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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H.G.

DATE: FEB 27 2012

OFFICE: MIAMI

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility 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,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Brazil who entered the United States pursuant to a B2 visa on January 20, 2003. The applicant remained in the United States beyond the authorized period and filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on March 26, 2006. The applicant departed the United States on October 17, 2008 after accruing over one year of unlawful presence in the United States. The applicant was paroled into the United States on November 11, 2008. The Field Office Director found the applicant to be inadmissible to the United States under 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 and seeking readmission within ten years of her last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her lawful permanent resident spouse¹ and stepson.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated July 31, 2009.

On appeal, counsel for the applicant asserts that the applicant should not have been granted advance parole and that departing from the United States after being granted advance parole was not a departure in the context of unlawful presence. Further, counsel contends that the applicant has demonstrated extreme hardship to her spouse and stepson.

In support of the waiver application and appeal, counsel for the applicant submitted a brief, affidavits from the applicant and her spouse, identity documents, letters of support, medical records concerning the applicant's spouse and stepson, family photographs, psychological reports concerning the applicant's spouse, and financial documents. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act, in pertinent part, provides:

(B) ALIENS UNLAWFULLY PRESENT.-

- (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

¹ It is noted that the applicant is seeking to adjust status based upon the Cuban Adjustment Act. The record contains a Form I-485 denial decision dated August 16, 2007, which states that the applicant and her spouse do not have a bona fide marital relationship. However, the applicant filed a Form I-290B appeal from that decision and her case was reopened on August 24, 2008.

(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 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.

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 qualifying relative in this case is her lawful permanent resident spouse. The record contains references to hardship the applicant’s stepson would experience if the waiver application were denied. It is noted that Congress did not include hardship to an applicant’s stepchildren as a factor 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 stepson will not be separately considered, except as it may affect the applicant’s spouse.

The record reflects that the applicant is a fifty-five year-old native and citizen of Brazil. The applicant’s spouse is a forty-four year-old native of Cuba and lawful permanent resident of the United States. The applicant is currently residing in North Miami Beach, Florida with her spouse and stepson.

Counsel for the applicant asserts that the applicant should not have been granted advance parole before she departed the United States on October 17, 2008. Counsel further states that since the applicant departed the United States after receiving a grant of advance parole, her departure did not trigger the accrual of unlawful presence. If an adjustment applicant has over one year of unauthorized stay in the United States prior to filing a Form I-485 application, a departure from the United States will trigger the unlawful presence bar, and the law contains no exception for

individuals who reenter the United States with an Advance Parole document.² This applicant accrued over a year of unauthorized stay in the United States before filing her Form I-485 on March 26, 2006, and became subject to the unlawful presence bar upon her departure from the United States on October 17, 2008.

Counsel for the applicant states that the applicant's spouse is suffering from major depression, for which he is taking medication, and that he would suffer extreme hardship if separated from his wife. The applicant's spouse states that he suffers from panic attacks and was fired from his job because of his deep depression. *See Affidavit from* [REDACTED] dated August 24, 2009. In support of these contentions, the applicant submitted a letter from a physician stating that the applicant's spouse has been on medication for hypertension and anxiety for the past five months, due to his emotional hardships. *See Letter from* [REDACTED] dated August 14, 2009. The applicant also submitted a letter from a psychologist stating that the applicant's spouse is suffering from major depressive disorder due to his wife's immigration status and suffers from panic attacks when he is under stress. *See Letter from* [REDACTED], dated August 19, 2009. The applicant's spouse states that he has recently been confronted with an array of emotional events, including his wife's uncertain immigration status, the death of his brother on February 22, 2009, and medical issues concerning his father and grandfather. *See Affidavit of* [REDACTED] dated April 18, 2009. According to the applicant's spouse, he was forced to take a leave of absence from work because of his anxiety problems and, in an updated affidavit, he states that he was fired because of his depression. *Id*; *See Affidavit from* [REDACTED] dated August 24, 2009. The record also contains a letter from a counselor stating that the applicant's spouse has suffered from panic attacks and post-traumatic stress disorder since the death of his brother and further negative experiences could put his mental and physical health at serious risk. *See Letter from* [REDACTED]

Counsel contends that the applicant's spouse's son is also experiencing medical hardship, as he is bedridden from a medical condition that requires surgery, bone grafting, and possible radiation treatment. It is initially noted that the applicant's stepson is not a qualifying relative in the context of this application and any hardship he suffers will only be considered insofar as it affects the applicant's spouse. The applicant's spouse states that he has sole custody of his son and that it was a dream for him to bring his son to the United States to live with him and the applicant. *See Affidavit from* [REDACTED] dated April 18, 2009. The applicant's spouse further states that his son is currently unable to walk due to a bone cyst and the applicant takes care of him. *See Affidavit from* [REDACTED] dated August 24, 2009. The record contains medical records concerning the applicant's stepson, which note a cystic lesion in his left femur. *See CT Examination Records from* [REDACTED] dated August 14, 2009. The AAO concludes that were the applicant's spouse to remain in the United States without the applicant due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

² This applicant was issued authorization for advance parole on October 16, 2008. The instructions for Form I-131, the advance parole application, contain warnings that departures pursuant to advance parole may trigger the unlawful presence bar.

The applicant's spouse asserts that he cannot relocate to Brazil to live with the applicant because he does not know how to speak, read, or understand Portuguese, the national language of Brazil. *See Affidavit from* [REDACTED], dated April 18, 2009. The applicant's spouse further states that he is responsible for three generations of males in his family, including his son, father, and grandfather, none of whom can speak Portuguese. *Id.* The applicant's spouse has sole custody of his son, who is bedridden due to a cyst in his bone. *See Affidavit from* [REDACTED] [REDACTED] dated August 24, 2009. The record also reflects that the applicant and her spouse own property in the United States and the applicant's spouse states that he recently became employed again. *Id.* In this case, the record contains sufficient evidence to show that the hardships faced by the qualifying relative, if he were to relocate to the Brazil, rise to the level of extreme hardship.

Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. 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-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated:

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 a waiver of inadmissibility 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 include the extreme hardships the applicant's lawful permanent resident spouse would face if the applicant were to reside in the Brazil, regardless of whether he accompanied the applicant or remained in the United States; the applicant's apparent lack of a criminal record; support letters filed on behalf of the applicant; and the payment of taxes. The unfavorable factors in this matter include the applicant's unlawful presence in the United States.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. 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 her burden and the appeal will be sustained.

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