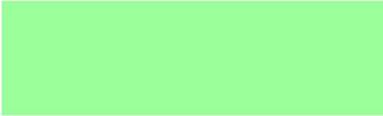




(b)(6)



DATE: **MAR 21 2013** OFFICE: BOSTON, MA

FILE:

IN RE: APPLICANT:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, Boston, Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil 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 his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse.

The Field Office Director concluded that the applicant failed to demonstrate the existence of extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated May 8, 2012.

On appeal, the applicant's spouse contends she will experience extreme psychological and financial hardship without the applicant present. She additionally asserts that she will not be able to meet her financial obligations if she moves to Brazil, and she will suffer emotional hardship because she will have to leave her four year old daughter behind.

The record includes, but is not limited to, statements from the applicant's spouse, psychological, medical, and financial records, evidence of birth, marriage, residence, and citizenship, other applications and petitions, and photographs. 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-

.....  
(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 that the applicant was admitted to the United States on July 17, 2001, in B-1/B-2 nonimmigrant status, and was authorized to remain until August 16, 2001. The applicant stayed in the United States past his date of authorized stay, and returned to Brazil on July 23, 2003. Inadmissibility is not contested on appeal. The AAO therefore finds that the applicant accrued more than one year of unlawful presence, from August 17, 2001 until July 23, 2003, and is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The record further reflects that the applicant was readmitted into the United States in B-1/B-2 nonimmigrant status on July 21, 2004, with authorization to remain until January 20, 2005. The applicant remained past his date of authorized stay, and filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on March 4, 2010. As such, the applicant also accrued periods of unlawful presence from January 21, 2005, until March 3, 2010, and from May 8, 2012, the date his Form I-485 was denied, until the present time. Although the applicant's departure occurred in July 2003, almost ten years ago, because the last ten years included periods of unlawful presence in the United States, the applicant's ten years of inadmissibility will not "run" by July 2013 and he will remain inadmissible.

The AAO finds that to read the statute as providing an exception to the ten-year bar by virtue of subsequent periods of unlawful presence in the United States would be to allow one to avoid the punitive effects of a law by violating the law anew, an absurd result contrary to well-established principles of statutory construction. *See Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where...the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intentment of the law."); *U.S. v. McKeithen*, 822 F.2d 310, 315 (2nd Cir. 1987) (quoting *United States v. About 151.682 Acres of Land*, 99 F.2d 716, 721 (7th Cir.1938)) ("[A]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."). The AAO therefore holds that inadmissibility under section 212(a)(9)(B)(i) of the Act, which is triggered upon departure, remains in force until the applicant has been absent from the United States for three years under section 212(a)(9)(B)(i)(I) or ten years under section 212(a)(9)(B)(i)(II). Accordingly, the applicant 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 his U.S. Citizen spouse.

The record contains references to hardship the spouse's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children 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 spouse's child will not be separately considered, except as it may affect the applicant's 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.

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.

The applicant's spouse claims she experiences severe psychological difficulties when contemplating possible separation from the applicant. She explains she attended counseling in January 2012 to deal with her stress and anxiety. Documentation of psychological evaluation and treatment from January to February 2012 is included on appeal. Therein, a licensed mental health counselor reports that the spouse had a turbulent family history, in that her mother abandoned her, and she suffered physical and emotional abuse from her father. The counselor adds that the spouse witnessed incidents of domestic violence between her parents, and that she has a volatile relationship with her mother. The counselor additionally indicates that the spouse reports she attempted to commit suicide in 2006, and that currently she has suicidal ideation but has no plan or intent. The spouse asserts she relies on the applicant emotionally, and that he has been the only person in her life who has treated her well. The spouse contends she also depends on the applicant financially, because after she lost her job in 2011 he became the sole financial provider in the household. Letters from the applicant's employers are submitted, which indicate that the applicant earns \$11 an hour working 31 hours per week at one job, and \$9.50 an hour working 20 hours per week at another job. Copies of U.S. federal income tax returns are also present in the record. The spouse submits copies of household bills as evidence of expenses.

The spouse claims she would also experience emotional and financial hardship if she relocated to Brazil. She explains that the applicant's father is very sick, and that moving to Brazil would make the applicant unable to pay for his father's medical expenses in addition to the costs of living in Brazil. A physician in Ipanema, Brazil writes in a letter that the applicant's father had heart surgery in 2009 and 2010, and is currently being evaluated for new cardiac catheterization. The spouse adds that if she relocated to Brazil, she would have to leave her four year old daughter behind in the United States because the child's father, who is not the applicant, would not permit her daughter to live overseas.

The applicant has submitted sufficient evidence to demonstrate that his spouse would experience financial hardship without the applicant present. The spouse's Forms W-2, Wage and Tax Statement, indicates she earned \$13,064 in 2011, and the applicant earned \$21,914. As such, although the record contains no evidence to support the spouse's assertion that she lost either of her jobs in 2011, documentation submitted indicates that the spouse does not earn enough money to support herself and her daughter. Therefore, the applicant has shown his spouse would experience financial difficulties without him present.

Furthermore, the applicant has established that his spouse suffers from emotional and psychological hardship. The record reflects that the spouse had a physically and emotionally abusive relationship with her father, and that she was abandoned by her mother at a young age. Moreover, documentation submitted on appeal establishes that the applicant's spouse underwent treatment for her psychological issues, and that her emotional state carries some risk of self-harm. The spouse's emotional dependency on the applicant, given her family history, is sufficiently documented on appeal. As such, the AAO concludes the record contains evidence that the applicant's spouse would experience psychological difficulties without the applicant present.

The AAO therefore finds there is sufficient evidence of record to demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record establishes that the financial, psychological, or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO concludes that she would suffer extreme hardship if the waiver application is denied and the applicant returns to Brazil without his spouse.

The record, however, does not establish that the applicant's spouse would experience extreme hardship upon relocation to Brazil. Although the spouse claims that she would have to leave her daughter in the United States, there is no evidence of record, such as an affidavit from the father, or a court order, indicating that the father is involved in his daughter's life, or that he would not let the daughter relocate to Brazil. Without such evidence, the AAO is unable to evaluate the emotional hardship the spouse would suffer upon separation from her daughter. Additionally, although the spouse asserts she will experience financial hardship in Brazil, there is no evidence of record demonstrating that the applicant and the spouse will be unable to find adequate employment in Brazil to meet their financial obligations. Although the spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for 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)).

The AAO notes that relocation to Brazil 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 emotional, financial, 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 she would experience extreme hardship if the waiver application is denied and the applicant's spouse relocates to Brazil.

We 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.

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 his 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, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.