

(b)(6)

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]
DATE: **JAN 02 2013**

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: Applicant: [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.

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, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Costa Rica 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 for more than one year and seeking admission within ten years of his last departure from the United States. The applicant is married to a U.S. citizen and is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse.

In her decision of September 14, 2011, the field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, counsel asserts that the field office director abused her discretion in finding that the denial of the waiver application would not result in extreme hardship. Counsel states that the applicant has submitted sufficient evidence of extreme hardship.

The record includes, but is not limited to: counsel's brief; statements from the applicant and his spouse; a letter of support from the pastor of the applicant and his spouse; 2008 and 2009 federal income tax returns for the applicant's spouse; a statement from a lawyer in Costa Rica describing the requirements for coverage under the social security system in that country; 2010 bank statements for the applicant and his spouse; two earnings statements relating to the applicant; a psychological evaluation of the applicant's spouse; a copy of a New Jersey Supreme Court decision; several copies of money transfer receipts; and country conditions information on Costa Rica. The entire record was reviewed and all relevant evidence considered in reaching this decision.

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.

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

The record reflects that the applicant was admitted to the United States as a B-1/B-2 visitor on July 8, 2004, and remained in the United States until July 4, 2008, when he departed for Costa Rica. As the applicant accrued unlawful presence of more than one year and is seeking admission within ten years of his 2008 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his 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. In the present case, the applicant's qualifying relative is his U.S. citizen spouse. 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-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 (BIA) 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 BIA 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 will first address the issue of whether the record establishes that the applicant's spouse would experience extreme hardship if she relocates to Costa Rica.

Counsel, on appeal, asserts that the applicant's spouse would experience extreme hardship on an economic and emotional level if she were to leave the United States. Counsel states that the applicant's spouse is an American citizen who has resided her entire life in the United States; that the applicant's spouse has never been to Costa Rica and that although she speaks Spanish, she is not literate in Spanish; that the applicant's spouse will be severing ties with her mother, sister and daughter; that the applicant's spouse will not receive health insurance as the laws of Costa Rica require at least two years of residency; and that the applicant's spouse will need to acquire legal resident status to work.

Counsel also contends that the applicant's spouse has a daughter from a prior relationship and that the child's biological father will not allow the child to leave the United States. He notes, however, that it will be difficult to obtain a written statement to this effect as the applicant's spouse and the child's father have a bad relationship. Therefore, counsel asserts, the applicant's spouse's statement regarding her prior partner's opposition should be given the meaningful consideration it deserves. He also states that, pursuant to *Baures v. Lewis*, 167 N.J. 91 (2001), New Jersey law would restrict the applicant's spouse from moving her daughter to Costa Rica as a custodial parent in New Jersey must formally request permission from the court to relocate and prove that relocation is in the best interest of the child. He further maintains that while hardship to the applicant's spouse's daughter is not considered under the statute, it should be weighed to the extent that it results in hardship to the qualifying relative.

The record contains a November 29, 2010 statement from the applicant's spouse in which she asserts that she has never left the United States and will not be able to move to Costa Rica. The applicant's spouse also states that her daughter's biological father has informed her that he will not allow his daughter to leave the United States "even though he does not see her often."

In a separate November 29, 2010 statement, the applicant states that his spouse will not be able to relocate to Costa Rica as she has never left the United States and she will not be able to adapt to the lifestyle in his country. The applicant also asserts that there is no work for him in Costa Rica and that he will not be able to support his spouse and stepchild. He further maintains that his stepchild does not speak Spanish and will not have health insurance in Costa Rica.

The AAO notes that the applicant has submitted a statement from [REDACTED] a lawyer and notary in Costa Rica, who lists the documentary requirements (e.g., resident identification card and documents of migration) for a foreigner to become a member of his country's social security system. Mr. Rodriguez indicates that to obtain residency for naturalization, a foreigner must first reside in Costa Rica for two years with his or her Costa Rican spouse. The record also contains a copy of the online 2009 Human Rights Report: Costa Rica, issued by the U.S. Department of State on March 11, 2010; which provides an overview of human rights concerns, including domestic violence against women and children, child prostitution, human trafficking and child labor. Additional country conditions information is provided in the Department of State's background note on Costa Rica, dated August 11, 2010.

The submitted evidence does not, however, support the preceding claims of hardship. The 2009 human rights report on Costa Rica and the 2010 background note on Costa Rica do not demonstrate that the applicant would not be able to obtain employment to support his family upon return to Costa Rica. The human rights report focuses on human rights concerns in Costa Rica, rather than economic conditions and the 2010 background note offers a general overview of Costa Rica's history, political system, economy and foreign relations. While the human rights report does indicate that the national minimum wage in Costa Rica does not provide a decent standard of living for a worker and his or her family, the AAO does not find the record to indicate that the applicant would be limited to minimum wage employment. Moreover, general economic or country conditions in an alien's native country do not establish hardship in the absence of evidence that the conditions would specifically impact the qualifying relative. See *Kuciemba v. INS*, 92 F.3d 496 (7th Cir. 1996) (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985)). Moreover, although counsel indicates that his spouse is not literate in Spanish, the AAO notes that she does speak Spanish, thereby easing her transition into Costa Rican culture and society.

The translation of [REDACTED] statement provided for the record indicates that a foreigner must show proof of residency to be enrolled in the Costa Rican social security system and that the requirements for obtaining a "residency for naturalization" include two years of residence in Costa Rica with a Costa Rican spouse. [REDACTED] statement also reports that medical treatment is readily available to individuals who are not residents of Costa Rica upon payment. In the present case, the record does not establish that the applicant's spouse suffers from any medical conditions requiring significant medical care or that the applicant would be unable to pay for any medical care his spouse might require during her first two years of residence in Costa Rica. We also note that the applicant's Form G-325A, Biographic Information, indicates that his parents reside in Costa Rica, and that the record does not indicate that the applicant and his spouse would be unable to seek their assistance upon relocation.

