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

[redacted]

H6

Date: OCT 2 6 2012 Office: PANAMA CITY, PANAMA FILE: [redacted]

IN RE: Applicant: [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.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant, a native and citizen of Ecuador, entered the United States without inspection in May 1997 and departed the United States in January 2010. The applicant was found to be 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 a period of more than one year. The applicant does not contest this finding of inadmissibility. Rather, he seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with his U.S. citizen spouse.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated April 14, 2011.

The record contains the following documentation: attorney's brief in support of appeal; statements from the applicant's spouse; medical documentation for the applicant's spouse; psychological reports for the applicant's spouse and the applicant's son; financial documentation; letters of reference; and information on country conditions in Ecuador. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> 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. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Under this provision of the law, children are not deemed to be "qualifying relatives." However, although children are not qualifying relatives under this statute, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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-Moralez,* 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.

Counsel contends that the applicant's spouse is suffering from medical hardship due to her separation from the applicant. The record shows that the applicant's spouse was diagnosed with cervical cancer in 2002, and underwent an operation for the cancer. The applicant's spouse was pregnant at the time, and lost the child. Although the record states that the applicant's spouse's condition is currently in remission, her doctors have advised that she continue to have the situation monitored, and extensive evidence in the record shows that the applicant's spouse has been evaluated for her condition on an annual basis.

The record further indicates that on June 17, 2009, the applicant's spouse was involved in an accident at work, which resulted in three fingers on her right hand being crushed. Medical documentation in the file indicates that the applicant's spouse continues to experience pain and limited motion due to this accident and surgery has been recommended. Counsel states that the applicant's spouse has postponed the surgery because she cannot take time off from work or abandon her parental responsibilities for the surgery, which would include four to six weeks of recovery time. Thus, the applicant has shown that his wife is experiencing medical hardship due to her separation from the applicant, as the applicant's spouse would be able to undergo recommended surgery for her hand if the applicant were present to support her through the operation.

Counsel contends that the applicant's spouse is suffering from financial hardship due to her separation from the applicant. Counsel states that the applicant's spouse has no special skills or education, but has continued to maintain employment in the United States. The record notes that applicant's spouse is currently employed, and that her weekly income is $362, or an annual income of $18,824. The applicant's spouse continues to work, even though, as noted above, she is experiencing pain and limited motion in her right hand due to her accident.

Counsel further contends that the applicant's spouse is suffering psychological hardship since being separated from the applicant. The record includes the results of a stress test administered to the applicant which indicate a high level of stress. The record further includes a psychoemotional and family dynamics assessment on the applicant's spouse and the applicant's son dated April 29, 2011. The assessment indicates that the applicant's spouse is experiencing a prolonged anxious-depressive condition with major sleep, relaxation, and appetite problems, with inner tension feelings and fatigue, palpitations, and shortness of breath, among other salient psychoemotional and psychosomatic symptoms. The assessment concludes that the applicant's spouse is suffering from a dysthymic disorder, or chronic depressed mood.

The psychoemotional and family dynamics assessment also states that the applicant's son is experiencing emotional suffering, sadness, with a sense of impotence and depressed mood. As noted above, under section 212(a)(9)(B) of the Act, although children are not deemed to be qualifying relatives, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. The assessment states that the applicant's spouse's feelings and concerns about her son are affecting the applicant's spouse.

The record establishes that if the waiver application were denied, the applicant's spouse would experience financial, medical and emotional hardship, as well as emotional hardship resulting for her concern for the applicant's son. These hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

The record further indicates that the applicant's spouse would experience hardship were she were to relocate to Ecuador to be with the applicant. The record includes a statement from a doctor which states that the applicant's spouse needs to have periodic surveillance evaluations due to her history of cervical cancer, and the doctor further states that it would be beneficial for her to maintain a relationship with her current gynecologic oncologist in the United States for the continuity of care. The applicant's spouse states that she fears that she will not be able to obtain adequate treatment in Ecuador for her condition. According to the Internet site of the U.S. Department of State, Country Specific Information in regard to medical facilities and health information in Ecuador:

> Adequate medical and dental care is available in the major cities of Ecuador. In smaller communities and in the Galápagos Islands, services are limited, and the quality is generally well below U.S. standards. Ambulances, with or without trained emergency staff, are in short supply in cities, but even more so in rural areas.

In addition, the record indicates that the applicant's spouse has resided in the United States for more than 15 years, that she has strong ties to the community, and that a majority of her family resides in the United States, including her father. Based on the evidence on the record, the applicant has established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to Ecuador to reside with the applicant.

The AAO thus finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien 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-Moralez, 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 favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse and U.S. citizen son would face if the applicant were to reside in Ecuador, regardless of whether they accompanied the applicant or remained in the United States; the fact that the applicant resided in the United States for almost 15 years; the applicant's apparent lack of a criminal record, and letters of reference written on behalf of the applicant. The unfavorable factor in this matter is the applicant's unlawful presence while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8

U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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