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DATE: **JAN 10 2013** OFFICE: GUATEMALA CITY

IN RE:

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:

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,

Perry Rhew, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Guatemala City, Guatemala, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted, but the underlying application remains denied.

The applicant is a native and citizen of Guatemala 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 readmission within 10 years of her last departure from the United States. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. Citizen spouse.

The Field Office Director concluded the applicant failed to provide sufficient evidence of extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated August 6, 2009.

The AAO affirmed that the record lacked evidence to demonstrate the applicant's spouse would experience extreme hardship given the applicant's inadmissibility and consequently dismissed the appeal. *See AAO Decision*, February 1, 2012.

On motion, counsel for the applicant submits a brief, letters from family and friends, real estate and medical records, a death certificate, money transfer receipts, flight reservations, and documentation of permanent residence. In the brief, counsel contends the supplemented record is sufficient to establish the applicant's spouse would suffer from extreme hardship upon continued separation and upon relocation to Guatemala.

The record includes, but is not limited to, the documents listed above, a letter from a psychologist, medical records, other letters in support, evidence of the applicant's spouse's visits to the applicant, money transfer receipts, evidence of birth and citizenship, documentation of removal proceedings, and other petitions and applications. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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-

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(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.

(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.

The record reflects the applicant entered the United States without inspection on October 4, 2004 near Brownsville, Texas, and accrued unlawful presence from her entry until June 28, 2005, when she was first granted voluntary departure. The applicant also accrued unlawful presence from the date she failed to depart, October 26, 2005, until she was again granted voluntary departure by an immigration judge, November 29, 2006.<sup>1</sup> She complied with her grant of voluntary departure and left the United States on December 15, 2006. Inadmissibility is not contested on motion. The AAO therefore affirms the applicant accrued more than one year of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant's qualifying relative for a waiver of this inadmissibility is her U.S. Citizen spouse.

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.

<sup>1</sup> As stated in the AAO's February 1, 2012 decision, both these periods of time count towards the applicant's unlawful presence for purposes of section 212(a)(9)(B)(i)(II) of the Act as they occurred during a single visit. See *Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy*, dated May 6, 2009.

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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.

A licensed social worker confirms she has been treating the spouse for depression caused by the applicant's removal to Guatemala, and the spouse's physician indicates the spouse experiences depression, high blood pressure, and abdominal pain. Counsel asserts the AAO's conclusion on appeal with respect to the spouse's psychological difficulties is without support, and that the spouse's medical issues were set forth in plain language by his treating physician. Counsel

additionally contends the spouse's financial hardship was established with previously submitted joint tax returns for the years the spouse and the applicant cohabitated, as well as with "a series of financial records and related documentation." *Brief on motion*, submitted March 1, 2012. Additional money transfer receipts as well as documentation on trips to Guatemala are submitted to supplement the record.

Counsel asserts on motion that relocating to Guatemala would entail moving to a country without adequate psychiatric or psychological care for the applicant's spouse. Counsel further contends that death certificates for the applicant's brothers in Guatemala indicating they were murdered demonstrate the adverse and life-threatening conditions the applicant's spouse could face upon relocation to that country.

Counsel's contention that the spouse suffers from financial hardship given the applicant's inadmissibility is still unsupported by evidence of record. Although counsel claims that other documents and previously submitted joint income tax returns from 2005 and 2006, when the applicant last resided in the United States, demonstrate financial difficulties, the record lacks evidence on the spouse's or the applicant's current income. Without such evidence, and without documentation of household expenses, the AAO cannot find that the spouse's current expenses, including the remittances he sends to the applicant, exceed his and the applicant's income, and what financial hardship, if any, he is experiencing. Given this insufficient evidence, the AAO cannot determine what, if any, financial hardship the applicant's spouse suffers given the applicant's inadmissibility.

Counsel additionally claims the AAO cannot point to empirical studies on the number of separated spouses requiring medical or psychiatric care, the nature or duration of that care, treatment period, or the prognosis for recovery, to reach a conclusion that the spouse's psychological hardship is less severe than hardship which is faced by relatives of other inadmissible aliens. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The applicant therefore has the burden of proof in establishing the hardship her spouse suffers is extreme. In light of this, the AAO notes that the applicant has not provided details on the nature and duration of her spouse's psychological treatment or the prognosis for recovery, much less a comparison between his emotional state and that of other relatives of inadmissible aliens. Additionally, though the record demonstrates the spouse has high blood pressure and abdominal pain in addition to depression, the spouse's treating physician does not discuss the severity of his complete medical condition, any treatment needed, or provide details on how his medical condition affects his quality of life. The physician also does not indicate whether the applicant can assist with any medical needs the spouse may have. Absent these explanations in plain language from the treating physician, the AAO cannot determine the severity of a medical condition or the treatment needed, or the nature and extent of any hardship the applicant's spouse would suffer as a result of the applicant's inadmissibility. In addition, the record contains numerous letters which indicate that the applicant's spouse is an

active participant in various activities in his community. These letters diminish any claims of physical or psychological hardship.

The AAO again acknowledges that the applicant's spouse would face difficulties in the event of continued separation from the applicant. However, we do not find evidence of record to demonstrate that his hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, medical, emotional or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO cannot conclude that he would suffer extreme hardship if the waiver application is denied and the applicant remains in Guatemala without her spouse.

Counsel submits a death certificate for the applicant's brother, as well as letters indicating the applicant's three children have undergone psychological treatment following their uncle's homicide, to demonstrate that the applicant's spouse would experience adverse and life-threatening country conditions if he relocated to Guatemala. However, there is no assertion or supporting documentation to show that the applicant's spouse has faced any danger in his trips to Guatemala at any point before or after his brother-in-law's death, nor is there evidence to show that the spouse is targeted for violence in that country. Furthermore, the U.S. Department of State has not issued a current travel warning for Guatemala. The AAO notes the letters which purport to show the applicant's three children have received psychological attention following the death of their uncle contain unexplained inconsistencies. For instance, the applicant's son [REDACTED] is referred to as a female, and the letters indicate the three children, who were 15, 16, and 18 years of age at the time, all missed fifth and sixth grade, not different grades which correlate to their different ages. The AAO also notes that although counsel claims the applicant's spouse would be unable to obtain psychological or psychiatric treatment in Guatemala, these letters indicate such treatment is in fact available. Given these inconsistencies, the AAO cannot give significant weight to assertions contained in these letters, or to counsel's assertion on psychological or psychiatric treatment in Guatemala.

The AAO notes that relocation to Guatemala would entail difficulties. However, we do not find evidence of record to show that the spouse's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record lacks sufficient evidence to demonstrate the safety-related or other impacts of relocation on the applicant's spouse are in the aggregate above and beyond the hardships normally experienced, the AAO cannot conclude that he would experience extreme hardship if the waiver application is denied and the applicant's spouse relocates to Guatemala.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. Citizen spouse as required under section 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying

family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for a 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, although the motion is granted, the underlying application remains denied.

**ORDER:** The motion is granted, but the underlying application remains denied.