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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
and Immigration
Services**

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Date: **SEP 30 2011**

Office: NEW YORK

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,

Maria F. Rhew

for

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application is approved. The matter will be returned to the district director for continued processing.

The record reflects that the applicant is a native and citizen of Ecuador who entered the United States without authorization in September 1994. In March 2001, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), based on a concurrently filed Form I-130, Petition for Alien Relative, submitted on the applicant's behalf by his then U.S. citizen spouse.¹ In January 2002, the applicant was issued Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States. The applicant's Form I-485 was denied on March 12, 2004. The applicant submitted a second Form I-485 application in March 2008, which was denied in May 2009. Pursuant to the record, the applicant continues to reside in the United States.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until he filed the first Form I-485 application in March 2001. Thus, the applicant is 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. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated May 8, 2009.

In support of the appeal, counsel for the applicant submits the following: a brief; a psychological addendum from [REDACTED] dated May 27, 2009; and a re-evaluation report from [REDACTED] dated March 26, 2009. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B)(i)(II) 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-

¹ The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. See *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

....

(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 Attorney General [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...

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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. 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).

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’s U.S. citizen spouse contends that she would suffer extreme hardship were she to remain in the United States while her husband relocates abroad due to his inadmissibility. The applicant’s spouse explains that she can not live without her husband and the prospect of long-term separation from him is causing her hardship. She details that she is having trouble eating and sleeping and her lack of sleep is jeopardizing her job. She explains that she is tremendously depressed and traveling back and forth to visit her husband in Ecuador is not an option as she would be unable to afford the extensive travel. *Letter from* [REDACTED] dated October 26, 2008.

In support, a letter and an addendum have been provided from [REDACTED] the applicant’s spouse’s treating psychologist. [REDACTED] confirms that the applicant’s spouse is currently being treated in individual psychotherapy two to three times per month for Major Depressive Disorder and

has been prescribed Zoloft, an antidepressant medication, by her primary care physician. [REDACTED] explains that the applicant's spouse's symptoms including chronic insomnia, disruption of appetite, daily depressed mood, inability to enjoy her usual pleasurable activities, a restriction in her socialization, disturbances of her memory and powers of concentration and attention and feelings of helplessness and hopelessness. Her depression, he explains, is negatively impacting all aspects of her life, including her gainful employment and her physical health. [REDACTED] concludes that the applicant's spouse's symptoms are directly connected to her fear of her husband being forced to leave the United States due to his inadmissibility. *Letters from* [REDACTED] [REDACTED] dated April 7, 2009 and May 27, 2009.

In a psychological evaluation and in a re-evaluation, [REDACTED] confirms that since the first time he met the applicant's spouse, in September 2008, the Adjustment Disorder with Mixed Anxiety and Depressed Mood that he initially diagnosed has worsened. [REDACTED] concludes that the applicant's spouse is now suffering from Major Depressive Disorder and long-term separation from the applicant's spouse may trigger a further escalation of depressive symptomatology, which might lead to an emotional collapse and hospitalization. *Letters from* [REDACTED] [REDACTED] dated September 22, 2008 and March 26, 2009. Finally, numerous letters have been provided from friends and family attesting to the hardships the applicant's spouse will experience due to her husband's inadmissibility. Based on a totality of the circumstances, the AAO concludes that were the applicant to relocate abroad, his wife would experience extreme hardship.

The applicant's U.S. citizen spouse asserts that she does not want to relocate to Ecuador to reside with the applicant due to his inadmissibility. She explains that she was born and raised in the United States and has no ties to Ecuador and long-term separation from her family, including her parents and siblings, her friends, her gainful employment and her community would cause her hardship. She further explains that she is unfamiliar with the country, culture, customs and language and a relocation would cause her hardship. Finally, the applicant's spouse asserts that she is a primary caregiver to her younger sister, who suffers from Down's syndrome, and long-term separation from her, and the inability to care for her on a daily basis as she has been doing, would cause her hardship. *Supra* at 3, 5-6.

The record reflects that the applicant's spouse was born and raised in the United States. Were she to relocate to Ecuador to reside with the applicant, she would have to adjust to a country with which she is not familiar. She would have to leave her community, her family, most notably her younger sibling, and her gainful employment and she would be concerned for her well-being in Ecuador. It has thus been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on

the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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).

In evaluating whether . . . 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 "balance 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 favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant were to relocate to Ecuador, regardless of whether she accompanied the applicant or stayed in the United States, his community ties, his long-term gainful employment as a truck driver, support letters from the applicant's family and friends, the payment of taxes, the apparent lack of a criminal record, and the passage of more than sixteen years since the applicant's unlawful entry to the United States. The unfavorable factors in this matter are the applicant's unauthorized entry to the United States and periods of unlawful presence and unlawful employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the I-601 waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.