

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



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**

PUBLIC COPY



H2

Date: MAR 09 2012

Office: CALIFORNIA SERVICE CENTER

FILE:



IN RE:



PETITION: 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 PETITIONER:



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 Director, California Service Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a combined motion to reopen and reconsider. The motion to reopen will be granted and the waiver application will be approved.

The applicant is a native and citizen of Sri Lanka who was found to be inadmissible to the United States 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. On motion, the applicant does not contest this finding of inadmissibility. Rather, the applicant seeks a waiver of inadmissibility so that he may reside in the United States with his U.S. citizen spouse.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Director*, dated April 13, 2006.

On appeal, the AAO determined that the applicant had established that his U.S. citizen spouse would experience extreme hardship were she to relocate to Sri Lanka to reside with the applicant due to his inadmissibility. However, the AAO concluded that the applicant had failed to establish that his spouse would experience extreme hardship were she to remain in the United States while the applicant relocated abroad due to his inadmissibility. Consequently, the appeal was dismissed. *Decision of the AAO*, dated March 3, 2009.

On motion, counsel for the applicant submits the following: a brief; an affidavit from the applicant's spouse; medical and mental health documentation pertaining to the applicant's spouse; evidence of a claim filed with the [REDACTED] Compensation by the applicant's spouse as a result of a workplace injury; and information about the new electronic toll collection system in Ohio. The entire record was considered in rendering a decision on the motion.

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

- (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.

Section 212(h) of the Act 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 -
 - (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 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 or child of the applicant. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant 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 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.

The AAO, in its decision dated March 3, 2009, found that the applicant had established extreme hardship to his U.S. citizen spouse were she to relocate abroad to reside with the applicant as a result of his inadmissibility. *Supra* at 4-5. As such, this criterion will not be re-addressed on motion. In the same decision, the AAO concluded that the applicant had failed to establish that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant relocated abroad due to his inadmissibility. Specifically, the AAO noted that while it acknowledged that the applicant's spouse had suffered numerous losses in her lifetime and that being separated from her husband would constitute an additional loss, the psychological evaluations submitted failed to establish that the impact of the applicant's removal from the United States would result in emotional hardship that is beyond what is experienced by other individuals separated as a result of removal. *Supra* at 5.

On motion, counsel addresses the concerns raised by the AAO. To begin, an affidavit has been provided from the applicant's spouse, currently in her early 60s, further detailing the hardships she will experience were her spouse to relocate abroad as a result of his inadmissibility. In her affidavit, the applicant's spouse first explains that in November 2007 she was diagnosed with degenerative osteoarthritis and as a result, there are many days when she cannot walk or maneuver the steps in her home by herself and as a result, she relies on the applicant for assistance. In addition, the applicant's spouse notes that she damaged her left knee while at work and now suffers from chronic pain. Further, the applicant's spouse details that although employed as a toll collector, her position is being eliminated by E-Z Pass in October 2009 and with the loss of her employment, she will lose her medical and hospitalization insurance and thus needs her husband to continue working. Finally, the applicant's spouse explains that the stress of her husband's inadmissibility has brought back stomach ulcers. *Letter from* [REDACTED] *dated March 27, 2009.*

In support, a psychological report has been provided concluding that were the applicant to relocate abroad, his spouse will develop substantial impairment of her social functioning, which would cause her to develop a mood disorder, substantially aggravate her gastrointestinal disorders, and expose her to financial hardship. *Psychological Report from* [REDACTED] *Clinical Psychologist, dated March 24, 2009.* In addition, a letter and medical reports have been provided from the applicant's spouse's treating physician confirming that she has been diagnosed with Bilateral Degenerative Osteoarthritis, is at risk of hip replacement, has flare ups that result in excruciating pain, and requires help with her daily activities, including going up and down the stairs of the house. *Letter from* [REDACTED] *Cleveland Clinic, dated March 16, 2009.* Further, documentation establishing the applicant's spouse's ongoing Worker's Compensation case for permanent partial disability has been submitted. *See Letter from* [REDACTED] *Compensation, dated March 24, 2009.* In addition, evidence of the applicant's spouse's gastrointestinal problems has been submitted. Finally, documentation has been provided establishing the applicant's financial support of the household as a result of his long-term gainful employment as a [REDACTED]. On motion, based on a totality of the circumstances, the AAO concludes that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant relocated abroad as a result of his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, on motion the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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-Morales, 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 favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse would face if the applicant were to reside in Sri Lanka, regardless of whether she accompanied the applicant or remained in the United States; the payment of taxes; community ties; and the applicant's long-term gainful employment, since 1996, with [REDACTED]. The unfavorable factors in this matter are the applicant's conviction for a crime involving moral turpitude and periods of unlawful presence and employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that on motion, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the motion to reopen will be granted and the waiver application approved.

ORDER: The motion to reopen is granted. The waiver application is approved. The director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.