The claim that the applicant's spouse's former partner would prevent her from moving to Costa Rica with their daughter is also not supported by the record. We note that the record does not contain a copy of a birth certificate for the applicant's spouse's daughter¹ or any other documentation that establishes the identity of her father. Therefore, we cannot find that the applicant's spouse's former partner would have any parental rights with respect to her daughter, regardless of any opposition he might have to her relocation. We also note that the record lacks evidence to demonstrate that the applicant's spouse and her former partner have entered into a legal custody arrangement that would require her to obtain permission from a New Jersey court to relocate to Costa Rica with her daughter. Accordingly, the record does not establish that the applicant's spouse would be prevented from moving to Costa Rica with her daughter. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *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)). Similarly, the unsupported assertions of counsel do not constitute

¹ The AAO has found other documentation in the record to be sufficient to establish that the applicant's spouse is the mother of a daughter born in 2008.

evidence. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We also note the hardship claims made on behalf of the applicant's spouse's daughter. However, as previously indicated, she is not a qualifying relative for the purposes of this proceeding and the record does not address how any hardships she might experience in Costa Rica would affect her mother, the only qualifying relative.

The AAO acknowledges that the applicant's spouse was born and reared in the United States, and that she has family ties to the United States. However, we do not find the hardships raised by the record, even when considered in the aggregate, to exceed those normally created when a family member relocate to a new country. Accordingly, we cannot find that moving to Costa Rica would result in extreme hardship for the applicant's spouse.

The AAO next considers the extent of the hardship that the applicant's spouse would experience if the waiver application is denied and she remains in the United States.

On appeal, counsel asserts that other than the applicant, the applicant's spouse's sister is her only source of support. He also states that even when she was employed, the applicant's spouse made a minimal living and that a co-sponsor was necessary when she filed the Form I-130 for the applicant. Counsel further contends that the applicant's spouse was previously abused by her daughter's father.

In his statement of November 29, 2010, the applicant asserts that it would be completely devastating if he returned to Costa Rica as his spouse does not work and she would lose the only stability she has ever known. In her statement of the same date, the applicant's spouse reports that she, her daughter and the applicant reside with the applicant's family in North Plainfield, New Jersey; that she and the applicant pay a monthly rent of \$700; that she is unemployed and takes care of her daughter at home; that prior to meeting the applicant, she was not aware that she suffered from depression and post-traumatic stress due to the living conditions she experienced as a child and as a young single mother; that her suffering disappeared when she met the applicant but that she has become extremely depressed and anxious about the possibility of not having the applicant in the United States; that she has not been able to sleep through the night since her spouse's interview of November 4, 2010; that losing the applicant will send her into a tailspin from which she fears she could not recover; that the applicant is her only financial support; and that she will not be able to afford childcare if the applicant returns to Costa Rica.

In support of the claim of financial hardship, the record contains documentation indicating that the applicant's spouse was gainfully employed through September 2010. As established by her federal income tax returns, the applicant's spouse earned \$8,772 and \$8,352 in 2008 and 2009, respectively. The record contains copies of two weekly earnings statements for the applicant (net pay \$685.14) from November 2010.

To establish the emotional hardship being experienced by his spouse, the applicant has submitted a psychological evaluation conducted on November 22 and 27, 2010 by clinical psychologist and trauma specialist, [REDACTED] states that the applicant's spouse is experiencing significant anticipatory anxiety and psychological distress; that she reported having difficulty sleeping and is constantly worried about the applicant's immigration status; and that she described having trouble concentrating, feeling depressed and having a difficult time tolerating the anxiety she is experiencing. [REDACTED] also states that it appears that the applicant's spouse suffered depressive symptoms throughout her childhood and that she reported symptoms indicative of a diagnosis of post-traumatic stress disorder, which is likely the result of having witnessed years of domestic violence in her parents' home and experiencing it herself at the hands of her former partner. To supplement her behavioral observations, [REDACTED] indicates that she administered the Beck Depression Inventory II, the Beck Anxiety Inventory, the Perceived Stress Scale, the Impact of Events Scale, the Beck Hopelessness Scale, The Resiliency Scale and the Self-Efficacy Scale to the applicant's spouse. She reports that the results from these tests corroborate the findings of her clinical interview of the applicant's spouse.

Based on observation and the psychometric results from the administered tests, [REDACTED] diagnoses the applicant's spouse with Major Depressive Episode, Moderate and Post-traumatic Stress Disorder, and recommends that she seek support in the form of psychotherapy. She further states that the applicant's spouse would experience extreme psychological hardship if the applicant departs the United States as she is vulnerable, highly dependent on him and has a history of mental health difficulties.

While the record does not support all of the claims regarding the hardship that the applicant's spouse would experience as a result of separation, the AAO, nevertheless, finds that when the hardship factors for the applicant's spouse are considered in the aggregate, the applicant has established that the denial of the waiver application would result in hardship that exceeds that normally created by the separation of spouses.

However, the AAO 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*, 20 I&N Dec. 880, 886 (BIA 1994). 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*, 21 I&N Dec. 627, 632-33 (BIA 1996). 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.

The record does not demonstrate extreme hardship to a qualifying relative as required for a waiver under section 212(a)(9)(B)(v) of the Act. As the applicant has not established statutory eligibility for relief, the AAO finds no purpose would be served in determining whether he merits a waiver as a matter of discretion.

(b)(6)

Page 9

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. 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.