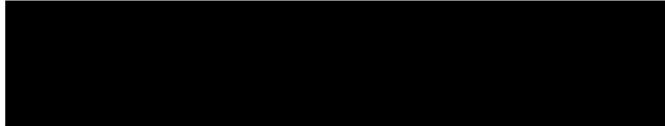


U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H2

Date: **DEC 11 2012**

Office: WASHINGTON, DC

FILE:



IN RE: Applicant:



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,

A handwritten signature in cursive script that reads "Michael Shumway".

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The director stated that the applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act. The director concluded that the applicant had failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

We note that the submissions by the attorney for case number [REDACTED] have been included with the case number [REDACTED]

On appeal, counsel contends that U.S. Citizenship and Immigration Services (USCIS) erred by giving improper weight to critical documents, and neglecting to consider the evidence cumulatively. Counsel states that there are new developments submitted on appeal: the applicant's former spouse is now unemployed; Carlos, Jr., his son, was diagnosed with attention deficit hyperactivity disorder (ADHD), his wife was diagnosed with tuberculosis (TB), and gave birth to a child on December 26, 2011. Counsel states that the applicant is the sole financial support, providing health insurance and \$1,000 every month, for his two minor U.S. citizen children, who live with the applicant's former spouse. Counsel states that the mother of Carlos Jr. asserts that the applicant and Carlos have a close relationship and the applicant's deportation would have a severe effect on their son. Counsel declares that Dr. Rachina Varia has stated that Carlos, Jr. needs the emotional support of both parents, particularly his father. Counsel argues that if Carlos relocated to El Salvador, the transition would exacerbate his ADHD as well as destroy his access to special education because in El Salvador only a small percentage of students with disabilities have access to special education in school. Counsel states that the applicant has a close bond with his U.S. citizen wife and daughter, who are distressed about the applicant's immigration situation, and would experience extreme emotional hardship if separated from the applicant. Counsel contends that the applicant's wife did not know at the time she wed the applicant that he would be inadmissible to the United States from his burglary conviction. Counsel declares that USCIS erred in ignoring the hardship to the applicant's wife in relocating to El Salvador such as not having access to TB treatment, distress about violent crime, separating from family members in the United States, not having family ties to El Salvador, and not being able to obtain a job. Counsel contends that the submitted documents show that in El Salvador the economy is devastated, there is unemployment and gang violence, and lack of access to health care and special education services.

We will first address the finding of inadmissibility.

The director determined that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

- (i) [A]ny 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

On April 5, 2001, the applicant was convicted of statutory burglary in violation of Va. Code Ann. § 18.2-91. The judge sentenced the applicant to incarceration for 300 days, and suspended all but 90 days on the condition that the applicant have good behavior for two years from the date of release from confinement.

At the time of his conviction, section 18.2-91 stated:

If any person commits any of the acts mentioned in § 18.2-90 with intent to commit larceny, or any felony other than murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79 or § 18.2-80, or if any person commits any of the acts mentioned in § 18.2-89 or § 18.2-90 with intent to commit assault and battery, he shall be guilty of statutory burglary, punishable by confinement in a state correctional facility for not less than one or more than twenty years or, in the discretion of the jury or the court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

As the applicant has not disputed on appeal that his offense is a crime involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in the instant case are the applicant's three U.S. citizen children and his U.S. citizen wife. If extreme hardship to the qualifying relative is

established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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.

In rendering this decision, the AAO will consider all of the evidence in the record.

As to the hardship to the applicant's wife and children in remaining in the United States while the applicant lives in El Salvador, the applicant's assertion of having a close relationship with his wife and children is in agreement with the letters from his spouse, former spouse, siblings, in-laws, and the letter from Dr. [REDACTED] a licensed clinical psychologist, who declared that the applicant's son and daughter "are of the age where they have a strong emotional attachment to their biological father that should not be broken." Birth certificates show the applicant's children were born on July 14, 2000 and April 25, 2004, and are now 8 and 12 years old. The applicant contended that his two children are financially dependent upon him and he would not be able to support them if he lived in El Salvador because he has no social or familial contacts there and unemployment is high. His contention is consistent with evidence that the applicant's wife resigned from her job, the Western Union invoices showing the applicant paid \$1,000 every month since March 2010 to the Virginia Department of Social Service, and the newspaper article in *El Faro* discussing J.P. Morgan Chase & Company's analysis stating that in El Salvador "only half of the economically active population is employed." The claim that the applicant's son has ADHD is supported by the psychological assessment from a clinical psychologist dated June 15, 2010, and the individual education program record dated May 18, 2010, which reveals that his son is eligible to receive special education services for speech-language impairment and delays in expressive language. When we consider the young age of the applicant's son and daughter and the emotional and financial dependence that they have on their father, as well as the ADHD and expressive language disorder of the applicant's son and his special needs, we find the asserted hardships demonstrate the applicant's children will experience extreme hardship if they remain in the United States while their father lives in El Salvador.

In regard to the hardships to the applicant's children if they relocated with their father to El Salvador, the applicant contended in the affidavit dated August 27, 2010 that it would be dangerous for his children to live in El Salvador, and they would not have access to the educational and mental health resources they require. The claim of widespread violence in El Salvador is in accord with the book on violence in El Salvador by the International Human Rights Clinic at the Human Rights Program at Harvard Law School and the document from the Immigration and Refugee Board of Canada dated July 15, 2009, stating that sources indicate that El Salvador is one of the most dangerous countries in the world, and has street gangs totaling more than 30,000 members. El Salvador has the designation of Temporary Protected Status. See Federal Register Volume 77, Number 7 (Wednesday, January 11, 2012), Notices, Pages 1710-1715. When the asserted factors are considered together, the heightened risk to the physical safety of the applicant's children in El Salvador, and lack of access to the educational and mental health resources they require, they demonstrate that the hardship to the applicant's children in relocation to El Salvador with their father will be extreme.

Based upon the record before the AAO, the applicant in this case establishes extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) 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).

Id. at 301.

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 conviction for statutory burglary in April 2001, his illegal entry into the United States as a child, as well as his unlawful presence and unauthorized employment. The favorable factors in the present case are the positive references of the applicant's character by his wife, former spouse, in-laws, daughter, and his sister and brother; the extreme hardship to his children and hardship to his wife; and the passage of 11 years since the applicant's conviction. The applicant's crime and immigration violations are serious violations of the law, nevertheless, when taken together, we find 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 application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.