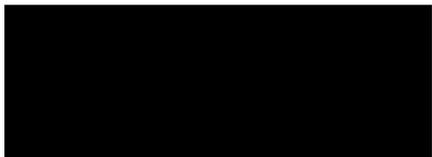


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts, Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H2

FILE:  Office: NEWARK, NJ Date: FEB 02 2011

IN RE: 

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

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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of Tanzania and a citizen of Canada. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance.¹ The applicant is the spouse of a U.S. citizen and the father of a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated November 20, 2007.

On appeal, counsel asserts that the Field Office Director's decision was in error and that the record establishes that the applicant's spouse will suffer extreme hardship. He submits additional documentation in support of the hardship claim. *Form I-290B, Notice of Appeal or Motion*, dated December 21, 2007.

The record includes, but is not limited to, statements from the applicant's spouse; medical statements relating to the applicant's mother-in-law; employment letters and earnings statements for the applicant and his spouse; tax returns and W-2 forms for the applicant and his spouse; bank statements; educational certificates for the applicant's spouse; support letters for the applicant and court documents relating to the applicant's criminal history.² The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

¹ The AAO notes that the applicant may also be inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Act for having accrued more than 180 days of unlawful presence in the United States. The Form I-485, Application to Register Permanent Residence or Adjust Status, filed by the applicant on April 24, 2007 indicates that the applicant's last entry to the United States was made as a nonimmigrant visitor on October 30, 2001. The applicant's Form G-325A, Biographic Information, reflects that the applicant was employed in the United States as early as 1999 and educational certificates establish that, prior to 1999, he attended school in the United States. The record fails to indicate that the applicant's presence in the United States during these years was authorized and, accordingly, he may have begun accruing unlawful presence as of April 1, 1997, the effective date of the unlawful presence provisions under the Act. The AAO will not, however, determine whether the applicant's admission is barred under section 212(a)(9)(B)(i) of the Act as the record fails to provide sufficient information to calculate the applicant's periods of unlawful presence. We note that if the applicant is able to establish extreme hardship to his spouse under section 212(h) of the Act, he will also satisfy the waiver requirements for unlawful presence under section 212(a)(9)(B)(v).

² Additional documentation relating to the applicant's criminal history was submitted on October 15, 2010 in response to a Request for Evidence issued by the AAO on July 27, 2010.

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
 - (B) citizen or lawfully resident spouse, parent, son, or daughter of such alien

The record reflects that the applicant was convicted of Possession of Marijuana, Less than 50 Grams, in violation of section 2C:35-10(a)(4) of the New Jersey Statutes on or about December 16, 2004. A certified copy of a New Jersey State Police laboratory report submitted for the record indicates that the amount of marijuana in the applicant's possession at the time of his April 17, 2004 arrest was .85 grams. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a controlled substance violation.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if —

. . . .

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

In that the record reflects that the applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana, he is eligible to seek a waiver of his inadmissibility under section 212(h) of the Act.

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and child are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (BIA) stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 BIA 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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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 BIA 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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) [REDACTED] was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation." In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO now turns to a consideration of whether the record in the present matter establishes that the applicant’s spouse and/or child would experience extreme hardship if his waiver application is denied

On appeal, counsel contends that the applicant’s mother-in-law’s health prevents his spouse from moving to another country. In an April 20, 2007 affidavit, the applicant’s spouse states that if she relocated with her husband, she would have to leave her mother who has been diagnosed with breast and lung cancer, and who depends on her for financial assistance and for transportation to her chemotherapy appointments. The applicant’s spouse also states that if she moved to Tanzania or Canada, she would lose her home, her friends and all of her immediate family who live in the United States. She contends that it would be very difficult for her to give up the life to which she has grown accustomed and to live in a country where she would not have a better life, would not speak the language and would not know the culture. In a subsequent statement, filed on appeal, the applicant’s spouse asserts that doctors have recently found a tumor in her mother’s brain, which will require surgery and radiation, and that she will have to care for her mother following her surgery and rehabilitation.

The record contains three 2007 medical statements provided by [REDACTED] and [REDACTED]. [REDACTED] The Cancer Center, Hackensack University Medical Center. The statements report that the applicant’s mother-in-law was diagnosed with breast cancer in 2001 and lung cancer in 2006, and that in 2007, her lung cancer was found to have metastasized to her brain and her prognosis is poor. They indicate that the applicant’s mother-in-law will undergo surgery and radiation, as well as continuing chemotherapy for her lung cancer, and that the support of her daughter is essential during this process. The

statements also indicate that, as a result of her treatment, the applicant's mother-in-law will experience the following side effects: memory loss, respiratory difficulties, nausea, vomiting and the possibility of visual or auditory symptoms and aphasia, language difficulties.

note that the applicant's spouse is their patient's only child and that she will need to supervise, monitor and care for her mother during her mother's rehabilitation, "which could last for the rest of her life."

Having considered the record, the AAO finds no evidence that supports the applicant's spouse's claims that relocation to Canada, the applicant's country of citizenship, would result in a lowered quality of life, linguistic difficulties or cultural isolation. We do, however, acknowledge that the applicant's spouse was born and reared in the United States, and that her family is here. We further recognize that the applicant's spouse's mother is suffering from what her doctors' medical statements indicate is a terminal illness and that the applicant's spouse is her only child. We also take note of the assertions made by the medical professionals caring for the applicant's mother-in-law regarding the essential role the applicant's spouse plays in her support system. When we consider the emotional impact on the applicant, an only child, of abandoning a gravely ill parent, particularly in light of the fact that the applicant has been actively involved in caring for her mother, we find that relocation would result in extreme hardship, considering all hardship factors cumulatively and notwithstanding what may be more advantageous conditions in Canada than in other foreign countries.

On appeal, the applicant's spouse asserts that the applicant supports her emotionally and financially. She indicates that, or and that, without the applicant, she will have sole responsibility for the care of her mother and her baby. The applicant's spouse states that, although she was planning to return to work after giving birth, her circumstances may not let her return full-time and she will have to obtain government assistance as she will not be able to meet her financial obligations working part-time. She claims that her life, her baby's life and her mother's life will be destroyed as a result of the applicant's inadmissibility.

The record documents that the applicant's spouse gave birth to a girl on December 3, 2007. Further, as previously discussed, it establishes that the applicant's mother-in-law is suffering from metastatic lung cancer, which her doctors have indicated will be fatal. The AAO does not find the record to contain sufficient evidence to establish the applicant's spouse's specific responsibilities regarding her mother or how they would affect her ability to care for her child or maintain her employment. We, nevertheless, acknowledge the extent to which the applicant's spouse would be affected if she lost the applicant's support at a time when she is already facing the loss of her terminally ill mother. When this additional hardship and those normally created by the separation of spouses are considered in the aggregate, the AAO finds the applicant to have established that his spouse would suffer extreme hardship if his waiver application is denied and she remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factors in the present case are the applicant's criminal conviction for which he now seeks a waiver and his periods of unauthorized residence, education and employment in the United States. The favorable factors in the present case are the applicant's U.S. citizen spouse and child, the extreme hardship the applicant's spouse would suffer as a result of his inadmissibility; his mother-in-law's serious health condition; the letters submitted on the applicant's behalf from a satisfied customer at his place of business, a film script consultant who has worked with the applicant and a friend who testifies to the applicant's character; and the absence of a criminal record since 2004.

The AAO finds that the applicant's criminal conviction and his immigration violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal will be sustained.