presence. Hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

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 applicant asserts that her U.S. citizen spouse has suffered emotional, financial, and physical hardship due to his wife’s inadmissibility. The applicant and her spouse have been separated physically since May 31, 2006. During that time period, the applicant and her spouse have shared custody of the applicant’s two daughters from her previous marriage and the applicant’s spouse’s adopted son. The applicant’s spouse currently resides with the applicant’s teenage daughters in California and the applicant resides with her ten-year-old stepson in Honduras. The applicant’s spouse’s son suffers from frontal lobe atrophy and attention deficit disorder that has impacted his ability to behave and learn. The boy was adopted by the applicant’s spouse, the child’s grandfather by birth, after apparent neglect by the child’s birth mother that led to the child overdosing on methamphetamines at eight months old. The applicant’s spouse states that the

adoption was successful due to the applicant's role in helping to provide a stable home and care for the child. The applicant's spouse states that he is now suffering emotionally because he is not able to care for the child due to his wife's inadmissibility and his need to work full-time in the United States to support his family. He states that he is distraught by the fact that the applicant is raising the child apart from him, but he feels that she is in the best position to provide for him because of his special needs and his need to work full-time.

The applicant's spouse also helps care for his elderly parents in California. The record reflects that the applicant's spouse's mother has Alzheimer's disease, is bedridden, and is 100% disabled. [REDACTED] reports that [REDACTED] is 86 years old, is bed-ridden, incontinent, and completely dependent on the care of others 24 hours per day. [REDACTED] also states that the applicant's spouse "helps with feeding, shopping, and handling the emotional and financial needs of his parents." The applicant's spouse's father suffers from prostate cancer and is also of advanced age, and as such, is unable to meet the needs of caring for his wife. The applicant's spouse is emotionally affected by his parent's health and his inability to be able to rely on the applicant for the emotional and physical support that she used to provide him in caring for his parents.

The applicant's spouse also states that he is anxious and depressed when he must leave Honduras after he visits his wife and son there. He states that he wishes that he could remain in Honduras with them, but he is not able to do so because of his obligations in the United States, namely his insurance business, care of his elderly parents, and care of his stepdaughters. The applicant's spouse was affected emotionally by the divorce in his first marriage, where his wife suffered from alcohol dependency. The applicant's spouse stated in his personal declaration that his first spouse was in and out of jail, and he raised his daughter from that marriage on his own. The divorce and custody documents support in the record support the applicant's spouse's statements. As a result of that emotional trauma, the applicant's spouse is particularly affected by the separation from the applicant.

The applicant's spouse's stated financial hardship comes from his need to maintain two homes, one in California and one in Honduras, and provide for his wife, son, step-daughters, and parents. He has been in the insurance broker business in California since at least 1996 and relies on that business to support his family. He states, however, that he has lost business due to his separation from his wife because he has spent the summers in Honduras to maintain his marriage. He also states in his personal declaration that he has "burned through his savings," although no documentary evidence is provided of his financial loss. In the applicant's declaration, she states that her husband has lost 60% of his income due to his travel to Honduras to visit her. Again, no documentary evidence is provided of this financial loss. There is documentation in the record of the applicant's spouse's travel to Honduras, as well as evidence of the applicant's daughters' travel to Honduras, which presumably is an expense for the applicant's spouse. Because of the lack of documentary evidence of other financial loss, the financial hardship alone in this case is not enough to rise to the level of extreme hardship. When coupled with the emotional hardship that the applicant's spouse must suffer due to the separation from his wife while at the same time

caring alone for his elderly parents and stepdaughters, however, the hardship rises to the level of extreme hardship.

In this case, the applicant's spouse is a native of the United States who does not speak Spanish. He has lived his entire life in the United States and his professional and financial livelihood is dependent on his established insurance broker business that he has operated in California since 1996. The applicant's spouse provides physical, financial, and emotional support to his elderly parents and the applicant's two lawful permanent resident teenage daughters in the United States. If he were to move to Honduras permanently, he would no longer be able to provide physical and emotional support his parents. Moreover, the loss of his professional career in the United States would affect his ability to provide for his family financially. Although there is no evidence in the file regarding the applicant's ability to find a paying job in Honduras, his inability to speak Spanish and his training in a field specific to the conditions in the United States would certainly result in a hardship in that process. The AAO notes that Honduras has a developing economy with widespread poverty and unemployment. *See* U.S. Department of State, Honduras, Country Specific Information, available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1135.html (last visited Sept. 19, 2011). That financial hardship of the loss of the applicant's spouse's career coupled with the emotional hardship that would be caused by the separation from his elderly parents, would likely result in extreme hardship to the applicant's spouse. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 566 (noting relevance of the presence of family ties to U.S. citizen or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate, and the financial impact of departure).

The record, when considered in the aggregate, reflects that the applicant's U.S. citizen husband would suffer extreme hardship if the applicant is unable to reside in the United States. Moreover, the applicant has established that her husband would suffer extreme hardship were he to relocate abroad to reside with her. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Morales*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include the care that she has provided to her stepson at this time and to her parents-in-law before her departure from the United States. Additionally, the applicant has written a statement where she has explained her actions that led to her inadmissibility and she has accepted responsibility for those actions. The unfavorable factors include the applicant's unlawful entry into the United States, her failure to notify the Immigration Court of her change of address, and her unlawful presence in the United States. The applicant's violations of immigration law cannot be condoned, but the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

Lastly, the applicant was found to be inadmissible under INA § 212(a)(9)(A)(ii)(II). In regards to this ground of inadmissibility, the applicant submitted an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) in the same decision as the denial of her Application for a Waiver of Grounds of Inadmissibility. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under INA § 212(a)(9)(B)(v) it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On August 10, 2000 the applicant was ordered removed from the United States *in absentia*. The applicant last departed the United States on May 31, 2006. She remains inadmissible to the United States under INA § 212(a)(9)(A) until May 31, 2016 and, in the meantime, requires permission to reapply for admission. A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained.