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

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: DEC 13 2012 Office: PANAMA CITY, PANAMA FILE: [redacted]

IN RE: [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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Colombia 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 10 years of her last departure. The applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative. She seeks a waiver under 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 her spouse.

The director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Field Office Director's Decision.* dated June 23, 2011.

On appeal, counsel asserts that the director erred in concluding that the applicant's qualifying relative would not suffer extreme hardship and submits additional hardship evidence for consideration. *See Counsel's Brief in Support of Appeal*, dated August 25, 2011.

The evidence of record includes, but is not limited to: counsel's briefs, statements from the applicant's spouse, a psychological evaluation of the applicant's spouse, medical evidence, financial documents, copies of relationship and identification documents, and information concerning country conditions in Colombia. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.
> >
> > (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay

> authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record reflects that the applicant entered the United States in August 1989 without inspection. She was placed in deportation proceedings and on November 29, 1989, an immigration judge ordered her deported *in absentia*. The record contains inconsistent statements about whether the applicant departed the United States in 1992 and reentered without inspection in 1996.[1] The applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485), in 2003. The applicant was apprehended in August 2005 when she appeared for her adjustment interview. The applicant filed a motion to reopen, which was denied by an immigration judge on October 11, 2005, and the applicant was removed on December 19, 2005. The AAO finds that the applicant accrued over one year of unlawful presence from April 1, 1997 until she filed Form I-485 in 2003.[2] As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her 2005 departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's 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 the applicant or other family members 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*, 21 I&N Dec. 296, 301 (BIA 1996). In the instant case, the applicant's spouse is the qualifying relative.

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*,

---

[1] The AAO concludes that inconsistencies concerning the applicant's departure in 1992 and reentry in 1996 are inconsequential in determining her inadmissibility pursuant to sections 212(a)(9)(B) and (C) of the Act.

[2] No period of unlawful presence prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

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, 631-32 (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, "[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., In re 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 her inadmissibility.

On appeal, counsel states that the applicant's spouse's financial hardship is extreme: He had to cancel his electricity account, cellphone, and cable services because he could not pay for them. Counsel states that although the applicant's spouse is diagnosed with depression, he cannot afford treatment, because he lost his medical insurance benefits when he lost his employment. Counsel further states that the applicant's spouse is a native of Brazil and he has been in the United States for over thirty-seven years. According to counsel, moving to an unfamiliar country like Colombia, where the applicant's spouse fears for his safety, would be a "significant change" for him, and he "would not be entitled to employment or health benefits" there. Furthermore, counsel states that the applicant "entirely" relies on her spouse for financial support, because she is unemployed in Colombia.

The applicant's spouse states that "life has been unbearable" for him without the applicant. He suffers from depression, anxiety, insomnia and a lack of appetite. He states that every day he falls "deeper and deeper into despair," but he cannot receive psychological help because in May 2010, he lost his medical and dental benefits when he was laid off. He was unemployed for about four months and he now earns $400 a week in his current employment, though he receives no medical benefits. The applicant's spouse states that he could not afford to pay his bills. Documentary evidence, including collection claims notices, corroborates the applicant's spouse's claims. He turned off his electricity in June 2011 and cancelled his cellphone and cable services. He cannot cook at home because he has an electric stove, and he uses candles at night. He pays $1,025 monthly rent and sends $300 each month to the applicant. He also pays a mortgage on undeveloped property that he tried selling; the offers he received were less than his mortgage debt. Financial evidence in the record corroborates his claims of financial hardship.

In his 2009 psychological report, [redacted] a clinical psychopathologist, diagnosed the applicant's spouse with adjustment disorder with predominant depressed mood and mild anxiety. The applicant's spouse's symptoms include anxiety, nervousness, worry, and fear; frequent negative thoughts; loss of pleasure and joy; feeling restless, agitated, angry, fatigued, and guilty about issues; and inability to relax and loss of sleep. The applicant's spouse reported to [redacted] that he fears for the applicant's well-being in Colombia, because her former husband was killed there.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant. Documentary evidence corroborates the applicant's spouse's claims of extreme financial hardship and shows a significant decreased in his income, which has put him in a dire situation and has affected his living standards substantially. We also note his emotional state and his inability to receive

counseling because he lost his medical benefits when he became unemployed and his current employment does not offer benefits. The applicant's spouse also is concerned about his ability to support the applicant with his limited income because she is unemployed in Colombia. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if he were to relocate to Colombia. We note that the applicant's spouse is not a native or citizen of Colombia. Without his current income, he would be unable to financially support himself and the applicant. Although limited, his current income in the United States permits him to support himself and the applicant. Furthermore, the applicant's spouse has been living in the United States for most of his life, over thirty-seven years, and he has no family in Colombia other than the applicant. The AAO also notes the safety concerns raised by the applicant's spouse and counsel. The U.S. Department of State has issued a travel warning for Colombia, dated October 3, 2012, which indicates that although security in Colombia has improved in recent years, terrorist and criminal activities remain a threat throughout the country. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to Colombia to be with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(a)(9)(v) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to her qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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, 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 adverse factor in the present case is the applicant's unlawful presence in the United States, for which she now seeks a waiver, her unauthorized employment, and her noncompliance with the immigration judge's deportation order in 1989. The mitigating factors include the applicant's U.S. citizen spouse, the extreme hardship to his spouse if the waiver application is denied, the applicant's length of stay outside of the United States, and the absence of a criminal record for the applicant.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.