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



H6

DATE: APR 12 2012 OFFICE: PORTLAND, MAINE

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year, voluntarily departing the United States, and again seeking admission within 3 years of his last departure from the U.S. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child.

The Field Office Director concluded that the applicant 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. See *Decision of the Field Office Director*, dated August 31, 2009.

On appeal, counsel asserts that if the waiver is not granted, the applicant's spouse would suffer extreme hardship of an emotional/psychological, physical/medical, and economic nature. See *Counsel's Appeal Brief*, undated.

The record contains but is not limited to: Form I-290B and counsel's brief; Forms I-601, I-485 and denials of each; hardship affidavit; applicant's affidavit; applicant's son's mother's affidavit; earlier hardship statements by applicant, applicant's spouse, and applicant's son; psychological evaluation; medical records; marriage, birth, and death records; financial records; and Form I-130. The entire record was reviewed and considered in rendering a decision on the appeal.

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- ...

(I) has been unlawfully present in the United States for a period of more than 180 days but less than one year, voluntarily departs the United States (whether or not pursuant to section 244(e)) prior to commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal 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 record reflects that the applicant entered the United States on December 11, 2000 as a B-2 visitor authorized to stay in the U.S. for six months. He remained beyond the authorized period, not departing the U.S. until after one year. The applicant entered the United States again on February 5, 2002 as a B-2 visitor with authorization to stay until August 4, 2002. He has not departed the U.S. since. The applicant accrued unlawful presence from June 10, 2001 until his December 2001 departure. As the applicant was unlawfully present in the United States for more than 180 days but less than one year, he was found to be inadmissible under section 212(a)(9)(B)(i)(I) of the Act. The record supports this finding, the applicant does not dispute inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B) of the Act.

A waiver of inadmissibility under section 212(9)(B)(v) of the Act is dependent on a showing that the bar to admission would impose 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 applicant's children can be considered only insofar as it results in hardship to the 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 record reflects that the applicant’s spouse is a 49-year-old native of Puerto Rico and citizen of the United States. She states that less than two weeks after marrying the applicant in February 2008, she lost her job of more than twenty-five years and has been unable to find work since. The applicant’s spouse states that her husband supports her financially, allowing her to pursue a medical billing degree with which she can rejoin the workforce. A letter from Salter College confirms that she is a full-time student who started the program in June 2009 and is expected to graduate in April 2010. The applicant’s spouse’s household consists of herself, her adult son [REDACTED] from a prior marriage, the applicant, and his son from a prior relationship, [REDACTED] who spends three full days and two nights each week with his father. The applicant’s spouse states that her husband supports not only their household, but makes weekly child support payments for

care and purchases clothing, shoes and other items for him as needed. The applicant states that he is his spouse's sole means of support and also helps her pay for school.

Assertions have been made concerning hardship to the applicant's child. As discussed above, hardship to the applicant's children can be considered only insofar as it results in hardship to the applicant's qualifying relative – here the applicant's spouse. The U.S. citizen mother of the applicant's now 6-year-old son, states that the applicant is a wonderful father and asks for him constantly. mother states that without a doubt her son would suffer tremendously if his father was not around him. While the AAO acknowledges that the applicant and his son will suffer separation-related hardship, the applicant has failed to establish that the separation-related hardships to the applicant's child would cause extreme hardship to the applicant's spouse.

The applicant's spouse states that she suffers from a number of serious medical conditions for which she will be on medication for the rest of her life, including diabetes for which she requires insulin injections, and from diabetes-related nerve damage which limits her mobility, particularly in the winter. She states that the applicant assists her in every way he can with clothing, cooking, and household chores and he actively participated in her mother's care before she passed away. MD confirms that the applicant's spouse has a medical history of asthma, type 2 diabetes mellitus, diabetic peripheral neuropathies, anxiety, hypertension and high cholesterol.

The applicant's spouse states that her husband supports her emotionally and she cannot sleep or eat just thinking they could be separated. In a psychological evaluation dated October 28, 2009, Ph.D. states that removal of the applicant would be a devastating loss for his spouse who described their relationship as the first time in her life someone was there for her giving the emotional and practical support she needs. diagnoses the applicant's spouse with recurring Major Depression and Acute Anxiety and states she would be at a higher risk for developing chronic, more debilitating depression in the years to come if her husband is required to leave the U.S. for an extended period. states that the applicant's spouse reported suffering acute anxiety and panic symptoms during some difficult times in the past. In the psychological evaluation, provides a substantial amount of information concerning the basis, criteria, and symptoms underlying each diagnosis. states that the applicant's spouse reported a significant history of alcoholism and depression in her family, the accounts of which are detailed in the evaluation. states that the applicant's spouse's significant family history and her own history of depressive illness and anxiety has left her with a much greater vulnerability to more chronic debilitating depressive illness over time.

The AAO has considered cumulatively all assertions of separation-related hardship including the medical/health-related, emotional/psychological, physical and economic implications to the applicant's spouse. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship due to separation from the applicant.

Addressing relocation-related hardship, the applicant's spouse states that she was born a U.S. citizen in Puerto Rico and has lived on the mainland since she was 10-years-old. She states that she does not speak Portuguese, has no literacy skills in the language, and at nearly 50-years-old would have little chance securing employment in a foreign country. The applicant's spouse states that she has close family ties in the U.S., particularly to her niece whom she looks after and her adult son who lives with her and that separation from them would be very difficult. The applicant's spouse states that she fears for her health in Brazil, as she suffers a number of serious medical conditions, requires multiple medications including insulin which must be refrigerated, and needs constant care from her trusted physicians. [REDACTED] Ph.D. states that psychosocial losses like separation from children, extended family members, friends, neighbors, career path, home and familiar surroundings, familiar cultural context and identity would alone be sufficient to trigger the onset of Major Depression, but for the applicant's spouse who is already suffering from the disease, has a prior personal history of depressive illness, and a family history of alcoholism and depression, relocation to Brazil would be devastating.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including her lifelong residence in the United States; adjusting to an unfamiliar culture and country in which she has never lived and does not speak the language; close family ties to her adult son and extended family members as well as to the applicant's young son in the U.S.; significant physical medical, psychological and health-related conditions requiring frequent monitoring, medication, and access to trusted physicians, treatment and facilities; and her stated economic, employment, living conditions and healthcare system concerns regarding Brazil.

Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship if she were to relocate to Brazil to be with the applicant.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different

types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Morales 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 for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion 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 present case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's significant family ties - particularly to his 6-year-old son to whom he is very close, in whose life he is quite active on a regular basis, and whose U.S. citizen mother attests to the applicant's good moral character and

essential presence in her son's life; the applicant's close relationship with his adult stepson who attests to the applicant's character and essential presence in his mother's life; attestations by others to his good moral character and essential presence in the community; and his lack of criminal history. The unfavorable factors are the applicant's periods of unlawful presence and unauthorized employment in the United States.

Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

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 his burden and the appeal will be sustained.

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