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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

H6

Date: FEB 22 2012

Office: BALTIMORE

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Maria Yeh
fs

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted and the prior decision will be affirmed. The waiver application is denied.

The applicant is a native and citizen of Belize who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her U.S. citizen spouse and child.

The District Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to either of her qualifying relatives. The application was denied accordingly. *Decision of the District Director*, dated February 12, 2007.

On appeal, the AAO first noted that the applicant was clearly inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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. As stated by the AAO:

The AAO observes that the applicant has resided in the United States since May 1992. *Form G-325A, Biographic Information, for the applicant*. While the record is unclear as to how the applicant initially entered the United States, the AAO notes that it does establish that the applicant was admitted to the United States on a B-2 visa valid for six months on September 22, 2001 at Los Angeles, California. *Form I-94, Departure Card*. The applicant therefore was no longer in a lawful status as of March 22, 2002. *Id.* The applicant remained in the United States and filed a Form I-485, Application to Register Permanent Resident or Adjust Status on August 26, 2003. *Form I-485*. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining the bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant departed the United States, returning on May 21, 2004 and again on October 24, 2004 under an advance parole authorization. *Form I-512L, Authorization for Parole of an Alien into the United States*, dated April 26, 2004. Although not addressed by the District Director, the AAO notes that the applicant's departure from the United States under the advance parole authorization triggered the unlawful presence provisions of the Act and that she accordingly accrued unlawful presence from March 22, 2002, the day after her lawful nonimmigrant status ended, to August 26, 2003, the date she filed the Form I-485. In applying to adjust her status, the applicant is seeking admission within ten years of her 2004 departure from the United States.

The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year.

Decision of the AAO, dated July 13, 2009.

The AAO concluded that the applicant had failed to establish that her U.S. citizen spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant as a result of her inadmissibility and alternatively, were he to remain in the United States while his wife resided abroad due to her inadmissibility. The appeal was dismissed. *Id.* at 5-6.

On motion to reopen and reconsider, counsel first asserts that the AAO's shifting of the basis for inadmissibility is patently unfair and provides the applicant with insufficient time and means for rebuttal. *See Brief in Support of Motions*, dated August 11, 2009. The AAO notes that counsel on motion does not contest the ground of inadmissibility referenced by the AAO or submit any evidence to rebut the AAO's finding. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). While the AAO has determined that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence, a ground that was not identified in the decision of the district director, the applicant remains eligible for a waiver of inadmissibility.

Counsel further contends that the district director made a number of factual errors with regard to the applicant's previous arrests. Counsel asserts that the applicant was not arrested in 2000 and 2004. *Supra* at 2. Because the applicant is inadmissible under sections 212(a)(9)(B)(i)(II) of the Act and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver of inadmissibility under section 212(h) of the Act, the number of times the applicant has been arrested and/or convicted and moreover, whether the applicant is in fact inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having being convicted of crimes involving moral turpitude, need not be addressed at this time.

Section 212(a)(9)(B) 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.

...

(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 or the child 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-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 AAO determined that extreme hardship had not been established were the applicant’s spouse to remain in the United States while the applicant relocated abroad due to her inadmissibility. As the AAO noted,

If the applicant’s spouse resides in the United States, the applicant needs to establish that he will suffer extreme hardship.... Counsel asserts that both the applicant’s child and spouse are undergoing medical treatment for severe physical conditions, and as such, they both require the attention and care of the applicant. *Attorney’s statement*, dated March 12, 2007. However, as previously noted, the record fails to provide sufficient evidence to establish the specific nature or severity of the medical conditions of the applicant’s spouse and child, or that the applicant’s spouse would be unable to care for their child in her absence. Further, the applicant’s child is not a qualifying relative for the purposes of this case and the record does not specify how the applicant’s spouse, the only

qualifying relative, would be affected by caring for a child with a medical condition in the United States.

Supra at 6.

On motion, the above deficiencies have not been addressed by counsel. As such, on motion the AAO concludes that it has not been established that the applicant's spouse will experience extreme hardship were he to remain in the United States while his wife relocates abroad due to her inadmissibility.

In regards to hardship were the applicant's spouse to relocate abroad to reside with the applicant due to her inadmissibility, the AAO determined on appeal that extreme hardship had not been established. To begin, the AAO noted that the applicant's spouse was born in Belize and his parents continue to reside there. Furthermore, while the applicant's spouse served in the United States Air Force in Iraq and has been suffering from a variety of medical problems since his return, the record failed to establish whether the health conditions noted in his medical records are minor or of a more serious nature that would not be readily treatable in Belize. As for the applicant's child's medical condition, the record failed to identify the specific medical condition affecting the applicant's child, its severity, prognosis or treatment requirements. Nor had the applicant established that her family would be unable to acquire health insurance in Belize. Finally, the AAO noted that counsel had failed to establish that the applicant and/or her spouse would not be able to fully support themselves and pay for needed medical treatment for the family should the applicant's spouse relocate to Belize to reside with his wife. *Supra* at 4-6.

On motion, counsel first maintains that the applicant's spouse's parents do not reside in Belize. Counsel asserts that the applicant's spouse's mother has lived in the United States since 1970 and his father passed away in 1996. Counsel thus contends that the applicant's spouse has no immediate relatives in Belize. In addition, counsel asserts that as an Air Force Veteran who currently serves in the U.S. Coast Guard as an independent contractor, the applicant's spouse's ties to the United States are very intense, given his devotion to defending the United States. Moreover, counsel explains that the applicant's spouse's skills are not easily transferred to work in Belize and thus, the financial impact of relocating abroad would be disastrous. Finally, counsel outlines that the applicant's spouse suffers from a variety of medical problems since his return from Iraq and states it is essential that he continue receiving medical care from the physicians familiar with his condition. *Supra* at 1-2.

To begin, with respect to counsel's assertion that the applicant's spouse has extensive long-term ties to the United States, including the presence of his mother, no documentary evidence has been provided to support the assertion. No documentation has been provided establishing her place of residence, how much contact the applicant's spouse has with her at this time, and what hardships he would face were he to be separated from her due his wife's inadmissibility. Alternatively, it has not been established that his mother would be unable to travel to Belize on a regular basis to visit him. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As for the applicant's spouse's gainful employment, as noted by the AAO, no documentation has been provided establishing that the applicant and/or the applicant's spouse would be unable to obtain gainful employment in Belize to maintain the applicant's spouse's standard of living. The AAO notes that no documentation has been provided on motion establishing the applicant's spouse's current employment duties and responsibilities and the effects that relocation abroad would cause with respect to said employment. Finally, counsel has not provided any medical documentation on motion establishing the applicant's spouse's current medical situation, the severity of his conditions, the treatment plan, and what specific hardships he would face were he to relocate abroad. Counsel's assertion that continuing medical care for the applicant's spouse is clearly not available in Belize is unsupported. As noted above, assertions without supporting documentation do not constitute evidence.

The record, reviewed in its entirety, does not support a finding that the applicant's spouse will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or is refused admission. There is no documentation establishing that the applicant's spouse's hardships are any different from other families separated as a result of immigration violations. Although the AAO is not insensitive to the applicant's spouse's situation, the record does not establish that the hardships he would face rise to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decisions are affirmed. The waiver application is denied.

ORDER: The prior decisions are affirmed. The waiver application is denied