

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



U.S. Citizenship  
and Immigration  
Services

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Date: **DEC 08 2012** Office: **NAIROBI, KENYA**

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Nairobi, Kenya, and 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 Republic of the Congo (Congo) 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 readmission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen and is the father of two U.S. citizen stepchildren. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 31, 2011. The AAO notes that the Field Office Director also denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) in the same decision, though no Notice of Appeal or Motion (Form I-290B) was filed for that application.

On appeal, the applicant, through counsel, claims that the Field Office Director erred in denying the applicant's waiver application, because the applicant's wife is suffering financially and emotionally. *Form I-290B, Notice of Appeal or Motion*, filed February 15, 2011. Counsel also submits new evidence of hardship on appeal.

The record includes, but is not limited to, statements from the applicant's wife, letters of support, medical documents for the applicant's wife, financial documents, photographs, country-conditions documents on Congo that accompanied the applicant's asylum application, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9) 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.

....

(iii) Exceptions.-

....

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

....

- (v) Waiver.-The [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 [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. Hardship to the applicant, his stepchildren, or grandchildren 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 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 of Immigration Appeals (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.

In the present application, the record indicates that on April 2, 1997, the applicant entered the United States on a B-2 nonimmigrant visa with authorization to remain in the United States until October 1, 1997. On October 1, 1997, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589), which an immigration judge denied on August 12, 2002. The applicant filed an appeal of the immigration judge's decision to the Board, which the Board dismissed on December 30, 2003. The applicant then filed a Petition for Review with the Sixth Circuit Court of Appeals (Sixth Circuit), which the Sixth Circuit denied on February 10, 2005. On May 25, 2004, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), which was denied on July 21, 2005. On March 30, 2008, the applicant was removed from the United States.

The AAO notes that the proper filing of an affirmative application for adjustment of status has been designated by the 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 Memorandum by Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, dated May 6, 2009.* Additionally, under section 212(a)(9)(B)(iii)(II) of the Act, no period of time in which the applicant has a bona fide asylum application pending shall be taken into account in determining the period of unlawful presence in the United States, unless the applicant was employed without authorization. Since the applicant accrued over one year of unlawful presence between July 22, 2005, the day after his Form I-485 was denied, and March 30, 2008, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year, and seeking admission within 10 years of his departure from the United States. The applicant does not contest his inadmissibility.

The record contains references to hardship the applicant's stepdaughter and grandchildren would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children or grandchildren as factors to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's stepdaughter and grandchildren will not be separately considered, except as it may affect the applicant's spouse.

Other than the applicant's wife's statement regarding the applicant's difficult living conditions in Congo, no claim has been made that the applicant's wife will endure hardship should she relocate. The AAO acknowledges that the applicant's wife is a U.S. citizen, and relocation would involve some hardship. However, the applicant has not submitted objective documentary evidence that demonstrates that she will experience hardship in Congo. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, based on the record before it, the AAO finds that, considering the potential hardships in the aggregate, the applicant has failed to establish that his wife would suffer extreme hardship if she relocated to Congo.

Regarding the hardship caused by their separation, in her statement dated February 16, 2011, the applicant's wife claims that without the applicant, she is suffering physically and mentally, and she has "no reason to live." In her statement dated August 22, 2010, the applicant's wife states she speaks to the applicant every day, and she worries about him. In a statement dated March 9, 2010, [REDACTED] states the applicant's wife is being treated for dysthymic disorder, but despite therapy and medication, the applicant's wife is still "quite depressed" and anxious. [REDACTED] indicates that the separation from the applicant is a "major issue" for the applicant's wife, "causing her more distress." Medical documentation in the record establishes that the applicant's wife was admitted to an emergency room on February 9, 2011, after commenting to her sister about "not wanting to go forward." On appeal, counsel claims that as a result of the denial of the applicant's waiver application, the applicant's wife had a breakdown, was "dangerously hypertensive," and required medical attention. The applicant's wife was diagnosed with depressive disorder, adjustment disorder, anemia, and hypertension. Additionally, in her statement dated November 30, 2010, the applicant's wife claims she also suffers from diabetes, and she needs a hysterectomy because of fibroid tumors in her uterus.

The applicant's wife states she cannot afford to live on her own, so she resides with her sister and brother-in-law. However, her sister lost her job, her house is being foreclosed, and they cannot continue to support her. Additionally, in a psychiatric diagnostic assessment dated February 10, 2011, caseworker [REDACTED] reports that the applicant's wife states she works full-time and sends the applicant \$500 a month, and she is paying for an immigration attorney. Documentation in the record corroborates claims that the applicant's wife sends money to the applicant. In her statement dated March 15, 2010, the applicant's wife states the applicant is not working. She claims that she cannot afford the medicines she needs for her medical conditions or the hysterectomy she requires. Moreover, between legal fees, her own bills, and supporting the applicant, she has no money left over, and any extra money is sent to the applicant.

The AAO acknowledges that the applicant's wife is suffering emotional, medical, and financial hardship due to her separation from the applicant. The AAO finds that when the applicant's wife's emotional, medical, and financial issues are considered in combination with the hardships that usually result from separation of a spouse, the applicant has established that his wife is experiencing extreme hardship in the United States in his absence.

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. 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, supra* at 886. 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, supra* at 632-33. 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.

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.

**ORDER:** The appeal is dismissed.